OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 October 2001 [1]

I — Introduction

A — *Background to the dispute*

1. Following investigations conducted in the polypropylene sector on 13 and 14 October 1983 pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [2] the Commission of the European Communities commenced an inquiry on polyvinylchloride (hereinafter 'PVC'). It subsequently undertook various investigations at the premises of the undertakings concerned and sent them requests for information.

2. On 24 March 1988 it instituted on its own initiative a proceeding under Article 3(1) of Regulation No 17 against 14 PVC producers. On 5 April 1988 it sent each of those undertakings a statement of objections as provided for in Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17. [3] All the undertakings concerned submitted observations in June 1988. Except for Shell International Chemical Company Ltd, which had not requested a hearing, they were heard in September 1988.

3. On 1 December 1988 the Advisory Committee on Restrictive Practices and Dominant Positions (hereinafter 'the Advisory Committee') delivered an opinion on the Commission's draft decision.

4. At the end of the proceeding the Commission adopted Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865, PVC), [4] (hereinafter 'the PVC I decision'). By that decision, the Commission penalised the following PVC producers for infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC): Atochem

1 — Original language: French.
2 — OJ, English Special Edition 1959-1962, p. 87.
3 — OJ, English Special Edition 1963-1964, p. 47.
4 — OJ 1989 L 74, p. 1.

SA, BASF AG, DSM NV, Enichem SpA, Hoechst AG (hereinafter 'Hoechst'), Hüls AG, Imperial Chemical Industries plc (hereinafter 'ICI'), Limburgse Vinyl Maatschappij NV, Montedison SpA, Norsk Hydro AS (hereinafter 'Norsk Hydro'), Société Artésienne de Vinyle SA, Shell International Chemical Company Ltd, Solvay et Cie (hereinafter 'Solvay') and Wacker-Chemie GmbH.

5. All those undertakings except Solvay brought actions to have that decision annulled by the Community judicature.

6. The Court of First Instance declared Norsk Hydro's application inadmissible by order of 19 June 1990. [5]

7. The other cases were joined for the purposes of the oral procedure and the judgment.

8. By judgment of 27 February 1992 in *BASF and Others* v *Commission*, [6] the Court of First Instance declared the PVC I decision non-existent.

9. On appeal by the Commission, the Court of Justice, by judgment of 15 June 1994 in *Commission* v *BASF and Others*, [7] set aside the judgment of the Court of First Instance and annulled the PVC I decision.

10. The Commission thereupon adopted a fresh decision, on 27 July 1994, in relation to the producers who had been the subject of the PVC I decision, with the exception, however, of Solvay and Norsk Hydro AS [Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 — PVC) (OJ 1994 L 239, p. 14, hereinafter 'the PVC II decision')]. That decision imposed on the undertakings to which it was addressed fines of the same amounts as those imposed by the PVC I decision.

11. The PVC II decision contains the following provisions:

'*Article 1*

BASF AG, DSM NV, Elf Atochem SA, Enichem SpA, Hoechst AG, Hüls AG, Imperial Chemical Industries plc, Limburgse Vinyl Maatschappij NV, Mon-

5 — Case T-106/89 (not published in the European Court Reports).

6 — 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.

7 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

tedison SpA, Société Artésienne de Vinyle SA, Shell International Chemical [Company] Ltd and Wacker Chemie GmbH infringed Article 85 of the EC Treaty (together with Norsk Hydro... and Solvay...) by participating for the periods identified in this Decision in an agreement and/or concerted practice originating in about August 1980 by which the producers supplying PVC in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.

Article 2

The undertakings named in Article 1 which are still involved in the PVC sector in the Community (apart from Norsk Hydro and Solvay which are already the subject of a valid termination order) shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their PVC operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerted practice covering price or market-sharing inside the Community. Any scheme for the exchange of general information to which the producers subscribe concerning the PVC sector shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified, and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

(i) BASF AG: a fine of ECU 1 500 000;

(ii) DSM NV: a fine of ECU 600 000;

(iii) Elf Atochem SA: a fine of ECU 3 200 000;

(iv) Enichem SpA: a fine of ECU 2 500 000;

(v) Hoechst AG: a fine of ECU 1 500 000;

(vi) Hüls AG: a fine of ECU 2 200 000;

(vii) Imperial Chemical Industries plc: a fine of ECU 2 500 000;

(viii) Limburgse Vinyl Maatschappij NV: a fine of ECU 750 000;

(ix) Montedison SpA: a fine of ECU 1 750 000;

(x) Société Artésienne de Vinyle SA: a fine of ECU 400 000;

(xi) Shell International Chemical Company Ltd: a fine of ECU 850 000;

(xii) Wacker-Chemie GmbH: a fine of ECU 1 500 000.'

B — *Procedure before the Court of First Instance*

12. By various applications lodged at the Registry of the Court of First Instance between 5 and 14 October 1994, Limburgse Vinyl Maatschappij NV, Elf Atochem SA (hereinafter 'Elf Atochem'), BASF AG, Shell International Chemical Company Ltd, DSM NV and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst, Société Artésienne de Vinyle SA, Montedison SpA, ICI, Hüls AG and Enichem Spa brought actions before the Court of First Instance.

13. Each sought the annulment of the PVC II decision in whole or in part and, in the alternative, the annulment or reduction of the fine. Montedison Spa also pleaded that the Commission should be ordered to pay

damages on account of costs incurred in putting together a guarantee and any other expenses arising from the PVC II decision.

C — *The judgment of the Court of First Instance*

14. By judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others* v *Commission*[8] (hereinafter 'the contested judgment'), the Court of First Instance:

— joined the cases for the purposes of the judgment;

— annulled Article 1 of the PVC II decision in so far as it found that Société Artésienne de Vinyle SA had participated in the infringement complained of after the first half of 1981;

— reduced the fines imposed on Elf Atochem, Société Artésienne de Vinyle SA and ICI to EUR 2 600 000, EUR 135 000 and EUR 1 550 000 respectively;

— dismissed the remainder of the action;

— ruled on the costs.

D — *Procedure before the Court of Justice*

15. By application lodged at the Court Registry on 29 June 1999, Elf Atochem appealed pursuant to Article 49 of the EC Statute of the Court of Justice.

16. It claims that the Court should:

— set aside the contested judgment and give a final ruling in the case;

— order the Commission to pay the costs.

17. The Commission contends that the Court should:

— dismiss the appeal;

8 — Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931.

— order the appellant to pay the costs.

II — Assessment

18. The appellant puts forward two pleas which should be assessed in turn.

The first plea

19. Elf Atochem complains, first of all, that the Court of First Instance did not rule on a plea alleging that the PVC II decision was an essentially different decision from the PVC I decision, a plea which this and other appellants had expanded extensively before the Court, as is apparent from paragraph 222 of the contested judgment. In the appellant's submission, that failure to state reasons is on its own sufficient to lead to the annulment of the contested judgment.

20. In that regard it should be stated that, in paragraph 257 of the contested judgment, the Court held that 'the Decision contains only editorial amendments not affecting the objections'.

21. It did therefore respond to the appellant's argument and, moreover, I shall consider below whether its view was well founded.

22. Elf Atochem is therefore wrong to complain that the Court did not give a ruling.

23. Consequently, the plea alleging failure to state the grounds is unfounded and should be rejected.

The second plea

24. Elf Atochem maintains that the Court of First Instance wrongly held that the Commission was not required to open a new administrative procedure, pursuant to Regulations Nos 17 and 99/63, in order to adopt the PVC II decision. Its plea is subdivided into four limbs.

25. The first two limbs relate to the need to carry out preparatory measures, namely, the hearing of the undertakings and the consultation of the Advisory Committee, before adopting the PVC II decision. Assessment of these therefore depends on

whether the preparatory measures carried out previously, for the purpose of the PVC I decision, retained their validity, which is the subject of the third limb of this plea. The third limb should therefore be examined first.

28. The question of the effects of the annulment of a decision on the validity of the preparatory acts depends, as the Court of First Instance rightly held in paragraph 184 of the contested judgment, on the grounds of annulment, and the appellant does not dispute this.

The third limb, alleging that the whole of the PVC I decision was annulled by the judgment in *Commission* v *BASF and Others*, cited above

29. That statement, which, moreover, merely reflects the application to this case of the general principle of *res judicata*, is confirmed by the case-law cited by the Court of First Instance and by the case-law invoked by the appellant itself.

26. Elf Atochem states that that judgment annulled the PVC I decision for infringement both of the authentification rules and of the principle of collegiality. The annulment declared applies to the whole measure, since the Court of Justice did not limit its scope to certain parts. The preliminary administrative procedure is an integral part of the measure. Therefore, if the measure is annulled, it is necessary to carry out again the preliminary administrative measures provided for in Regulations Nos 17 and 99/63.

30. Indeed, in the precedents cited by the appellant, the nullity of the Commission's decision arose — unlike in the present case — from a procedural defect affecting measures taken prior to the final adoption of the text and therefore imposed an obligation on the author of the decision to remedy the invalidity affecting the preparatory measures.

27. In support of this, the appellant refers to the judgments in *Transocean Marine Paint* v *Commission*[9] and *British Aerospace and Rover* v *Commission*.[10]

31. Thus, in *Transocean Marine Paint* v *Commission*, the partial nullity of the contested decision was due to the fact that, during the preliminary procedure, the Commission had not informed the undertakings of a condition which it subsequently included in its final decision,

9 — Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063.

10 — Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493.

which explained the need to carry out the preliminary procedure again.

32. In *British Aerospace and Rover* v *Commission*, what was at issue was the adoption by the Commission of a new decision in respect of State aid in the context of disputes relating to the implementation of previous decisions and not the consequences of a judgment annulling a measure. Unlike in the present case, there was new evidence which might make a new procedure necessary.

33. The Court of First Instance was therefore right to hold that it was necessary to determine, in the light of the operative part and of the grounds of the judgment of the Court of Justice in respect of the PVC I decision, the effect of the annulment of that decision on the preparatory acts.

34. That annulment arose from the mere fact that the Commission infringed the procedural rules governing only the detailed procedure for the definitive adoption of the decision. Therefore, the nullity could not extend to the procedural stages which predated the occurrence of that irregularity and to which those rules were not intended to apply.

35. The appellant's insistence that the annulment, which it claims applies to the whole measure, is due not only to that procedural defect but also, even mainly, to an infringement of the principle of collegiality, does not alter that conclusion in any way.

36. Indeed, neither of those two grounds of nullity affects measures predating the final decision. A failure to authenticate the text of the decision, and an infringement of the principle of collegiality occurring at the time of its final adoption, are both, by their very nature, unconnected with the previous conduct of the procedure and cannot therefore affect its validity. The fact that those grounds of nullity affect the whole of the decision is irrelevant in that regard, since it does not follow that the nullity extends to other measures, such as the preparatory measures.

37. The situation was therefore similar to that considered in the judgment in *Spain* v *Commission*, [11] cited by the Court of First Instance in paragraph 184 of the contested judgment, in which the Court of Justice held that the procedure for replacing the annulled measure may be resumed at the very point at which the illegality occurred.

38. The Court of First Instance did not, therefore, err in law by holding that the nullity of the PVC I decision did not extend to the measures taken prior to the annulled decision.

11 — Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993.

39. The third limb of this plea should therefore be rejected.

The first limb, alleging infringement of the right to be heard in respect of the adoption of a new decision

40. Elf Atochem considers that, for the purpose of adopting the PVC II decision, the Commission should have applied Regulations Nos 17 and 99/63 again because that decision was not only taken six years after the PVC I decision, that is to say, in a substantially different economic context, which gave a reason for hearing the parties, but also contains new factors in relation to the earlier decision.

41. The first difference lies in the fact that the addressees of the PVC II decision are not the same as those of the PVC I decision. The grounds and operative part of the PVC II decision single out Norsk Hydro and Solvay, which are not censured, the Commission stating in point 59 of the decision: 'Since Solvay did not make an application to the Court of Justice for the annulment of the [PVC I decision], and Norsk Hydro's application was declared inadmissible, the [PVC I decision] remains valid as against them'. This clearly illustrates that the two decisions — namely, the PVC I decision taken against Norsk Hydro and Solvay and the PVC II decision taken against the other undertakings — coexisted. Yet only the PVC I decision was the subject of a preliminary administrative procedure.

42. The second difference arises from the fact that, in the PVC II decision, the Commission, significantly, bases its objections on the actions taken collectively by undertakings, amongst which Norsk Hydro and Solvay are still listed, even though those two companies are not addressees of that decision. So, paradoxically, the conduct of those companies, which are third parties as regards the PVC II decision, is still taken into consideration by the Commission in order to determine the extent of the infringement alleged against the undertakings which are the addressees of the PVC II decision. The PVC I and PVC II decisions therefore relate to supposed cartels and/or collective concerted practices, whose members referred to in 1994 are different from those implicated in 1988.

43. I agree with the Commission that this line of reasoning is the result of a misunderstanding of the legal nature of the Commission's decision. As the Court of First Instance pointed out in paragraph 167 of the contested judgment, although the decision is presented in the form of a single measure, it is in fact a series of individual

decisions. Therefore the annulment could only apply to the undertakings whose actions had been successful, as the Court of Justice also held in its judgment in *Commission* v *AssiDomän Kraft Products and Others*. [12]

44. On the other hand, the initial decision remained valid for Solvay and Norsk Hydro, and it was therefore not necessary to address the PVC II decision to them. That could only be addressed to the undertakings to which the PVC I decision no longer applied.

45. Therefore, the fact that the PVC I and PVC II decisions had different addressees does not in any way mean that the second contained a difference in respect of which the undertakings should have been heard.

46. The same is true of the claim that the PVC II decision took into account the conduct of Solvay and Norsk Hydro when — unlike the situation regarding the PVC I decision — those undertakings were not among the addressees of the decision.

47. It is apparent, from paragraphs 768 to 778 of the contested judgment, that the Court established, without being contradicted by the appellant, that the Commission did not impute collective responsibility to each undertaking, but responsibility for the actions in which each had participated.

48. It follows that the responsibility imputed to each undertaking does not depend on the infringements committed by the others. Therefore, it cannot be claimed that the PVC II decision, contrary to the PVC I decision, took into account the actions of undertakings which were not addressees of the decision.

49. Finally, the Commission's explanations concerning limitation [13] do not constitute, either, a difference in respect of which the undertakings should have been consulted.

50. With those explanations, the Commission supplements its arguments in support of the existing objections, on which the undertakings were consulted prior to the adoption of the PVC I decision, but does

12 — Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363.

13 — See points 56 to 58 of the decision.

not add a new objection. The new decision therefore relates only to actions on which the undertakings had the opportunity to express their views.

51. The fact that the Commission supplements its arguments at a later stage is therefore permissible without it being necessary to hear the undertakings again, as is apparent from the case-law of the Court of Justice. [14]

52. However, the appellant's arguments reveal that whether or not there are new objections, or even simple differences between the two decisions, is not, in its view, in any way decisive.

53. The appellant considers that each decision taken by the Commission contains its own objections. The Commission cannot simply reproduce the objections contained in a previous decision which has been annulled.

54. In support of that argument it cites Article 4 of Regulation No 99/63, which provides that the Commission shall in its decisions deal only with those objections in respect of which the parties have been afforded the opportunity of making their views known.

55. It considers, therefore, that any Commission decision finding an infringement should be preceded by its own preliminary procedure.

56. It must be pointed out in that regard that, as indicated above, the validity of preparatory measures completed before the authentification of the text of the decision was unaffected by the annulment of the decision.

57. In the present case, therefore, the undertakings concerned were heard and were able to put their case as to the complaints made against them by the Commission.

58. Consequently, the condition laid down by Article 4 of Regulation No 99/63, cited by the appellant, is fulfilled, since it is not alleged that the Commission stated objections on which the undertakings had not had the opportunity to express their views.

14 — Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 15.

59. It is apparent from that provision only that every decision must be based on objections on which the parties have been able to express their views. That does not mean that a previous decision which has been annulled cannot have been based on the same objections.

60. Not only is such a condition not apparent from the wording of the regulation, but the aim of that measure provides no reason for it.

61. The provision is designed to protect the rights of the defence by ensuring that undertakings are not taken by surprise by the Commission but, on the contrary, are able to put their case at the appropriate time in respect of all the complaints made against them.

62. Compliance with that objective does not preclude those objections from having already appeared in a previous decision, if that previous decision was, as in the present case, annulled without the annulment affecting the preparatory measures.

63. However, Elf Atochem claims in the alternative that if the Commission's obligation to hear the parties again does not arise under Regulations Nos 17 and 99/63, it is, in any event, a consequence of the requirement that the rights of the defence be 'scrupulously' observed.

64. I do not support that assessment.

65. As we have just seen, the aim of the hearing of the undertakings is to give them the opportunity of expressing their views on the matters to which the Commission has taken objection. In the present case, this was done in the course of the procedure conducted preparatory to the PVC I decision. I cannot see, therefore, in what respects the rights of the defence required the undertakings to be heard again on the same facts.

66. It should be remembered, in that regard, that the PVC II decision relates only to acts carried out between 1980 and 1984, in respect of which the undertakings were fully able to express their views.

67. Therefore, the right to be heard was fully observed, notwithstanding possible subsequent developments in the factual and legal situation. That right cannot be considered to imply that the Commission is required to give the undertakings the opportunity to make observations in respect of other aspects of the Commission's action, such as the exercise of its

power to assess the expediency of a decision.

68. Furthermore, as the Commission points out, the appellant's request to be allowed to make observations on the differences between the PVC I and PVC II decisions amounts in practice to a demand for joint scrutiny of the preliminary draft decision. However, it is apparent from the case-law of the Court of Justice that such a claim is inconsistent with the system envisaged by Regulation No 17. [15]

69. As for the appellant's argument regarding the role which the Hearing Officer might have played in its favour, that consideration does not alter the fact that, in the present case, the Hearing Officer was called upon and drew up a report during the preparation of the PVC I decision. If there was no obligation to hear the undertakings again, there was no need to call for the further intervention of the Hearing Officer.

70. I should add that, here too, the reference to the rule in *Transocean Marine Paint* v *Commission*, cited above, does not substantiate the appellant's argument. That case was fundamentally different from this one in that the contested decision contained one substantial change, in relation to the preliminary procedure, namely the addition of a condition concerning exemption.

15 — *Musique Diffusion française and Others* v *Commission*, cited above, paragraph 35.

71. It follows from the above that the first limb of this plea should be rejected.

The second limb, relating to a failure to consult the Advisory Committee

72. Elf Atochem maintains that the procedural requirement to consult the Advisory Committee, laid down in Articles 10(3) and 15(3) of Regulation No 17, should have been observed if the measure were not to be void. The aim of consulting the Advisory Committee was to seek the opinion of the representatives of the Member States and was therefore different from that of hearing the undertakings. The fact that the Commission failed to do the latter did not relieve it of doing the former.

73. In that regard it need only be noted that, as we have seen above, measures taken preparatory to the PVC I decision, including the consultation of the Advisory Committee, were not affected by the annulment of the decision. Consequently, since that consultation had taken place, the relevant provisions of Regulation No 17 were observed in the present case.

74. Accordingly, the second limb of this plea should be rejected.

The fourth limb, alleging infringement of the right of access to the file

75. Elf Atochem maintains that the Commission did not spontaneously offer the undertakings access to the evidence it had, whether in their favour or otherwise, even though the conditions of access to the file had been extended between 1988 and 1994.

76. The appellant claims that the examination of the documents finally made accessible in connection with a measure of organisation of procedure taken by the Court of First Instance revealed very serious infringements of the principle *audi alteram partem* inasmuch as certain documents in the appellant's favour had not been disclosed and that, on other documents which had been disclosed, evidence in the appellant's favour had simply been concealed by the Commission.

77. The appellant criticises the Court for having made the finding of an infringement of defence rights conditional on proof that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment.

78. It considers that such a restrictive notion of the rights of the defence was never confirmed by the Court of Justice in connection with Articles 85 and 86 of the Treaty, but only as far as concerns State aid.[16] In that context, the solution is explained by the privileged position of the Member States in relation to the Commission and the interested parties. The situation is therefore not comparable with that of the procedures designed to find infringement of Article 85 by an undertaking.

79. In any event, according to Elf Atochem, infringement of the principle *audi alteram partem* is constituted even if the undisclosed documents have not been used directly by the Commission.

80. What are we to make of this line of argument?

81. It must be stated, first of all, that, contrary to the appellant's claims, it is apparent from the case-law of the Court of Justice that mere non-disclosure of documents cannot result in the annulment of the decision.

82. It is unquestionably apparent from paragraph 80 of the judgment in *Hercules*

16 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraphs 47 and 48.

Chemicals v *Commission*[17] that, if an undertaking fails to establish that the documents in question contained evidence useful for its defence and that, consequently, its inability to take cognisance of it before the decision infringed its rights of defence, there are not grounds for annulling the Commission's decision.

83. The Court of First Instance was therefore right in holding that the mere existence of an irregularity in respect of access to the file did not justify annulment of the decision.

84. The appellant nevertheless considers that the examination of the documents effected by the Court of First Instance in order to determine whether, in this case, there had been an infringement of the rights of the defence, was based on an incorrect approach.

85. It has argued that, instead of looking at things from the perspective *ex ante* of the undertaking, the Court took an *ex post* approach. In other words, instead of examining whether the undertaking could have used the disputed documents, it analysed whether the undertaking's use of those documents could have culminated in the decision having a different content from that which it eventually had.

86. It is true that, in paragraph 1074 of the contested judgment, the Court states that none of the appellants 'establishes that the course of the procedure and the Decision might have been influenced, to the applicants' detriment, by failure to disclose documents of which they ought to have had knowledge'.

87. However, in paragraph 81 of its judgment in *Hercules Chemicals* v *Commission*, cited above, the Court of Justice expressly held that 'the undertaking concerned does not have to show that, if it had had access to the replies provided by the other producers to the statement of objections, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defence'.

88. Must it therefore be considered that the Court of First Instance did indeed use an incorrect assessment criterion?

89. I do not think so. Accordingly, to analyse the documents, it also used the terms 'affected the applicants' defence' (paragraph 1035 of the contested judg-

17 — Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235.

ment), 'in what way their defence rights have been affected' (paragraph 1036), 'affected the undertakings' defence' (point 1041), 'contain anything relevant to the applicants' defence' (paragraph 1073).

90. Furthermore, the expression 'course of the procedure', used in paragraph 1074, itself refers, implicitly, to the undertakings' opportunities to defend themselves during the procedure.

91. Moreover, reading the explanations given by the Court in respect of that examination unquestionably shows that it examined whether the documents in question would have been of any use at all to the appellant. It did not therefore confine its appraisal to whether the failure to disclose the disputed documents had had an impact on the content of the final decision.

92. In fact, its account had the effect, fundamentally, of showing that the documents concerned, far from providing the appellant with an argument, were either unlikely to be relied on by the appellant, because of their nature or subject-matter, or, because of their content, liable to confirm the Commission's conclusions, or in any event not to contradict them in the slightest.

93. I therefore consider that the Court complied, in its method of analysis, with the aforementioned case-law of the Court of Justice.

94. Even if that were not the case, it is still for the appellant to prove the existence of documents in respect of which the Court of First Instance was wrong to hold that non-disclosure did not compromise the rights of the defence.

95. It is not sufficient merely to state *in abstracto* that the Court followed an incorrect criterion, but has to be demonstrated that the consequence of that error was that a document, which the Court had held could not lead to the adoption of a different decision by the Commission, could have been relied upon by the undertakings.

96. Furthermore, it is not possible to interpret the case-law of the Court of Justice as meaning that it is sufficient for the undertaking to state that it could, in theory, have used the document in question for its defence. Clearly — if absurd consequences are to be avoided — it is necessary to establish that the use of the said document by the defence, even if it is impossible to be sure that it would have changed the Commission's opinion, had a reasonable chance of doing so.

97. In any event, the appellant is careful not to identify any document which it could have used for its defence and in respect of which the Court is alleged to have wrongly held that non-disclosure did not result in an infringement of the rights of the defence.

98. Accordingly, whatever criterion is followed, the appellant has not established that the irregularity committed in respect of access to the file had the slightest effect on its opportunity to defend itself.

99. The fourth limb of this plea should be rejected and, consequently, the whole plea.

III — Conclusion

For the foregoing reasons, I propose that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.