JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-245/92 P,

Chemie Linz GmbH, whose registered office is in Linz, Austria, represented by O. Lieberknecht, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of A. Bonn, 22 Côte d'Eich,

appellant,

supported by

DSM NV, whose registered office is in Heerlen, Netherlands, represented by I.G.F. Cath, of The Hague Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14a Rue des Bains,

intervener in the appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 10 March 1992 in Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, seeking to have that judgment set aside,

* Language of the case: German.

the other party to the proceedings being:

Commission of the European Communities, represented by G. zur Hausen, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini (Rapporteur), J.L. Murray and H. Ragnemalm, Judges,

Advocate General: G. Cosmas,

Registrars: H. von Holstein, Deputy Registrar, and D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1997, at which Chemie Linz GmbH was represented by O. Lieberknecht and M. Klusmann, Rechtsanwalt, Düsseldorf, DSM NV by I.G.F. Cath and the Commission by G. zur Hausen,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 26 May 1992, Chemie Linz GmbH brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275 ('the contested judgment').

Facts and procedure before the Court of First Instance

2 The facts giving rise to this appeal, as set out in the contested judgment, are as follows.

3 Several undertakings active in the European petrochemical industry brought an action before the Court of First Instance for the annulment of Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1, 'the Polypropylene Decision').

4 According to the Commission's findings, which were confirmed on this point by the Court of First Instance, before 1977 the market for polypropylene was supplied by 10 producers, four of which (Montedison SpA ('Monte'), Hoechst AG, Imperial Chemical Industries plc and Shell International Chemical Company Ltd) together accounted for 64% of the market. Following the expiry of the controlling patents held by Monte, new producers appeared on the market in

1977, bringing about a substantial increase in real production capacity which was not, however, matched by a corresponding increase in demand. This led to rates of utilisation of production capacity of between 60% in 1977 and 90% in 1983. Each of the EEC producers operating at that time supplied the product in most, if not all, Member States.

5 Chemie Linz AG, formerly Chemische Werke Linz AG, the applicant at first instance, to whose rights Chemie Linz GmbH ('Chemie Linz') has succeeded, was one of the producers which supplied the market in 1977, with a market share on the West European market of between 3.2 and 3.9%.

6 Following simultaneous investigations at the premises of several undertakings in the sector, the Commission addressed requests for information to a number of polypropylene producers under Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It appears from paragraph 6 of the contested judgment that the evidence obtained led the Commission to form the view that between 1977 and 1983 the producers concerned had, in contravention of Article 85 of the EC Treaty (now Article 81 EC), regularly set target prices by way of a series of price initiatives and developed a system of annual volume control to share out the available market between them according to agreed percentage or tonnage targets. This led the Commission to commence the procedure provided for by Article 3(1) of Regulation No 17 and to send a written statement of objections to several undertakings, including Chemie Linz.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Chemie Linz had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in Chemie Linz's case from

about November 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:

— 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;

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

— 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;

— introduced simultaneous price increases implementing the said targets;

— 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 1 of the Polypropylene Decision).

8 The Commission then ordered the various undertakings concerned to bring that infringement to an end forthwith and to refrain thenceforth from any agreement or concerted practice which might have the same or similar object or effect. The Commission also ordered them to terminate any exchange of information of the kind normally covered by business secrecy and to ensure that any scheme for the exchange of general information (such as Fides) was so conducted as to exclude any information from which the behaviour of specific producers could be identified (Article 2 of the Polypropylene Decision).

9 Chemie Linz was fined ECU 1 000 000, or ITL 1 471 590 000 (Article 3 of the Polypropylene Decision).

10 On 11 August 1986, Chemie Linz lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, Chemie Linz sought annulment of the Polypropylene Decision in so far as it concerned Chemie Linz, and, in the alternative, annulment of Article 3 of that decision in so far as the fine imposed on it exceeded the amount of a reasonable fine, to be fixed by the Court of First Instance, and an order that the Commission be ordered to pay the costs.

12 The Commission contended that the application should be dismissed and the applicant ordered to pay the costs.

13 By a separate document of 28 February 1992, Chemie Linz asked the Court of First Instance to postpone delivery of its judgment, to reopen the oral procedure and to order measures of inquiry pursuant to Articles 62, 64, 65 and 66 of its Rules of Procedure as a result of the statements made by the Commission at the hearing before it in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the *PVC* judgment of the Court of First Instance').

The contested judgment

14 In dealing with the request to reopen the oral procedure, referred to in paragraph 393, having again heard the views of the Advocate General, the Court of First Instance considered, at paragraph 394, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of the Rules of Procedure or to order measures of inquiry as requested by Chemie Linz.

15 At paragraph 395 of the grounds of the judgment the Court of First Instance held as follows:

'It must be stated first of all that the judgment in the *PVC* cases does not in itself justify the reopening of the oral procedure in this case. Furthermore, in the present case the applicant did not once argue, even by allusion, in the oral procedure that the Decision was non-existent because of the defects held in that judgment to have existed. The question to be examined, therefore, is whether the

applicant has adequately explained why it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. Even though the Community court, in an action for annulment under the second paragraph of Article 173 of the EEC Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the Treaty the possibility that the contested measure is non-existent must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion. In the present case, the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. The applicant argues that it follows from the statements made by the Commission's agents at the hearing in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 that an original duly signed by the Commission is also lacking in this case. That allegation, if true, would not in itself entail the non-existence of the Decision. The applicant has not put forward anything to explain why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* cases, where the Commission's term of office was about to run out in January 1989. It is not sufficient in that regard simply to reserve the right to make further pleas. In those circumstances there is nothing to suggest that the principle of the inalterability of the adopted measure was infringed after the adoption of the contested Decision and that the decision has therefore lost, to the applicant's benefit, the presumption of legality arising from its appearance. The mere fact that there is no duly certified original does not in itself entail the non-existence of the contested measure. There is therefore no reason to reopen the oral procedure in order to carry out further measures of inquiry. Since the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.'

16 The Court of First Instance dismissed the application and ordered Chemie Linz to pay the costs.

The appeal

17 In its appeal Chemie Linz requests the Court of Justice:

— principally:

— to annul the contested judgment with regard to Chemie Linz, as well as the Polypropylene Decision in so far as it concerns Chemie Linz;

— to order the Commission to pay the costs.

— in the alternative:

— to annul the contested judgment and refer the case back to the Court of First Instance for a fresh decision.

18 Chemie Linz also asks the Court of Justice to order the Commission to produce the versions existing at the time when the Polypropylene Decision was adopted, the authenticated originals of that decision and the minutes of the Commission's meeting of 23 April 1986 concerning that decision.

19 By order of the Court of Justice of 30 September 1992, DSM NV ('DSM') was given leave to intervene by the Court in support of the forms of order sought by Chemie Linz. DSM requests the Court to:

— annul the contested judgment;

— declare the Polypropylene Decision non-existent or annul it;

— declare the Polypropylene Decision non-existent or annul it as regards all addressees of that decision, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment concerning them, or whether or not their appeals were rejected;

— in the alternative, refer the case back to the Court of First Instance on the issue whether the Polypropylene Decision is non-existent or should be annulled;

— in any event order the Commission to pay the costs of the proceedings, both in relation to the proceedings before the Court of Justice and to those before the Court of First Instance, including the costs incurred by DSM in its intervention.

20 The Commission contends that the Court should:

— dismiss the appeal as inadmissible or, in the alternative, as unfounded;

— order Chemie Linz to pay the costs;

— reject the intervention as a whole as inadmissible;

— alternatively, reject as inadmissible the forms of order sought in the intervention to the effect that the Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, irrespective of whether those addressees appealed against the judgment of the Court of First Instance concerning them, or whether their appeals were rejected, and reject the remainder of the intervention as unfounded;

— in the further alternative, reject the intervention as unfounded;

— in any event order DSM to pay the costs arising out of the intervention.

21 In support of its appeal Chemie Linz puts forward pleas alleging breach of procedure and infringement of Community law within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice, based on the fact that the Court of First Instance refused to reopen the oral procedure and to order measures of inquiry.

22 At the Commission's request and despite Chemie Linz's objection, by decision of the President of the Court of Justice of 27 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555 ('the *PVC* judgment of the Court of Justice'), which was delivered on the appeal against the *PVC* judgment of the Court of First Instance.

Admissibility of the intervention

23 The Commission considers that DSM's intervention must be declared inadmissible. DSM explained that, as an intervener, it had an interest in having the contested judgment concerning Chemie Linz set aside. According to the Commission, annulment cannot benefit all addressees of a decision, but only those who bring an action for its annulment. That is precisely one of the distinctions between annulment and non-existence. Failure to observe that distinction would mean that time-limits for bringing an action would cease to be mandatory in actions for annulment. DSM cannot therefore seek the benefit of an annulment because it failed to appeal against the judgment of the Court of First Instance which concerned it (judgment of 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833). By its intervention DSM is simply seeking to circumvent a time-bar.

24 The order of 30 September 1992, cited above, granting DSM leave to intervene was made at a time when the Court of Justice had not yet decided the issue of annulment or non-existence in its *PVC* judgment. According to the Commission, following that judgment, the allegations of procedural defects, even if well founded, could lead only to annulment of the Polypropylene Decision and not to a finding of non-existence. Accordingly, DSM has ceased to have any interest in intervention.

25 The Commission also objects in particular to the admissibility of DSM's submission that the judgment of the Court of Justice should include provisions declaring non-existent or annulling the Polypropylene Decision as regards all its addressees, or at least as regards DSM, irrespective of whether or not those addressees appealed against the judgment of the Court of First Instance concerning them or whether or not their appeals were rejected. That submission is inadmissible, since DSM is seeking to introduce an issue which concerns it alone, whereas an intervener can only take the case as he finds it. Under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, an intervener may only support the form of order sought by another party, without introducing his own. In the Commission's view, that point in DSM's submissions confirms that it is seeking to use the intervention in order to get round the expiry of the time-limit for appealing against the judgment of the Court of First Instance in *DSM* v *Commission* concerning it.

26 As regards the objection of inadmissibility raised against the intervention as a whole, the Court observes first of all that the order of 30 September 1992 by which it gave DSM leave to intervene in support of the form of order sought by Chemie Linz does not preclude a fresh examination of the admissibility of its intervention (see, to that effect, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333).

27 Under the second paragraph of Article 37 of the EC Statute of the Court of Justice, the right to intervene in cases before the Court is open to any person establishing an interest in the result of the case. Under the fourth paragraph of Article 37, an application to intervene is to be limited to supporting the form of order sought by one of the parties.

28 The forms of order sought by Chemie Linz in its appeal includes, in particular, the annulment of the contested judgment on the ground that the Court of First Instance failed to find the Polypropylene Decision non-existent. It is clear from paragraph 49 of the *PVC* judgment of the Court of Justice that, by way of exception to the principle that acts of the Community institutions are presumed to be lawful, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.

29 Contrary to the Commission's contention, DSM's interest did not die on delivery of the judgment by which the Court of Justice annulled the *PVC* judgment of the Court of First Instance and held that the defects found by the latter were not such as to warrant treating the decision challenged in the *PVC* cases as non-existent. The *PVC* judgment did not concern the non-existence of the Polypropylene Decision and therefore did not bring DSM's interest in obtaining a finding of such non-existence to an end.

30 It is true that in its reply Chemie Linz withdrew some of its pleas in law in order to take account of the *PVC* judgment of the Court of Justice on the question of non-existence.

31 However, in so far as Chemie Linz continues to seek the annulment of the contested judgment, claiming that the Polypropylene Decision was adopted in an irregular manner and that the Court of First Instance ought to have carried out the necessary investigation to establish the procedural defects involved, DSM is still entitled to make those submissions in its intervention, on the ground that those defects should have led the Court of First Instance to find that decision non-existent.

32 It is clear from settled case-law (see in particular Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36) that the fourth paragraph of Article 37 of the EC Statute of the Court of Justice does not prevent an intervener from using arguments other than those used by the party it supports, provided the intervener seeks to support that party's submissions.

33 In this case the arguments put forward by DSM concerning the non-existence of the Polypropylene Decision are principally designed to show that, in rejecting Chemie Linz's request that the Court of First Instance reopen the oral procedure and order measures of inquiry, the latter failed to examine whether that decision was non-existent and therefore infringed Community law. Accordingly, while some of DSM's arguments differ from those of Chemie Linz, they relate to the pleas in law relied upon by the latter in the appeal, are aimed at supporting the claim that the contested judgment should be set aside and must therefore be examined.

34 As regards the Commission's objection to DSM's submission that this Court should declare the Polypropylene Decision non-existent or annul it as regards all its addressees, or at least as regards DSM, that claim specifically concerns DSM and is not identical to the form of order sought by Chemie Linz. It does not therefore satisfy the conditions laid down in the fourth paragraph of Article 37 of the EC Statute of the Court and must be held inadmissible.

Admissibility of the appeal

35 The Commission contends that the appeal is inadmissible in its entirety. In its view, Chemie Linz is putting forward for the first time a large number of facts and arguments which were not mentioned in the Court of First Instance. The appellant itself refers to new circumstances, such as the Commission's appeal in the *PVC* cases and the proceedings before the Court of First Instance in the '*Low-density polyethylene* ("*LdPE*")' cases (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). Chemie Linz maintains for the first time that the Polypropylene Decision was not adopted in the Dutch and Italian versions and puts forward purported evidence to show that alterations were made after the texts had been adopted by the Commission.

36 The Commission points out that the subject-matter of the proceedings may not be changed in the appeal and any new plea in law is accordingly inadmissible. Since the function of the appeal procedure is to review, on points of law, the judgment delivered at first instance, it must relate to the state of the dispute at the time when the Court of First Instance delivered its judgment (Case C-18/91 P *V* v *Parliament* [1992] ECR I-3997).

37 In that regard, it should be borne in mind, first, that, pursuant to Article 168A of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 10 and 42).

38 Secondly, under Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal.

39 It follows that, in so far as they concern the assessment made by the Court of First Instance of the facts submitted to it in the context of the request that the oral procedure be reopened, the appellant's complaints may not be examined in an appeal. Pleas in law introduced for the first time in such an appeal are also inadmissible.

40 However, it is incumbent on the Court of Justice to examine whether the Court of First Instance committed an error of law in failing to find that the Polypropylene Decision was vitiated by defects or in refusing to reopen the oral procedure and order measures of organisation of procedure and inquiry as requested by Chemie Linz.

41 It follows that the appeal is not inadmissible in its entirety but that the admissibility of each complaint and request made by Chemie Linz must be examined in turn in the context of an appeal.

Pleas in law relied upon in support of the appeal: breach of procedure and infringement of Community law

42 In support of its appeal, Chemie Linz, referring to paragraphs 393 to 395 of the grounds of the contested judgment, argues that, inasmuch as it rejected its request that the oral procedure be reopened and the necessary measures of organisation and inquiry ordered, the Court of First Instance committed a breach of procedure adversely affecting Chemie Linz's interests and an infringement of Community

law, more specifically an infringement of Articles 164 of the EC Treaty (now Article 220 EC) and 173 of the Treaty and Articles 48(2), 49, 62, 64 and 65 of the Rules of Procedure of the Court of First Instance.

43 Chemie Linz criticises, first, the refusal by the Court of First Instance to accede to its request that the oral procedure be reopened and measures of inquiry ordered. While Articles 62, 64 et seq. of its Rules of Procedure allow the Court of First Instance to adopt such measures, the duty to ensure that the law is observed laid down in Article 164 of the Treaty implies that those measures do not fall within the discretion of the Court of First Instance but are rather a mandatory duty. The Court of First Instance is bound to reopen the oral procedure where a party is pleading new facts of decisive importance, which it was not able to plead before the oral procedure was concluded. Similarly, measures of inquiry should be ordered where there are specific indications of the existence of circumstances of decisive importance which cannot be proved by the party pleading them.

44 The grounds on which the Court of First Instance based itself in rejecting the request made by Chemie Linz on 28 February 1992 do not stand up to legal examination. The alleged defects are so serious that they would entail annulment of the Polypropylene Decision and the Court of First Instance was bound to clarify the question of defects by ordering measures of inquiry. If it were accepted, as the Commission indicates is the case, that the Community court must reopen the oral procedure for the purposes of measures of inquiry, either when it has to determine of its own motion facts that are important for the decision, or where the parties are at odds on a factual issue that is important for the decision and has been put forward within the time allowed, it must be agreed that the first of those conditions is clearly satisfied in this case.

45 Chemie Linz considers that it could not have made its request any earlier. It is mistaken to base an argument, as the Commission does, on Article 48(2) of the Rules of Procedure of the Court of First Instance or to conclude that it was time-barred as a result of the period that had elapsed between 10 December 1991 and 28 February 1992. First of all, the Court of First Instance makes no reference to that provision. Furthermore, a judgment from which it results that a decision that has been challenged in a case is vitiated by defects hitherto unknown giving rise to

its nullity constitutes, in other proceedings, a plea based on fact or law for the purposes of Article 48(2) if it has direct consequences for that latter procedure. Lastly, Chemie Linz did not principally plead the *PVC* judgment of the Court of First Instance but the fact that it became apparent, during the LdPE proceedings, that an original of the decision contested in those proceedings was also lacking.

46 According to Chemie Linz, it cannot be contended that the request that the procedure be reopened was made too late, by analogy with Article 125 of the Rules of Procedure of the Court of First Instance, which concerns the procedure for revision. Application by analogy of time-limits is excluded by general principles of law. The reason for a time-bar in a procedure for revision runs counter to its application by analogy to the case provided for in Article 62 of the Rules of Procedure of the Court of First Instance: it forms part of the aim of safeguarding legal stability based on the authority of *res judicata* and ensuring legal certainty which can be challenged only under strict conditions and within very short time-limits. There is no reason which could be put forward, in any comparable way, to warrant restricting the possibility of relying on new pleas or requesting that the procedure be reopened in this type of situation. On the contrary, the need to assemble complete facts of decisive importance should lead to a broad interpretation of the rights recognised by the Rules of Procedure, except in the case of deliberate delaying tactics.

47 Chemie Linz states that the Court of First Instance accepted new facts that it put forward and did not reject them on the ground of delay. The assessment of the Court of First Instance in this connection should be followed by the Court, subject to the latter's ascertaining whether the Court of First Instance misused its discretion.

48 Moreover, Chemie Linz disputes the Commission's assertion that it had knowledge of the statements made by Agents of that institution shortly after the oral procedure in the *PVC* cases. Chemie Linz, which was not a party in those cases and was not represented at the hearing, was informed of the statements made by the Commission's Agent at that hearing at a later date, which cannot be determined, and did not have precise knowledge of that information until

27 February 1992, the date on which the *PVC* judgment of the Court of First Instance was delivered. Prior to that date, Chemie Linz had no reason to doubt the legality of the decision-making process within the Commission. Chemie Linz cannot therefore be criticised for having waited for the *PVC* judgment of the Court of First Instance before making its request.

49 The Commission's argument that Chemie Linz did not put forward in its request sufficient evidence of an infringement of Article 12 of its Rules of Procedure should be rejected. The facts alleged were sufficiently precise as to oblige the Court of First Instance to reopen the oral procedure. In no circumstances could it have produced more precise evidence at that time. Since the Commission has admitted generally that Article 12 was not complied with, that cause of nullity is not linked to the particular circumstances of the *PVC* cases relating to the replacement of the Commission.

50 Chemie Linz points out that the Commission's interpretation, to the effect that compliance with the rule relating to authentication of the Polypropylene Decision is of importance only if sufficiently precise evidence was put forward to cast doubt on the exact terms of the text adopted, would have the consequence that breaches of the essential procedural requirements under Article 12 of the Commission's Rules of Procedure would have no result in law as long as it could not be proved in the specific case that there had been an alteration after definitive adoption. That interpretation is, furthermore, contrary to paragraph 76 of the *PVC* judgment of the Court of Justice, according to which authentication of acts constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty. Accordingly, it should be ensured in each case that the definitive text of a decision is ascertainable and carries the signatures of the President of the Commission and its Secretary General.

51 Since subsequent knowledge of a cause of nullity constitutes a basis for revision, the request that the procedure be reopened should have been acceded to, because the existing new fact, if it had become known later, would also have constituted a basis for revision. Chemie Linz adds that in the context of reopening of the oral procedure, for reasons of procedural economy more facts should be taken into consideration than is the case in the revision procedure. Conversely a basis for revision should always be a reason for reopening the oral procedure. The

discovery of the breach of Article 12 of the Commission's Rules of Procedure constitutes a basis for revision and consequently, *a fortiori*, should constitute a basis for reopening the oral procedure.

52 Chemie Linz also complains that the Court of First Instance failed in its duty to clarify the facts pursuant to Article 64(3)(d) of its Rules of Procedure, under which the Court of First Instance may ask for documents or any papers relating to the case to be produced. In that connection, the Commission wrongly states that Chemie Linz is deducing from Article 173 of the Treaty a general obligation of inquiry with regard to facts presented belatedly and imprecisely. Chemie Linz did not plead facts belatedly or insufficiently precisely and the Court of First Instance was required to order the measures of organisation of procedure necessary to clarify the relevant facts.

53 Chemie Linz claims that only after such an inquiry would it have been able to put forward arguments that were precise enough to identify exactly the breach of essential procedural requirements committed by the Commission. To accept the contrary would amount to a denial of legal protection. If precise evidence was necessary at that stage in order for a request to reopen the procedure to be admissible, despite the fact, according to Chemie Linz, that what was involved were facts internal to the Commission and therefore in principle not accessible to the persons concerned, the rules concerning the nature of evidence offered would be nugatory and the Commission would thus be in the privileged position of being able to circumvent the Rules of Procedure with which it is, however, required to comply.

54 It is legitimate for the Court of First Instance not to verify systematically whether the Commission has in fact complied with all the formalities, but only if there is sufficient evidence. However, the requirements imposed should not be too strict, because documents internal to the Commission are involved which are not therefore accessible to the persons concerned by its decisions. In those circumstances, the statements made by the Commission in the *PVC* cases before the Court of First Instance should have constituted a sufficient reason for verifying whether the Commission had acted in the same way when it adopted the Polypropylene Decision.

55 Moreover, the same Chamber of the Court of First Instance had, in other proceedings, acceded to requests for information to that effect, albeit founded on evidence which was no more precise. On this point Chemie Linz endorses DSM's arguments. The difference in treatment at the procedural level is significant in Cases T-30/91 *Solvay* v *Commission* [1995] ECR II-1755 and T-36/91 *ICI* v *Commission* [1995] ECR II-1847 ('the *Soda-Ash* cases') which concerned a Commission decision adopted at a time when it was under no time-pressure. The First Chamber of the Court of First Instance considered in those cases that the objections, which had also been raised after the *PVC* judgment of the Court of First Instance, were significant enough to warrant production, by the Commission, of an authenticated original of its decision. The Court of First Instance thus performed its obligation to clarify the facts in two different and contradictory ways.

56 Chemie Linz requests the Court of Justice, secondly, to examine the breaches of procedural rules committed by the Commission without referring back to the Court of First Instance for determination of the facts that might entail the nullity of the Polypropylene Decision. Reasons of procedural law and procedural economy militate in favour of such a course. In that context the Court of Justice could make, of its own motion, the findings required by the measures of organisation of procedure. According to Chemie Linz, should the Court decide to hear the case itself, it ought to do so under the same conditions as a court of first instance, so that it could examine all the breaches of procedural rules committed by the Commission, provided that those breaches became known after the decision of the Court of First Instance That also applies in the case of circumstances which could have been pleaded before the parties' oral argument had drawn to a close. Chemie Linz should therefore be placed in the same position before the Court of Justice as it would have been had the procedure been reopened. In such a situation the parties would have been permitted, subject to Article 48 of the Rules of Procedure of the Court of First Instance, to plead other facts of which they could have availed themselves prior to the hearing, inasmuch as those facts related to the question of the validity of the decision submitted to the Court of Justice. According to Chemie Linz, the Court is authorised to order any necessary measures of inquiry and to establish the facts under Article 60 of its Rules of Procedure.

57 DSM states that new developments have taken place in other cases before the Court of First Instance. They confirm that it is incumbent on the Commission to

prove that it has followed its own essential procedural requirements and that, to clarify the issue, the Court of First Instance must, of its own motion or at the request of a party, order measures of inquiry in order to examine the relevant documentary evidence. In the *Soda-Ash* cases the Commission contended that the Supplement to the Reply lodged by Imperial Chemical Industries plc ('ICI') in those cases after the *PVC* judgment of the Court of First Instance contained no evidence that the Commission had infringed its Rules of Procedure, and that the request for measures of inquiry lodged by ICI amounted to a new plea in law. The Court of First Instance nevertheless put questions to the Commission and ICI as to the conclusions to be drawn from the *PVC* judgment of the Court of Justice and also asked the Commission, by reference to paragraph 32 of the *PVC* judgment of the Court of Justice, whether it was able to produce extracts from the minutes and the authenticated texts of the contested decisions. Following other developments in the procedure, the Commission finally admitted that the documents produced as authenticated were only authenticated after the Court of First Instance had ordered their production.

58 According to DSM, in the *LdPE* cases, the Court of First Instance also ordered the Commission to produce a certified copy of the original version of the contested decision. The Commission admitted that authentication had not taken place at the meeting at which the College of Members of the Commission adopted that decision. DSM observes that the procedure for authenticating acts of the Commission must therefore have been introduced after March 1992. It follows that the same defect of lack of authentication must affect the Polypropylene Decision.

59 DSM adds that the Court of First Instance adopted a similar approach to that taken in the *Polypropylene* cases in Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, at paragraphs 24 to 27, and Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, at paragraphs 28 to 31, when it rejected the applicants' pleas on the ground that they had failed to produce the slightest evidence which might rebut the presumption of validity of the decision that they were contesting. In Case T-43/92 *Dunlop Slazenger International* v *Commission* [1994] ECR II-441, the applicant's argument was rejected on the ground that the decision had been adopted and notified in accordance with the Commission's Rules of Procedure. In none of those cases did the Court of First

Instance reject the applicants' plea of irregularity in the adoption of the challenged act on the ground that the Commission's Rules of Procedure had not been complied with.

60 The only exceptions are to be found in the orders in T-4/89 *BASF* v *Commission* [1992] ECR II-1591 and Case T-8/89 Rev. *DSM* v *Commission* [1992] ECR II-2399; however, even in those cases the applicants did not rely on the *PVC* judgment of the Court of First Instance as a new fact, but on other facts. In Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, the Court rejected the plea that the Commission had infringed its own Rules of Procedure, because it had not been properly raised before the Court of First Instance. In the Polypropylene proceedings, however, the same plea had been raised before the Court of First Instance and was rejected on the ground that there was not sufficient evidence.

61 DSM considers that the Commission's defence in this case is based on procedural arguments that are irrelevant, given the content of the contested judgment, which in essence turns on the burden of proof. According to DSM, if, in the *Polypropylene* cases, the Commission has not itself produced evidence as to the regularity of the procedures followed, that is because it is not in a position to show that it complied with its own Rules of Procedure.

62 The Commission contends that Article 62 of the Rules of Procedure of the Court of First Instance does not require that Court to reopen the oral procedure as the appellant claims, but allows it to do so. The Court of First Instance convincingly explained its reasons for not reopening the oral procedure or ordering measures of inquiry, because there was no need to ascertain of its own motion facts of importance for the decision or to clarify important factual evidence, adduced within the period prescribed, on which the parties disagreed.

63 On the one hand, verification of the Court's own motion would have been necessary only if the parties had put forward sufficient evidence to suggest that the Polypropylene Decision was non-existent. In that connection Chemie Linz is

mistaken in maintaining that the Court of First Instance presumed that there was no original, whereas in reality all it did was to quote Chemie Linz's allegation, without assessing the point. The Commission adds that the Court of First Instance, whose task it is in principle to assess the need for measures of inquiry, could, even in the context of an investigation of its own motion, leave in abeyance the question of the existence of a duly-signed original, because such a defect would not in any event have been relevant. Since the *PVC* judgment of the Court of Justice, it is established that failure to authenticate a decision, in accordance with Article 12 of the Commission's Rules of Procedure, may lead to annulment of the contested decision but not to its being non-existent. However, Chemie Linz did not raise in a sufficiently precise manner and within the appropriate time-limit any plea founded on breach of that provision and the Court of First Instance did not therefore have to examine, even from the point of view of annulment of the Polypropylene Decision, the question of the existence of a duly-signed original.

64 Chemie Linz's request of 28 February 1992 was founded on the non-existence of the Polypropylene Decision, not on its nullity. Even if that plea had been construed as a plea of nullity, it would not have been sufficiently precise and reasoned and would have been out of time. In support of that plea Chemie Linz should have adduced evidence as the Court of First Instance held in comparable cases following the *PVC* judgment of the Court of Justice (*Dunlop Slazenger* v *Commission*; *Fiatagri and New Holland Ford* v *Commission* and *John Deere* v *Commission*, cited above). However, a plea in which an applicant confines itself to claiming that there was no duly-signed original of the decision is not sufficiently reasoned and is accordingly not capable of undermining the presumption of validity in favour of any decision. With regard to measures ordered by the Court of First Instance in other proceedings, the Commission indicates that these were taken where there was precise evidence to counter the presumption of validity. In the *PVC* cases, the applicants produced precise evidence relating to those proceedings. The same was true in other proceedings (see the orders of 25 October 1994 in Cases T-30/91 and T-36/91 *Solvay and ICI* v *Commission* and 10 March 1992 in Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission*, not published in the ECR, which clearly refer to factors particular to the case). Nothing similar took place during the proceedings which culminated in the contested judgment.

65 On the other hand, the Court of First Instance examined Chemie Linz's request of 28 February 1992, but considered that the applicant had not adduced relevant factual evidence within the prescribed period. The Court of First Instance rightly questioned whether the plea concerning the alleged defects of the Polypropylene Decision had been made timeously in the course of the proceedings in view of the rule set out in Article 48(2) of the Rules of Procedure of the Court of First Instance, according to which no new plea in law may be introduced after the written procedure has been completed unless it is based on matters of law or of fact which come to light in the course of the procedure.

66 The *PVC* judgment of the Court of First Instance cannot be regarded as a ground which came to light during the proceedings, since the case-law concerning the procedure for revision provided for in Article 41(1) of the EC Statute of the Court of Justice applies equally to Article 48(2) of the Rules of Procedure of the Court of First Instance. According to that case-law (order of the Court of First Instance in *BASF* v *Commission*, cited above, paragraph 12, and judgment in Case C-403/85 REV *Ferrandi* v *Commission* [1991] ECR I-1215), a judgment delivered by a different instance court cannot warrant revision of a judgment.

67 With regard to the explanations given by the Commission's Agents at the hearing in the *PVC* cases, in November 1991, Chemie Linz was represented at that hearing and it must be presumed that it was aware of the explanations provided by the Commission's Agents shortly after the hearing in those cases. Chemie Linz's assertion that it was only sure of what the Commission's Agent had said in the *PVC* cases following the *PVC* judgment of the Court of First Instance contradicts its request of 28 February 1992 to reopen the oral procedure, in which it referred to the evidence produced by the participants at the hearing in the *PVC* cases. Consequently, the plea of nullity was not put forward by Chemie Linz timeously, but rather three months later. The Commission points out that, in the analogous case of revision of a judgment, in accordance with Article 125 of the Rules of Procedure of the Court of First Instance, the period allowed is three months from the date on which the fact relied on by the applicant came to his knowledge.

68 The Commission indicates that the plea based on the lack of an original of the Polypropylene Decision should not have led the Court of First Instance to order

measures of inquiry, either from the point of view of non-existence, to which the contested judgment refers, or from the point of view of the possible nullity of that decision. The Court of First Instance held that Chemie Linz had not produced sufficient evidence to give rise to a presumption that there had been a breach of the principle of the inalterability of the act adopted. Moreover, that plea was put forward belatedly, in breach of the provisions of Article 48(2) of the Rules of Procedure of the Court of First Instance. Contrary to Chemie Linz's assertions, the Court of First Instance did not accept that its arguments had been presented timeously. On the contrary, it expressed doubts on the point, although it left the matter in abeyance, because it examined, by way of review of its own motion, the question of the non-existence of the Polypropylene Decision.

69 With regard to Chemie Linz's argument that there was also a ground for revision, which should have led to the oral procedure being reopened, the Commission contends that its Agent's statement in the *PVC* proceedings would not, alone, have led to a different decision in the Polypropylene case. Under Article 41 of the EC Statute of the Court of Justice, only facts of such a nature as to be a decisive factor can constitute a ground for revision.

70 On the question of the alleged breach, by the Court of First Instance, of its duty to clarify the facts, the Commission points out that neither Article 49 nor Article 64(3)(d) of the Rules of Procedure of the Court of First Instance determine the conditions under which measures of organisation of procedure may be requested. For the same reasons as led it to reject the request that the oral procedure be reopened, the Court of First Instance was right not to have ordered the measures of organisation of procedure requested by Chemie Linz. The purpose of such measures, as described in Article 64(1) of the Rules of Procedure of the Court of First Instance, is to ensure that cases are prepared for hearing and procedures carried out, not to remedy the applicant's negligence in submitting its pleas in law.

71 Lastly, the Commission asks how the Court of First Instance could have infringed Article 65 of its Rules of Procedure, since that article merely defines the evidence admissible in proceedings.

72 As regards DSM's arguments, the Commission states that these are fundamentally flawed, since they fail to take account of the differences between the *PVC* cases and this case, and misunderstand the *PVC* judgment of the Court of Justice.

73 Moreover, the Commission maintains its view that the applicants in the *Soda Ash* cases had not produced sufficient evidence to justify the order by the Court of First Instance that the Commission produce documents. At all events, in those cases and the *LdPE* cases, also cited by DSM, the Court of First Instance reached its decision in the light of the particular circumstances of the case before it. In the Polypropylene proceedings, supposed deficiencies in the Polypropylene Decision could have been pointed out in 1986, but no one did so.

74 If, in its judgments in *Fiatagri and New Holland Ford* v *Commission* and *John Deere* v *Commission,* cited above, the Court of First Instance rejected the applicants' allegations, which were raised timeously, on the ground that there was no evidence to support them, the same solution should *a fortiori* be reached in this case, where the arguments relating to procedural irregularities in the Polypropylene Decision were produced late and without evidence.

75 The pleas in law based on breach of procedure and infringement of Community law must be examined together. The infringement of Community law alleged by Chemie Linz, whether concerning Articles 164 and 173 of the Treaty or the various provisions of the Rules of Procedure of the Court of First Instance relied on in this context, relates, essentially, to the refusal by the Court of First Instance to reopen the oral procedure and order measures of organisation of procedure and inquiry, and it therefore overlaps with the plea alleging breach of procedure.

76 It is appropriate, therefore, to examine, whether, in refusing to reopen the oral procedure and order measures of organisation of procedure and inquiry, the Court of First Instance committed errors of law.

77 Turning first to measures of organisation of procedure, the Court must point out that, under Article 21 of the EC Statute of the Court of Justice, it may require the parties to produce all documents and to supply all information which it considers desirable. Article 64(1) of the Rules of Procedure of the Court of First Instance provides that measures of organisation of procedure are to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions.

78 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure are, in particular, to have as their purpose to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence and to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4), those measures may consist of asking for documents or any papers relating to the case to be produced and their adoption may be proposed by the parties at any stage of the procedure.

79 As the Court of Justice held in its judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 93, a party is entitled to ask the Court of First Instance, as a measure of organisation of procedure, to order the opposite party to produce documents which are in its possession.

80 However, it follows from both the purpose and subject-matter of measures of organisation of procedure, as set out in Article 64(1) and (2) of the Rules of Procedure of the Court of First Instance, that they form part of the various stages of the procedure before the Court of First Instance, the conduct of which they are intended to facilitate.

81 It follows that, after the hearing has taken place, a party may ask for measures of organisation of procedure only if the Court of First Instance decides to reopen the oral procedure. Accordingly, the Court of First Instance would only have had to

take a decision on such a request if it had upheld the request to reopen the oral procedure, so that there is no need to examine separately the complaints made by Chemie Linz in this regard.

82 As regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 *Prelle* v *Commission* [1971] ECR 561, paragraph 7, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure.

83 The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence and which it could not put forward before the close of the oral procedure.

84 In this case, the request to the Court of First Instance for the oral procedure to be reopened and measures of inquiry ordered was based on the *PVC* judgment of the Court of First Instance, on statements made by the Commission's Agents at the hearing in the *PVC* cases and on facts which came to light during the *LdPE* proceedings.

85 First, indications of a general nature relating to an alleged practice of the Commission and emerging from a judgment delivered in other cases, or statements made or facts which came to light on the occasion of other proceedings, could not, as such, be regarded as decisive for the purposes of the determination of the case then before the Court of First Instance.

86 Inasmuch as Chemie Linz maintains that the facts relied on in its request of 28 February 1992 should have led to revision of the contested judgment or, in any event, have led the Court of First Instance to accede to the request, it need merely be stated that, for the reasons previously indicated, those facts were not of such a nature as to be a decisive factor within the meaning of Article 41 of the EC Statute of the Court of Justice and did not therefore justify revision of that judgment.

87 Secondly, even when submitting its application, Chemie Linz was in a position to provide the Court of First Instance with at least minimum evidence of the expediency of measures of organisation of procedure or inquiry for the purposes of the proceedings in order to prove that the Polypropylene Decision had been adopted in breach of the language rules applicable or altered after its adoption by the College of Members of the Commission, or that the originals were lacking, as certain applicants in the *PVC* and *LdPE* cases to whom Chemie Linz referred had done (see, to that effect, *Baustahlgewebe* v *Commission*, cited above, paragraphs 93 and 94).

88 Without its being necessary to verify whether, as the Commission contends, Chemie Linz had knowledge of the facts on which it relied in its request of 28 February 1992 before delivery of the *PVC* judgment of the Court of First Instance, it follows, in any event, that that request was out of time.

89 In that connection, it should be noted that, contrary to Chemie Linz's assertion, the Court of First Instance did not hold in the contested judgment that the facts relied on in its request of 28 February 1992 had been submitted timeously.

90 Furthermore, the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged obligation to raise of its own motion issues concerning the regularity of the procedure by which the Polypropylene Decision was adopted. Any such obligation to raise matters of public policy could only exist on the basis of the factual evidence adduced before the Court.

91 It must therefore be concluded that the Court of First Instance did not commit any error of law in refusing to reopen the oral procedure and to order measures of organisation of procedure and inquiry.

92 In the light of Chemie Linz's submissions relating to the alleged defects of the Polypropylene Decision and DSM's argument that it follows that that decision was legally non-existent, it is appropriate also to examine whether, in interpreting the conditions capable of rendering an act non-existent, the Court of First Instance infringed Community law.

93 It is clear in particular from paragraphs 48 to 50 of the *PVC* judgment of the Court of Justice that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

94 However, 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 must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

95 From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

96 As was the case in the *PVC* actions, whether considered in isolation or even together, the irregularities alleged by Chemie Linz, which relate to the procedure for the adoption of the Polypropylene Decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

97 The Court of First Instance did not therefore infringe Community law as regards the conditions capable of rendering an act non-existent.

98 Finally, inasmuch as the appellant asks the Court to examine the legality of the Polypropylene Decision and to order measures of inquiry for establishing the conditions under which the Commission adopted that Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

99 On the one hand, measures of inquiry would necessarily lead the Court to decide questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113(2) of the Rules of Procedure of the Court of Justice.

100 On the other hand, the appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the EC Statute of the Court of Justice, deliver judgment itself in the case. As long as the contested judgment is not set aside, the Court is not therefore required to examine possible defects in the Polypropylene Decision.

101 It follows that the appeal must be dismissed in its entirety.

Costs

102 According to Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since Chemie Linz's pleas have failed, it must be ordered to pay the costs. DSM must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders Chemie Linz GmbH to pay the costs;

3. **Orders DSM NV to bear its own costs.**

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber