JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-199/92 P,

Hüls AG, whose registered office is in Marl, Germany, represented by H.-J. Herrmann and subsequently by F. Montag, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 8 Rue Zithe,

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-9/89 *Hüls* v *Commission* [1992] ECR II-499, 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, and B. Jansen, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos 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,

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 14 May 1992, Hüls AG ('Hüls') 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-9/89 *Hüls* v *Commission* [1992] ECR II-499 ('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 ('ICI') and Shell International Chemical Company Ltd ('Shell')) 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 Hüls was one of the producers which supplied the market in 1977, with a market share on the west European market of between 4.5 and 6.5%.

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 81 EC (ex Article 85), 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 Hüls.

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that Hüls had infringed Article 81(1) EC by participating, with other undertakings, and in Hüls's case from some time between 1977 and 1979 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 Hüls was fined ECU 2 750 000, or DEM 5 898 447.50 (Article 3 of the Polypropylene Decision).

10 On 2 August 1986, Hüls 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, Hüls sought annulment of the Polypropylene Decision, in the alternative reduction of the fine imposed on it and, in any event, an order that the Commission 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 lodged at the Registry of the Court of First Instance on 4 March 1992, Hüls asked the Court of First Instance to postpone the date on which judgment would be delivered, 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

Proof of the infringement — Findings of fact

The system of regular meetings

14 With regard to the system of regular meetings of polypropylene producers in the period from 1977 to the end of 1978 or the beginning of 1979, the Court of First Instance considered, first of all, at paragraph 96, that the only evidence put forward by the Commission to prove Hüls's participation in the meetings during the period in question was ICI's reply to the request for information. At paragraph 97 the Court of First Instance observed that ICI's reply to the request for information, in which it classified Hüls among the regular participants in the meetings, was expressly referring to its participation in 'bosses" and 'experts" meetings without indicating from what date. On the basis of ICI's reply to that request for information, the Court of First Instance noted, at paragraph 99, that those meetings had begun in late 1978 or early 1979 and that the passages of ICI's reply cited by the Commission in support of its allegation that Hüls participated in the meetings from December 1977 onwards concerned *ad hoc* meetings, not those meetings. The Court of First Instance concluded in paragraph 102 that the

Commission could not put forward any evidence to prove Hüls's participation in the infringement before the end of 1978 or the beginning of 1979 and that it had therefore not proved such participation to the requisite legal standard.

15 For the period from the end of 1978 or the beginning of 1979 to November 1983, the Court for First Instance found, at paragraph 114, that ICI's reply to the request for information classified Hüls, unlike two other producers, amongst the regular participants in the 'bosses" and 'experts" meetings without any limitation in time. The Court of First Instance interpreted that reply as dating Hüls's participation in the meetings from the beginning of the system of 'bosses" and 'experts" meetings, which was established at the end of 1978 or the beginning of 1979. At paragraph 115 the Court of First Instance noted that that reply by ICI was borne out by the fact that in various tables found at the premises of ICI, Atochem SA and SA Hercules Chemicals NV there appeared beside Hüls's name its sales figures, whereas it would not have been possible to draw up those tables on the basis of the statistics available under the Fides statistical system and that, in its reply to the request for information, ICI had moreover stated, with regard to one of those tables that 'the source of information for actual historic figures in this table would have been the producers themselves'. To that evidence the Court of First Instance added, at paragraph 116, the fact that Hüls's reply to the request for information was incomplete in so far as it had omitted to mention its participation in a meeting in 1981 the note of which showed that Hüls was one of the participants. Moreover, the Court of First Instance observed, at paragraph 117, that Hüls had admitted before the Court that it had participated regularly in the meetings during 1982 and 1983 whereas in its reply to the request for information it stated that it had not participated in the meetings before mid-1982.

16 The Court of First Instance concluded, at paragraph 118, that the Commission was entitled to consider that Hüls had participated regularly in the periodic meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983. At paragraph 119, the Court of First Instance found that the Commission was therefore entitled to take the view, based on the material provided by ICI in its reply to the request for information, which was borne out by numerous notes of meetings, that the purpose of the meetings was, in particular, to fix target prices and sales volumes. According to paragraph 121 of the contested judgment, the Commission was also fully entitled to deduce from ICI's reply as to the regularity of the 'bosses" and 'experts" meetings, as well as from the identical nature and purpose of the meetings, that they were part of a system of regular meetings.

17 The Court of First Instance added, at paragraphs 122 to 125, that the arguments put forward by Hüls to show that its participation in the meetings could not be regarded as offensive could not be accepted. According to the Court of First Instance, the same applied to the claim that as a small producer Hüls could not afford to stay away from the meetings, since it could have reported them to the Commission and asked it to order them to be brought to an end. That was also true of its strategy of withdrawing from basic products in order to concentrate on special products which, according to Hüls, caused a conflict of interests between itself and the other producers, since the Court of First Instance found that the discussions relating to sales volume targets concerned special products as well. With regard to the strategy of disinformation and mental reservation adopted by Hüls, the Court of First Instance pointed out that Hüls at least gave is competitors the impression that it was participating in the meetings in the same spirit.

18 At paragraph 126, the Court of First Instance concluded that it was for Hüls to adduce evidence to show that its participation in the meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit which was different from theirs. In that connection the Court of First Instance found, in paragraph 127, that Huls's arguments founded on its conduct on the market did not constitute evidence proving that it had no anti-competitive intention. Even on the assumption that its competitors knew that its conduct on the market was independent of what occurred at the meetings, the mere fact that it exchanged with them information which an independent operator would keep strictly confidential as business secrets was sufficient to show that it acted in an anti-competitive spirit.

19 The Court of First Instance concluded, in paragraph 129, that the Commission had established to the requisite legal standard that the applicant participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system.

The price initiatives

20 At paragraph 167, the Court of First Instance found that the records of the regular meetings of polypropylene producers showed that the producers which participated in those meetings had agreed to the price initiatives mentioned in the Polypropylene Decision. According to paragraph 168, since it had been established to the requisite legal standard that Hüls had participated in those meetings, it could not assert that it did not support the price initiatives which were decided on, planned and monitored at those meetings without providing any evidence to corroborate that assertion. At paragraph 170, the Court of First Instance considered that Hüls's contention that it took no account of the outcome of the meetings when determining its pricing conduct on the market could not be accepted as evidence to support its assertion that it did not subscribe to the price initiatives agreed at the meetings, but at the most demonstrated that it did not implement the decisions reached at the meetings. According to paragraph 171, despite the considerable differences between the prices actually charged and the target prices, the producers themselves judged the effects of their meetings to be positive.

21 At paragraph 172, the Court of First Instance considered that Hüls's implementation of the decisions reached at the meetings was more substantial than it claimed, at least after 1982, the time from which the Commission was able to produce price instructions issued by Hüls and matching the target prices set at the meetings and those issued by other producers. As regards the purely internal nature of Hüls's price instructions, the Court of First Instance observed, at paragraph 173, that although those instructions were internal in the sense that they were sent by the head office to the sales offices, they had been sent with a view to being implemented and thus having external effects. At paragraph 174, the Court of First Instance added that the Commission was fully entitled to deduce from ICI's reply to the request for information that those initiatives were part of a system of fixing target prices which continued to exist even when the discussions between the producers did not lead to the fixing of a precise target. Lastly, at paragraph 175, the Court of First Instance found that, although the last meeting of producers proved by the Commission to have taken place was that held on 29 September 1983, various producers had, between 20 September and 25 October 1983, sent out matching price instructions and the Commission could therefore reasonably take the view that the meetings of producers had continued to produce their effects until November 1983.

22 The Court of First Instance concluded, in paragraph 177, that the Commission had established to the requisite legal standard that the applicant was one of the producers amongst whom there had emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision, that those initiatives were part of a system and that those price initiatives continued to have effects until November 1983.

The measures designed to facilitate the implementation of the price initiatives

23 At paragraph 189, the Court of First Instance considered that the Polypropylene Decision was to be interpreted as asserting that at various times each of the producers had adopted at the meetings together with the other producers a set of measures designed to bring about conditions favourable to an increase in prices, in particular by artificially reducing the supply of polypropylene, and that the implementation of the various measures involved was by common agreement shared between the various producers according to their specific situation. At paragraph 190 the Court of First Instance found that, in participating in the meetings during which that set of measures was adopted, Hüls had subscribed to it, since it had not adduced any evidence to prove the contrary.

24 As regards the 'account leadership' system, the Court of First Instance found, at paragraph 191, that Hüls had participated in the four meetings at which that system was discussed by producers and that it was apparent from the notes of those meetings that Hüls had provided at them certain information relating to its customers. According to paragraph 192, the implementation of that system was attested by the note of the meeting of 3 May 1983 and by ICI's reply to the request for information. The Court of First Instance indicated, at paragraphs 193 to 196, that those items of evidence were not weakened by Hüls's arguments concerning the significant switches of supplier by customers which took place during 1982 and 1983, by the fact that Hüls's name appeared in brackets in a table annexed to the note of the meeting of 2 December 1982 and by the differences between that table and the table annexed to the note of the meeting of 2 September 1982.

25 The Court of First Instance noted, moreover, in paragraph 197, that Hüls admitted in its reply to the request for information that it had participated in local meetings in Denmark and that those meetings, as attested by the note of the meeting of 2 November 1982, were intended to ensure that the agreed measures were applied at the local level. Lastly, the Court of First Instance considered, at paragraph 198, that the note of the meeting of 2 December 1982, combined with ICI's reply to the request for information, proved without doubt that certain producers, including the German producers, had exerted pressure on recalcitrant producers.

26 At paragraph 199, the Court of First Instance concluded that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom there emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives mentioned in the Polypropylene Decision.

Target tonnages and quotas

27 The Court of First Instance first pointed out, at paragraph 231, that it had already found that, starting from the end of 1978 or the beginning of 1979, Hüls had participated regularly in the periodic meetings of polypropylene producers at which discussions relating to the sales volumes of the various producers were held and information on that subject exchanged. At paragraph 232 it pointed out that, concurrently with that participation, Hüls's name appeared in various tables found on the premises of polypropylene producers, whose contents clearly showed that they were drawn up for the purpose of determining sales volume targets. The Commission was therefore entitled to take the view that the data contained in those tables, which must have been drawn up on the basis of information from the producers themselves rather than Fides statistics, had, as far as Hüls was concerned, been provided by Hüls in the course of the meetings in which it participated. At paragraph 233, the Court of First Instance held that the terms used in the tables relating to the years 1979 and 1980 justified the conclusion that the producers had arrived at a common purpose.

28 As regards the year 1979 in particular, the Court of First Instance indicated, at paragraphs 234 and 235, that the note of the meeting of 26 and 27 September 1979 and the table headed 'Producers' Sales to West Europe', taken from the premises of ICI, did not bear out Hüls's argument that there was no quota system for 1979.

29 In paragraphs 236 to 239, the Court of First Instance found that, as regards the year 1980, it was clear from the table dated 26 February 1980 found at the premises of Atochem SA and from the note of the January 1981 meetings that sales volume targets were set for the whole of the year; it pointed out in that regard that, although the figures from the two sources were different, that was because the producers' forecasts had had to be revised downwards; it considered that the fact that the 'targets' allocated to Hüls were identical in the various tables for the years 1980 and 1981 was irrelevant and that the comment 'to be rechecked' added to the table of 26 February 1980 did not call in question the existence of a common purpose but merely indicated that at that time checks had still to be carried out; it added that, according to the note of the meetings held in January 1981, Hüls had provided its sales figures for 1980 in order to compare them with the sales volume targets determined and accepted for 1980.

30 In paragraphs 240 to 245, the Court of First Instance pointed out that, for 1981, the complaint against the producers was that they took part in negotiations in order to reach a quota agreement, that they communicated their 'aspirations', that they had agreed, as a temporary measure, to restrict their monthly sales to one-twelfth of 85% of the 'target' agreed for 1980, that they had taken the previous year's quota as a theoretical entitlement for the rest of the year, that they had reported their sales each month to the meetings, and, finally, had monitored whether the sales matched the theoretical quota allocated to them. According to the Court of First Instance, the existence of those negotiations and the communication of 'aspirations' were attested by various pieces of evidence such as tables and an ICI internal note; the adoption of temporary measures during February and March 1981 was apparent from the note of the meetings of January 1981; the fact that the producers each took their previous year's quota as a theoretical entitlement for the rest of the year and monitored whether sales matched that quota by exchanging their sales figures each month was established by the combination of a table dated 21 December 1981, an undated table entitled 'Scarti per società' found at the premises of ICI, and an undated table also found there; the participation of Hüls in those various activities was apparent from its

participation in the meetings at which those activities took place, and from the fact that its name appeared in the various documents mentioned above.

31 At paragraphs 246 to 249, the Court of First Instance stated that, for 1982, the complaint against the producers was that they took part in negotiations in order to reach an agreement on quotas, that they communicated their tonnage 'aspirations', that, failing a definitive agreement, they communicated their monthly sales figures during the first half of the year, comparing them with the percentage achieved during the previous year and, during the second half of the year, attempting to restrict their monthly sales to the same percentage of the overall market achieved in the first six months of that year. According to the Court of First Instance, the existence of those negotiations and the communication of their 'aspirations' were evidenced by a document entitled 'Scheme for discussions "quota system 1982"', by an ICI note entitled 'Polypropylene 1982, Guidelines', by a table dated 17 February 1982 and by a table written in Italian which was a complex proposal; the measures adopted for the first half of the year were established by the note of the meeting on 13 May 1982; the implementation of those measures was evidenced by the notes of the meetings of 9 June, 20 and 21 July and 20 August 1982; the measures adopted for the second half were proved by the note of the meeting of 6 October 1982 and the continuation of the measures was confirmed by the note of the meeting of 2 December 1982, a finding that could not be refuted by an internal ICI note of December 1982.

32 The Court of First Instance also found, at paragraph 250, that, as regards the year 1981 and 1982, the Commission was entitled to conclude from the mutual monitoring, conducted at the regular meetings, of the implementation of a system for restricting monthly sales by reference to a previous period that that system had been adopted by the participants at the meetings.

33 In respect of 1983, the Court of First Instance found, at paragraphs 251 to 256, that it was clear from the documents produced by the Commission that at the end of 1982 and the beginning of 1983 the polypropylene producers had discussed a quota system for 1983, that Hüls had participated in the meetings at which the discussions took place, that on those occasions it had supplied data relating to its sales and that in Table 2 appended to the note of the meeting of 2 December 1982 the word 'acceptable' appears beside the quota put down beside Hüls's name, so

that Hüls had participated in the negotiations held with a view to arriving at a quota system for 1983. According to the Court of First Instance, the Commission was entitled to conclude from the combination of the note of the meeting on 1 June 1983 and the note of an internal meeting of the Shell group on 17 March 1983, which were confirmed by two other documents mentioning the figure of 11% as Shell's market share, that those negotiations had led to the introduction of such a system, despite negotiating positions which were quite different at the outset.

34 At paragraphs 257 to 260, the Court of First Instance considered that Hüls's argument concerning the way the market had evolved was irrelevant since the Polypropylene Decision charged the producers not with having observed quotas but only with having agreed them. It pointed out that the comparison of the various producers' sales figures with the sales volume targets allocated to them and the fact that they reported their sales during specific periods showed that, contrary to Hüls's assertions, the quota system related not only to basic grades but to all polypropylene grades. It added that, owing to the identical aim of the various measures for restricting sales volumes — namely to reduce the pressure exerted on prices by excess supply — the Commission was entitled to conclude that those measures were part of a quota system.

35 The Court of First Instance concluded, in paragraph 261, that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom common purposes had emerged in relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which are mentioned in the Polypropylene Decision and which formed part of a quota system.

The fine

36 At paragraph 353 the Court of First Instance found that it was clear from its assessments relating to proof of the infringement that the Commission had correctly established the role played by Hüls in the infringement from the end of 1978 or the beginning of 1979 and that it was entitled to base its determination on that role when calculating the fine to be imposed on Hüls.

37 It noted, in paragraph 361, that in order to determine the amount of the fine imposed on Hüls the Commission had first defined the criteria for setting the general level of the fines imposed on the undertakings to which the Polypropylene Decision was addressed (point 108 of the Decision) and had then defined the criteria for achieving a fair balance between the fines imposed on each of those undertakings (point 109 of the Decision).

38 At paragraph 381 the Court of First Instance concluded that the fine imposed on Hüls was proportionate to the gravity of the infringement of the Community's competition rules which Hüls has been found to have committed but that it should be reduced owing to the shorter duration of the infringement.

The request that the oral procedure be reopened

39 In reaching its decision on the request, referred to in paragraph 382, that the oral procedure be reopened, after hearing the views of the Advocate General once again, the Court of First Instance considered, at paragraph 383, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of its Rules of Procedure or to order measures of inquiry.

40 At paragraph 384, the Court of First Instance held:

'It must be stated first of all that the judgment of 27 February 1992 in the *PVC* cases does not in itself justify the reopening of the oral procedure in the present case. Furthermore, unlike the argument which it put forward in the *PVC* cases (see paragraph 13 of the judgment), in the present case the applicant did not once argue, even by allusion, in the oral procedure that the Decision was non-existent because of the alleged defects. The question to be examined, therefore, is whether the applicant has adequately explained why in the present case, unlike in Joined Cases T-79/89 et al., it did not plead the existence of those alleged defects earlier, since they must in any event have existed before the action was brought. Even though the Community court, in an action for annulment brought under the second paragraph of Article 173 of the EEC Treaty, must of its own motion consider the issue of the existence of the contested measure, that does not mean that in every action brought under the second paragraph of Article 173 of the EEC Treaty the possibility that the contested measure is non-existent must automatically be investigated. It is only in so far as the parties put forward sufficient evidence to suggest that the contested measure is non-existent that the Community court must review that issue of its own motion. In the present case, the arguments put forward by the applicant do not provide a sufficient basis to suggest that the Decision is non-existent. In point I(2) of its document, the applicant pleads an alleged infringement of the rules on languages laid down in the Commission's Rules of Procedure. Such an infringement cannot, however, entail the non-existence of the contested measure but only its annulment, provided that the argument is received at the proper time. The applicant also contends, in point I(3) of its document, that in view of the circumstances of the *PVC* case there must be a presumption of fact that the Commission also made subsequent amendments to its polypropylene decisions without having the authority to do so. The applicant has not, however, explained why the Commission would have made subsequent alterations to the Decision in 1986, that is to say in a normal situation entirely unlike the special circumstances of the *PVC* case, where the Commission's term of office was about to run out in January 1989. Mere reference to "unawareness of irregularity" is not sufficient in this regard. The general presumption put forward by the applicant in this respect does not constitute a sufficient ground for ordering measures of inquiry after the reopening of the oral procedure.'

41 Paragraph 385 states:

'Finally, the argument put forward by the applicant in point I(1) of its document must be interpreted as asserting, on the basis of the statements made by the Commission's representatives in Joined Cases T-79/89 et al., that an original of the contested Decision, authenticated by the signatures of the President of the Commission and the Executive Secretary, is lacking. That allegation, if true, would not in itself entail the non-existence of the Decision. In the present case, unlike in the *PVC* cases, cited above, the applicant has not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure took place after the adoption of the contested Decision and that the Decision thus lost, to the benefit of the applicant, the presumption of legality arising from its apparent existence. In such a case, the mere fact that there is no duly authenticated original does not in itself entail the non-existence of the contested measure. Therefore, in this respect too, there was no reason to reopen the oral procedure in order to carry out further measures of inquiry. Since the applicant's arguments could not justify an application for revision, its suggestion that the oral procedure be reopened should not be upheld.'

42 The Court of First Instance annulled the seventh indent of Article 1 of the Polypropylene Decision in so far as it held that Hüls had taken part in the infringement from some time between 1977 and 1979, and not from the end of 1978 or the beginning of 1979. It reduced the amount of the fine imposed on Hüls in Article 3 of that Decision, setting it at ECU 2 337 500, that is to say DEM 5 013 680.38. For the rest, it dismissed the application and ordered Hüls to bear its own costs and pay one half of the Commission's costs, the Commission to bear the remaining half of its own costs.

The appeal

43 In its appeal Hüls requests the Court of Justice to:

— set aside the contested judgment and declare the Polypropylene Decision non-existent;

— in the alternative, set aside the contested judgment and declare the Polypropylene Decision as a whole null and void;

— in the further alternative, set aside the contested judgment and declare the Polypropylene Decision null and void in so far as it was upheld, the fine fixed at ECU 2 337 500 and Hüls ordered to pay the costs, and to give judgment in accordance with the forms of order sought by Hüls at first instance;

— in the further alternative, refer the case back to the Court of First Instance;

— order the Commission to pay the costs.

44 As a protective measure, Hüls asks the Court of Justice to direct the Commission to produce the original or a certified copy of the minutes of the Commission's meeting which probably took place on 23 April 1986 and at which the Polypropylene Decision was adopted pursuant to Article 12 of its Rules of Procedure, to produce the text of the Polypropylene Decision in the languages in which it was adopted by the College of Members of the Commission and to indicate whether alterations were subsequently made to the decision adopted by

the College of Members of the Commission and, if so, what were the alterations. In its reply Hüls also asks to be granted access to those documents.

45 By order of the Court of Justice of 30 September 1992, DSM NV ('DSM') was given leave to intervene in support of the orders sought by Hüls. 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.

46 The Commission contends that the Court should:

— declare the appeal inadmissible in so far as Hüls is relying on infringement of substantive Community law when the Polypropylene Decision was reviewed, and reject the appeal as unfounded as to the remainder;

— in the alternative, reject the appeal as unfounded;

— in any event, order Hüls to pay the costs;

— reject the intervention as a whole as inadmissible;

— alternatively, reject 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.

47 In support of its appeal, Hüls puts forward pleas alleging breach of procedure and infringement of Community law relating, first, to the fact that the Court of First Instance refused to hold the Polypropylene Decision non-existent or to annul it for breach of essential procedural requirements; secondly, to the refusal by the Court of First Instance to reopen the oral procedure and to order the necessary measures of organisation and inquiry; and, thirdly, to the establishment and review of the facts submitted for the assessment of the Court of First Instance, to its assessment of the individual responsibility of those participating in the infringement, and to its setting of the amount of the fine.

48 At the Commission's request and despite Hüls'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

49 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 Hüls 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.

50 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.

51 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.

52 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 Hüls 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).

53 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.

54 The forms of order sought by Hüls in its appeal include, 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.

55 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.

56 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 forms of order sought by Hüls. It does not therefore satisfy the conditions laid down in the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, so that it must be held inadmissible.

Admissibility of the appeal

57 The Commission has doubts as to the admissibility of the part of the appeal which alleges that the Court of First Instance infringed Community law when establishing and reviewing the facts, when assessing the individual responsibility of those participating in the infringement and when setting the amount of the fine.

58 Pursuant to Article 225 EC (ex Article 168A) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal is limited to points of law and may rely only on the grounds listed exhaustively therein, to the exclusion of any fresh appraisal of the facts. According to the Commission, Hüls's appeal does not enable it to be clearly determined whether the breaches of procedure allegedly committed by the Court of First Instance are criticised as a breach of the applicable rules of evidence or from the point of view of the specific application of the rules of evidence to the facts, which cannot constitute a ground of appeal in itself. Hüls does not adequately specify the rule of law that the Court of First Instance is alleged to have infringed.

59 According to the Commission, Hüls is criticising the fact, first, that the Court of First Instance relied *inter alia* on evidence that was undermined by other evidence and, secondly, that it was in breach of the principle that the benefit of the doubt must be given or the presumption of innocence. Hüls did not claim that the Court of First Instance had not examined or had distorted evidence, which could constitute a breach that the Court should examine, but rather it criticised the assessment of the facts by the Court of First Instance.

60 The same applies to the alleged breach of the rule of presumption of innocence. Where the Court of First Instance assesses various items of contradictory evidence and, after reflection, reaches a conclusion as to the finding of facts, that conclusion is not subject to review by the Court of Justice, unless it is clear from the file that that finding is objectively wrong. Only the legal characterisation of a fact and, in consequence, determination of the applicable rule of law may constitute the subject-matter of an appeal. Review by the Court of Justice concerns the question whether the facts found, after assessment of the evidence by the Court of First Instance, justify application of that rule of law. That should not, however, be confused with review of findings of fact and the assessment of items of evidence, which is what Hüls does.

61 Hüls states that it has explained in detail how the Court of First Instance was in breach of substantive provisions of Community law and clearly explained that no assessment of items of evidence was involved. On the contrary, it claimed that the Court of First Instance did not fully investigate the facts and based itself on presumptions where were contradicted by contrary presumptions. That method

of proceeding runs counter not only to principles of logic and experience, but also to the obligation of the Court of First Instance to undertake an inquiry and to obtain evidence.

62 Hüls expressly raised disregard of the principle that the benefit of the doubt must be given, which, it states, is a principle of law. It also relied on Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('ECHR'), which forms part of Community law pursuant to Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU). Hüls claims that failure to comply with the obligation of inquiry constitutes a breach of the presumption of innocence, which applies also to administrative law penalties, such as fines in cases of infringement of the competition rules.

63 According to Hüls, the Court of Justice must review the judgments of the Court of First Instance with regard to breaches of the law of evidence, and of principles of logic and common experience. The application of provisions of competition law to situations in which the facts do not allow for such application is a question of law, just like the question whether the facts found are sufficient to constitute a breach of Article 81 EC. To apply that provision to facts which do not form a sufficient basis for such a breach is an infringement of the competition rules. Breach of the applicable rules of evidence leads also, by enlarging their scope, to breaches of the competition provisions. The Court of First Instance committed such an error when it confirmed the existence of a concerted practice without finding on the market conduct by Hüls corresponding to such a practice. In conclusion, the questions concerning the degree of proof, the relevance and exhaustive nature of the facts found in relation to their legal consequences are points of law subject to review by the Court. The appeal is therefore wholly admissible.

64 In that regard, it should be borne in mind that, pursuant to 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).

65 It follows that, inasmuch as they relate to the assessment by the Court of First Instance of the evidence adduced, the appellant's complaints cannot be examined in an appeal. However, it is incumbent on the Court to verify whether, in making that assessment, the Court of First Instance committed an error of law by infringing the general principles of law, such as the presumption of innocence and the applicable rules of evidence, such as those concerning the burden of proof (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66; Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 40; C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 22; Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26; and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 24).

66 Pleas in law alleging that the grounds of the contested judgment are inadequate or contradictory are also admissible in an appeal (see Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29, and *Baustahlgewebe* v *Commission*, cited above, paragraph 25).

67 As regards the infringements of Article 81 EC relied upon by Hüls, these arise from the alleged breaches of the applicable rules of evidence and this complaint therefore has no independent content.

68 Consequently, each of Hüls's complaints concerning the way in which the facts adduced before the Court of First Instance were established and reviewed must be examined in turn in order to determine whether they are admissible in an appeal.

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

69 In support of its appeal Hüls, referring to paragraphs 382 to 385 of the contested judgment, claims that, inasmuch as the Court of First Instance held, first, that the Polypropylene Decision was not non-existent and was not to be annulled and, secondly, rejected Hüls's request that it reopen the oral procedure and order the necessary measures of organisation and inquiry, it infringed Community law and committed a breach of procedure adversely affecting its interests, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice. Referring to paragraphs 90 to 261 of the contested judgment, Hüls claims that, in establishing and reviewing the facts submitted for its assessment, the Court of First Instance committed infringements of Community law, which also had repercussions on its assessment of the individual responsibility of those participating in the infringement and its setting of the amount of the fine, a question which was dealt with in paragraphs 343 to 381 of the contested judgment.

Failure to find that the Polypropylene Decision was non-existent or to annul it for breach of essential procedural requirements

70 In the first limb of the plea alleging infringement of Community law, Hüls complains that the Court of First Instance failed to find the Polypropylene Decision non-existent or that it should be annulled on account of defects affecting the procedure by which it was adopted.

71 Hüls considers that the contested judgment must be annulled on the ground that the Court of First Instance disregarded the principles relating to non-existent acts, the effect of the presumption of legality of legal acts and the doctrine of the apparent existence of an act.

72 It submits that Community law recognises the concept of non-existence, whereby an act vitiated by particularly grave and manifest defects may be struck down. It

is not possible to draw up, on the basis of the case-law, an exhaustive list of defects giving rise to non-existence, but such defects could be defects as to competence, procedure, form or error going to the substance. A gross defect would not give rise to absolute nullity unless it was obvious, that is to say if an impartial observer would be aware of the irregularity immediately. In the contested judgment, the Court of First Instance disregarded those principles. The absence of signatures and subsequent alterations which prevent the authorities of the Member States from verifying the authenticity of the enforceable decision in accordance with Article 256 EC (ex Article 192) constitute grave and manifest defects entailing the non-existence of the Polypropylene Decision.

73 Hüls considers that, in its *PVC* judgment, the Court of Justice did not clearly explain the principles relating to the non-existence of a legal act. However, should defects affecting the procedure by which it was adopted not entail the non-existence of the Polypropylene Decision, they should at least, in the light of that judgment, lead to its being declared void.

74 The Court of First Instance also disregarded the fact that the grave and flagrant defects, such as the lack of a signature, causing the act to be non-existent, prevent the presumption of legality from arising, and there is no need for any further defect, namely infringement of the principle of the inalterability of the act adopted. Lastly, the doctrine of the apparent existence of the act notified, developed by the Court of First Instance, disregarded the fact that any defect in the act also necessarily affects the notified copy.

75 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 (T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847), the Commission contended that the Supplement to Reply lodged by 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.

76 According to DSM, 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), 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.

77 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.

78 The only exceptions are to be found in the orders in Case T-4/89 Rev. *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.

79 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.

80 The Commission considers that, in the light of the *PVC* judgment of the Court of First Instance, the Polypropylene Decision cannot be regarded as legally non-existent, even if it were vitiated by the same defects as the PVC decision. Since the contested judgment does not reveal any error of law, it should not be annulled. The requests for measures of inquiry and the evidence offered in support by Hüls cannot be taken into account.

81 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.

82 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.

83 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.

84 As regards, first, the conditions under which an act may be rendered non-existent, this Court observes that, as is clear in particular from paragraphs 48 to 50 of its *PVC* judgment, 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.

85 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.

86 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.

87 As was the case in the *PVC* actions, whether considered in isolation or even together, the irregularities alleged by Hüls, 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.

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

89 Secondly, with regard to the refusal by the Court of First Instance to find defects relating to the adoption and notification of the Polypropylene Decision such as to lead to its annulment, this plea was raised for the first time in the request that the oral procedure be reopened and measures of organisation of procedure and inquiry be taken. Consequently, the question whether the Court of First Instance was obliged to examine it overlaps with the question whether that Court should have acceded to the request, which is the subject-matter of the plea alleging breach of procedure.

90 Thirdly and finally, inasmuch as the appellant asks the Court of Justice to order measures of inquiry or offers evidence in order to establish the conditions under which the Commission adopted the Polypropylene Decision, suffice it to point out that such measures cannot be considered in an appeal, which is limited to points of law.

91 On the one hand, measures of inquiry would necessarily lead to the Court ruling on 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.

92 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.

93 It follows from the foregoing that the first limb of the plea alleging infringement of Community law must be dismissed.

Failure to reopen the oral procedure and to order measures of organisation of procedure and inquiry

94 By the second limb of its plea of infringement of Community law and its plea of breach of procedure, Hüls complains that the Court of First Instance failed to reopen the oral procedure and to order measures of organisation of procedure and inquiry.

95 In so far as Hüls's plea of infringement of Community law concerns the refusal by the Court of First Instance to reopen the oral procedure and to order measures of organisation of procedure and inquiry, it overlaps with the plea of breach of procedure. Those pleas must therefore be examined together.

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

97 Hüls claims that, in refusing to reopen the oral procedure, in accordance with its request of 4 March 1992, the Court of First Instance infringed Article 62 of its Rules of Procedure. In not ordering the Commission to produce its internal documents relating to the Polypropylene Decision, the Court of First Instance also infringed Article 21 of the EC Statute of the Court of Justice and Article 64(3)(d) of the Rules of Procedure of the Court of First Instance.

98 With regard, first, to Article 62 of the Rules of Procedure of the Court of First Instance, Hüls states that, under that provision, the Court of First Instance does not have unlimited discretion to decide whether to reopen the oral procedure. The case-law of the Court of Justice on Article 61 of its own Rules of Procedure may be transposed for the purpose of interpreting that provision and would enable the conclusion to be drawn that there is a requirement to reopen the oral procedure when two conditions are satisfied.

99 First, a request that the oral procedure be reopened must be based on material circumstances until then unknown, that is to say new facts that the party in question could not have put forward before the end of the oral procedure. Secondly, the party making the request must show that those facts are material to the outcome of the case. The presence, in this case, of new facts of relevance to the outcome of the case means that Article 62 of the Rules of Procedure of the Court of First Instance was infringed.

100 On the one hand, with regard to new facts, Hüls states that in its request of 4 March 1992, it adduced facts concerning the procedural practice followed by the Commission of which it only acquired knowledge in the course of the oral procedure before the Court of First Instance in the *PVC* cases.

101 First, Commission decisions are no longer signed by the President and the Secretary General, contrary to Article 12 of its Rules of Procedure. Secondly, the rules on languages are no longer observed, and the College of Members of the Commission adopts only drafts drawn up in some languages of procedure, while the Member who is competent in the matter alone adopts the texts in the other

languages, in breach of Articles 12 and 27 of those Rules of Procedure. Thirdly, the Commission makes substantial alterations to its decisions, subsequent to their adoption, in breach of Article 253 EC (ex Article 190).

102 Those are not general presumptions, as the Commission maintains, but precise information, based on statements made by the Commission's Agents at the hearing before the Court of First Instance on 10 December 1991 in the *PVC* case, relating to specific points in the administrative procedure leading to the adoption of decisions in competition cases.

103 The pleas are not out of time, contrary to what the Commission contends on the basis of Article 48 of the Rules of Procedure of the Court of First Instance and by analogy with the revision procedure. The statements by the Commission's Agents were made only at the hearing on 10 December 1991 and not on the occasion of other previous hearings. Moreover, Article 62 of the Rules of Procedure of the Court of First Instance does not contain any time-bar rule; that would be contrary to the very aim and spirit of that provision.

104 Bringing legal proceedings to a speedy conclusion is primarily in the interests of the applicant, in particular when it has paid a fine or lodged a security as Hüls did, so that there is no reason to introduce a time-bar in respect of Article 62. Article 48 of the Rules of Procedure of the Court of First Instance confirms that interpretation, since it does not provide for a time-bar either. As for the three-month time-limit laid down in Article 125 of those Rules of Procedure for revision of judgments, Hüls considers that this is intended to safeguard the legal certainty attaching to *res judicata* and that it cannot be applied by analogy to cases where new pleas in law are put forward or a request is made that the oral procedure be reopened.

105 On the other hand, with regard to the relevance of the new facts for resolving the dispute, the Court of First Instance itself confirmed, in paragraph 384 of its judgment, that an infringement of the rules on languages laid down by the Commission's Rules of Procedure can entail annulment of the contested decision. That is also the case where Article 12 of the Commission's Rules of Procedure or Article 190 of the Treaty is infringed. According to Hüls, it is certain that, in this case, the new facts would have been a decisive factor for the outcome of the case since they would have entailed the non-existence or, at the least, the nullity of the Polypropylene Decision.

106 The two conditions whose existence should have led the Court of First Instance to reopen the oral procedure are therefore satisfied in this case. Since the Court of First Instance did not do so, it infringed Article 62 of its Rules of Procedure.

107 Hüls goes on to allege that the Court of First Instance also infringed Article 64(3)(d) of its Rules of Procedure, since it did not comply with its obligation of inquiry. Article 21 of the EC Statute of the Court of Justice and Article 64 et seq. of the Rules of Procedure of the Court of First Instance confirm that it is for the latter to investigate the facts independently of the evidence adduced by the parties. The Court of First Instance has an obligation to act where an argument that could be a decisive factor in the judgment is introduced and the Community court cannot reach a decision on that argument without establishing the facts underpinning it, or ordering any inquiry necessary to establish the accuracy of such facts, as alleged by the party putting forward the argument.

108 According to Hüls, all those conditions were satisfied in this case, which should have obliged the Court of First Instance to investigate the facts underlying the request of 4 March 1992 and to require the Commission to produce all relevant documents. Furthermore, the Court of First Instance has a discretion in the selection of measures of organisation of procedure and committed an error of assessment when it decided not to order such measures. Where specific items of evidence point to procedural defects, the discretion enjoyed by the Court of First Instance under Article 64(3) of its rules of Procedure is reduced to the point where a measure of inquiry is required, since there is an obligation to clarify the matter. In comparing this dispute with the *PVC* cases, Hüls states that the Court of First Instance departed from its practice without objective reason and therefore committed an error of assessment.

109 In the contested judgment the Court of First Instance indicated that the defects relied upon by Hüls could not entail the non-existence of the Polypropylene Decision, but only its annulment. However, at the outset Hüls had specifically sought annulment. Nothing therefore absolved the Court of First Instance from verifying whether there had been an infringement of the rules on languages. The same is true of the subsequent alterations, made without authority, or the absence of the signatures of the President and the Secretary General of the Commission. When the Court of First Instance considered that Hüls had not put forward sufficient evidence to show that the decision had been subsequently altered, it misapplied the burden of proof on the applicant with regard to the account of the facts and the significance of the facts revealed at the *PVC* hearing before the Court of First Instance. Hüls considers that where there was a permanent irregular practice, it was for the Commission to show that its decision was indeed valid and that it had, exceptionally, followed its Rules of Procedure.

110 Hüls states that the items of evidence that might establish the facts are the internal decisions and documents of the Commission which only the latter could produce. The Court of First Instance should therefore have enjoined it to produce them. In failing to do so, it infringed Article 21 of the EC Statute of the Court of Justice and Article 64(3)(d) of the Rules of Procedure of the Court of First Instance.

111 According to Hüls, the objections that it raised are not out of time, contrary to the Commission's contention. They are in fact based on new facts relating to the administrative practice of the Commission, of which neither Hüls nor the Court of First Instance had knowledge before the oral procedure in the *PVC* cases before the Court of First Instance. According to Hüls, there are no time-bar rules in respect of the measures of organisation of procedure referred to in Article 64(3) of the Rules of Procedure of the Court of First Instance. The Commission itself recognised that Hüls had specifically pleaded an infringement of Article 12 of its Rules of Procedure. Moreover, those were not factual matters which could have been adduced in the pleadings, which suffices to undermine the reference to Articles 48 and 49 of the Rules of Procedure of the Court of First Instance.

112 Hüls points out that Article 21 of the EC Statute of the Court of Justice and Articles 62 and 64(3)(d) of the Rules of Procedure of the Court of First Instance

protect its interests and are therefore in the nature of safeguards, since the latter are directly linked to the process of drawing up the judgment. Their aim is to enable an interested party to put forward facts of which it acquired knowledge belatedly and should thus ensure that the Court of First Instance delivers its judgment on the basis of all the facts of decisive importance for resolving the dispute. The case-law of the Court of Justice relating to Article 61 of its Rules of Procedure shows clearly that it is the decisive importance of the new facts that is stressed. The same is true of Articles 21 of the EC Statute of the Court of Justice and Article 64(3)(d) of the Rules of Procedure of the Court of First Instance. Furthermore, those rules are also aimed at ensuring the observance and safeguarding of the rights of the defence, inasmuch as they make it possible not only for new and decisive facts to be put before the Court, but also for a position to be taken on the facts as a whole.

113 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.

114 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. The Court of First Instance left the question of the alleged absence of an original in abeyance, since such a defect could not in any event have been relevant. Since the *PVC* judgment of the Court of Justice, it is also 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, Hüls 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.

115 Hüls's request of 4 March 1992 was founded on the non-existence of the Polypropylene Decision, not on its nullity. Even if that plea were construed as a plea of nullity, it was not sufficiently precise and reasoned and was out of time.

116 On the other hand, the Court of First Instance examined Hüls's request of 4 March 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.

117 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 in different proceedings cannot warrant revision of a judgment.

118 With regard to the explanations given by the Commission's Agents at the hearing in the *PVC* cases in November 1991, Hüls was represented at that hearing and could have availed itself of those statements much earlier in the *Polypropylene* case. Consequently, the plea of nullity was not put forward by Hüls timeously, but more than 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 facts relied on by the applicant came to his knowledge. Moreover, because Article 48(2) of those Rules of Procedure is in the nature of an exception, the introduction of new pleas in law should take place within a reasonable period, even if no time-limit is expressly provided for.

119 On the question of the alleged infringement of the language rules, and the assertion that subsequent alterations were made to the Polypropylene Decision, Hüls has put forward suppositions without adducing specific evidence and without raising a specific plea of nullity. In the *PVC* cases before the Court of First Instance the applicants had adduced specific items of evidence relating to those procedures. Nothing similar had been done in the proceedings leading up to the contested judgment.

120 The Court of First Instance did, however, acknowledge that Hüls had specifically alleged that there was no original. However, even that allegation did not have to lead 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 the Polypropylene Decision. The Court of First Instance held that Hüls had not put forward any concrete evidence to suggest that any infringement of the principle of the inalterability of the adopted measure had taken place. 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 Hüls's assertion, the Court of First Instance did not accept in any way that its arguments had been presented timeously. On the contrary, it expressed doubts on the point, whilst leaving 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.

121 On the question of the alleged breach, by the Court of First Instance, of its duty to clarify the facts, relied on by Hüls in a very broad way, the Commission points out that Article 64(3)(d) of the Rules of Procedure of the Court of First Instance does not 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 properly declined to order the measures of organisation of procedure requested by Hüls. 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. Lastly, there is no contradiction between the contested judgment and the measures of organisation of procedure adopted by the Court of First Instance in the *PVC* cases, since the course taken by the proceedings was different in those cases.

122 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.

123 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.

124 As the Court of Justice held in its judgment in *Baustahlgewebe* v *Commission*, cited above, 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.

125 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.

126 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 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 Hüls in this regard.

127 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.

128 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 on the outcome of the case and which it could not have put forward before the close of the oral procedure.

129 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 and on statements made by the Commission's Agents at the hearing in the *PVC* cases, or at a press conference which took place after that judgment was delivered.

130 First, indications of a general nature relating to an alleged practice of the Commission concerning the language rules or subsequent alterations to a decision that emerged from a judgment delivered in other cases or from statements made 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.

131 As regards the defect relating to the absence of originals of the Polypropylene Decision authenticated by the signatures of the President and Secretary General of the Commission in all the authentic languages, it is true that the Court of First Instance found that this defect had been pleaded by Hüls in its request of 4 March 1992. However, Hüls failed to produce decisive facts, specific to the Polypropylene Decision, such as would justify reopening the oral procedure.

132 Secondly, even when submitting its application, Hüls 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* cases did (see, to that effect, *Baustahlgewebe* v *Commission*, cited above, paragraphs 93 and 94).

133 In that connection, it should be noted that, contrary to Hüls's assertion, the Court of First Instance did not hold in the contested judgment that the facts relied on in its request of 4 March 1992 had been submitted timeously.

134 Furthermore, the Court of First Instance was not obliged to order that the oral procedure be reopened on the ground of an alleged duty 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 exist only on the basis of the factual evidence adduced before the Court.

135 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 of inquiry.

136 It follows from the foregoing that the second limb of the plea of infringement of Community law and the plea of breach of procedure must also be rejected.

Infringements of Community law committed by the Court of First Instance in establishing and reviewing the facts submitted for its assessment, in assessing the individual responsibility of those participating in the infringement, and in setting the amount of the fine

General

137 By a third branch of the plea of infringement of Community law, Hüls complains that the Court of First Instance committed errors of law in its establishment and review of the facts which had repercussions on its assessment of the individual responsibility of those participating in the infringement and on its setting of the amount of the fine.

138 In appeals, the assessment of the evidence is not outside the purview of the Court of Justice where the legal criteria for the taking of evidence, its use and evaluation as well as questions of the burden of proof and degree of proof are involved.

139 According to Hüls, the assessment of the evidence is therefore open to review where it is a matter of determining whether the Court of First Instance has observed and correctly applied the rules of evidence, logic or general rules dictated by experience. It must also be ascertained whether the facts established justify the conclusions drawn from them. In competition cases, factual allegations made by the Commission should be such as to support the conclusions which it draws from them. As regards the question of degree of proof, it is sufficient, but not necessary, that the factual situation can be deduced from sufficiently serious,

precise and concordant presumptions that are not contradicted by contrary presumptions. Furthermore, the evidence must be considered as a whole, with account taken of the characteristics of the market in question.

140 According to Hüls, those requirements are based on the presumption of innocence laid down in Article 6(2) of the ECHR which also applies in the Community legal order. In appeals non-observance of the presumption of innocence must be assumed where, in proceeding to establish and review the facts, the Court of First Instance reaches results that are incompatible with the party's arguments and do not take them properly into account or where the facts proved do not suffice to support the conclusions drawn. Decisions vitiated by such defects should, under the terms of the first paragraph of Article 54 of the EC Statute of the Court of Justice, be quashed, since the conditions referred to in the first paragraph of Article 51 of that Statute are fulfilled.

Participation in regular meetings

141 According to Hüls, the Court of First Instance wrongly supposed, in paragraphs 114 to 129 of the contested judgment, that it had regularly taken part in producers' meetings from the end of 1978 or the beginning of 1979. In that connection, it indicates that the passage in ICI's reply to the Commission's request for information on which the Court of First Instance based its finding that Hüls participated regularly in those meetings does not contain any statement as to the length of time over which it did so. The status of 'regular participant' does not enable the period over which an undertaking took part in meetings to be determined. The Court of First Instance thus ignored the lack of probative force of the ICI statements and failed to satisfy the requirements relating to the assessment of evidence.

142 The tables mentioned in paragraph 115 of the contested judgment constitute highly suspect evidence, and do not allow conclusions to be drawn as to the

length of time over which Hüls participated in meetings. They give no indication as to who drew them up or their source. The figures mentioned cannot be described as sales figures: it cannot be excluded that they were one of many proposals for setting up a system of monitoring quotas. The tables could have been drawn up in various ways without any meetings taking place, and the Fides system could have been the source. In no way, therefore, can they constitute proof that meetings were held.

143 The Court of First Instance based itself solely on a general explanation provided by ICI, formulated in English in the subjunctive, the German translation of which is incorrect. ICI's statement concerns only one of the tables and does not therefore prove that the data in the table setting out the quota system for 1979 came from Hüls.

144 As regards the indications given by the Court of First Instance to the effect that the incomplete reply by Hüls to the request for information as well as its participation in the 1982-1983 meetings corroborated the allegation that Hüls had regularly participated in the regular meetings, it need merely be observed that participation in the meetings in 1982-1983 has no bearing on Hüls's conduct four or five years previously.

145 According to Hüls, there was never any collusion between the participants, only at most concerted practices, which would presuppose that the undertakings concerted together and corresponding conduct on the market, and that there was a relationship of cause and effect between the two. Even if it were admitted that the occasional participation by Hüls in the meetings led to its concerting with others, conduct by Hüls on the market was lacking.

146 Hüls concludes that the Court of First Instance, in breach of the principles of Community law relating to the degree of proof required and the assessment of evidence, found, on the basis of inconsistent facts, that it had participated in regular meetings since 1978-1979, whilst proof of that participation had been adduced for only one meeting in 1981 and then for 1982-1983. Furthermore,

even for the period 1981-1983, the Court of First Instance could only have arrived at a finding that Hüls had participated in meetings with the intention of fixing prices and sales volumes by disregarding the principles relating to the burden of proof. At paragraph 126, the Court of First Instance required Hüls to adduce proof that it was not guilty, contrary to the presumption of innocence. That was incompatible with the principles of Community law. The burden of proof lay not on Hüls but on the Commission. Hüls's non-participation in meetings was, after all, a negative fact which it could not prove.

147 According to the Commission, it is not true that the information provided by ICI concerning Hüls's participation in meetings from the end of 1978 or the beginning of 1979 was the sole item of evidence. Rather, it should be viewed in conjunction, in particular, with the table fixing quotas for 1979, referred to in paragraph 115 of the contested judgment, which showed a quota for Hüls based on data that could only have come from Hüls.

148 The Commission also points out that the Court of First Instance did not require Hüls to establish its innocence, but merely indicated that there was not sufficient evidence to justify unusual conduct on the part of Hüls, which claimed that it had taken part in meetings without any intention of associating itself with anti-competitive actions which were agreed on at the meetings. Paragraphs 116 and 117 of the contested judgment showed, moreover, that because of the way Hüls had conducted itself, the Court of First Instance attached less weight to its assertions than it did to the evidence on which the Commission had based its decision. The Court of First Instance did not therefore commit any infringement of law and certainly not any breach of the presumption of innocence within the meaning of Article 6 of the ECHR.

149 The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order (see, to that effect, *Bosman*, cited above, paragraph 79).

150 It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A).

151 As regards the question whether Hüls's complaints are well founded, it must first be pointed out that, contrary to the latter's assertion, the Court of First Instance found that ICI's reply in respect of Hüls's participation in regular meetings was corroborated by other facts, such as the tables referred to in paragraph 115 of the contested judgment.

152 Secondly, the question of the value to be attached to those tables, to the abovementioned reply from ICI and to the replies provided by most of the applicants in response to a written question from the Court of First Instance, according to which those tables could only have been established on the basis of the Fides system statistics, forms part of the assessment of evidence and cannot be reviewed by the Court of Justice on appeal.

153 Thirdly, on the evidence before the Court of First Instance, the latter was entitled to take into account, in assessing the credibility of Hüls's statements denying having participated in other meetings during the previous years, items of evidence which showed that, contrary to the information supplied in its reply to the request for information, Hüls had taken part in some meetings in 1982 and 1983.

154 Fourthly, it must be borne in mind that, where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (*Baustahlgewebe* v *Commission*, cited above, paragraph 58).

155 However, since the Commission was able to establish that Hüls had participated in meetings between undertakings of a manifestly anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. The Court of First Instance did not therefore improperly reverse the burden of proof in paragraph 126 of the contested judgment.

156 Fifthly and lastly, Hüls's arguments concerning the lack of proof of conduct on the market corresponding to concerted action on the part of the undertakings and of effects restrictive of trade are based on a misconception of the evidential requirements in respect of concerted practices within the meaning of Article 81(1) EC.

157 At paragraph 119 of the contested judgment, the Court of First Instance considered that the Commission was entitled, in the alternative, to describe as concerted practices, within the meaning of Article 81(1) EC, the regular meetings of polypropylene producers in which the applicant participated from the end of 1978 or the beginning of 1979 until September 1983.

158 The Court of Justice has consistently held that a concerted practice refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (see Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 26, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 63).

159 The criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition,

according to which each economic operator must determine independently the policy which he intends to adopt on the market (see *Suiker Unie and Others* v *Commission*, cited above, paragraph 173; Case 172/89 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 63, and *John Deere* v *Commission*, cited above, paragraph 86).

160 According to that case-law, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 174; *Züchner*, paragraph 14; and *John Deere* v *Commission*, paragraph 87, all cited above).

161 It follows, first, that the concept of a concerted practice, as it results from the actual terms of Article 81(1) EC, implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two.

162 However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.

163 Secondly, contrary to Hüls's argument, a concerted practice as defined above is caught by Article 81(1) EC, even in the absence of anti-competitive effects on the market.

164 First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

165 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.

166 Lastly, that interpretation is not incompatible with the restrictive nature of the prohibition laid down in Article 81(1) EC (see Case 24/67 *Parke Davis* v *Centrafarm* [1968] ECR 55, p. 71) since, far from extending its scope, it corresponds to the literal meaning of the terms used in that provision.

167 Consequently, contrary to Hüls's argument, the Court of First Instance was not in breach of the rules applying to the burden of proof when it considered that, since the Commission had established to the requisite legal standard that Hüls had taken part in polypropylene producers' concerting together for the purpose of restricting competition, it did not have to adduce evidence that their concerting together had manifested itself in conduct on the market or that it had had effects restrictive of competition; on the contrary, it was for Hüls to prove that that did not have any influence whatsoever on its own conduct on the market.

168 In those circumstances, it is not necessary to examine all the aspects of the interpretation given by the Court of First Instance to Article 81(1) EC and it need merely be held that in any event the Court of First Instance did not infringe the principle of the presumption of innocence or the rules of evidence in considering that the Commission had established to the requisite legal standard that Hüls had participated regularly in the system of regular meetings of polypropylene producers from the end of 1978 or the beginning of 1979 until September 1983, that the purpose of those meetings was, in particular, to fix price and sales volume targets and that they were part of a system. It follows that Hüls's complaints in that respect must be rejected.

The price initiatives

169 According to Hüls, at paragraphs 166 to 177 of the contested judgment, the Court of First Instance disregarded requirements as to the assessment of the evidence and degree of proof and reached general conclusions that were unsupported by findings of fact. Without taking into account the fact that Hüls had only participated sporadically and over a limited period in meetings at which price issues were discussed, the Court of First Instance arrived at a general presumption according to which Hüls had taken part in regular meetings of the producers at which they agreed price initiatives.

170 Furthermore, when it concluded from that participation that Hüls had subscribed to the price initiatives and their implementation and considered that, if that were not the case, it was for Hüls to produce corroborating evidence, the Court of First Instance wrongly required Hüls to prove its innocence. The Court of First Instance also overlooked the extenuating circumstances which undermine the presumption established in that connection at paragraph 168 of the contested judgment.

171 Hüls also maintains that, even if it took part in meetings, it gave price instructions taking up the meetings' advice only three times, between July and November 1982, and those instructions were purely internal and never communicated to

customers. Those initiatives were never put into practice by Hüls, which is of decisive importance for the purposes of a finding that there was no collusion between producers, but only concerted practices: in Hüls's case, there was no practice on the market corresponding to the concerted action. Thus those price instructions would have had no effect on the market whatsoever, since the sales offices did not pass them on to customers. Hüls carried out an independent price policy, pursuing, in its own interests, a policy of investing in special products in order to disengage from loss-making mass products.

172 In confining its findings to the period after 1982, the Court of First Instance recognised that it had no evidence against Hüls for the prior period, which should have been taken into account when the fine was set. The deliberately imprecise conclusions in the contested judgment contradict the findings of fact and amount to a breach of the duty to state reasons. Moreover, the Court of First Instance attached manifestly exaggerated importance to inconsistent evidence and inferred conduct from ICI's statements with which it could charge Hüls on an individual basis. Mere participation by Hüls in a few isolated meetings does not warrant the conclusion that it took part in price agreements in the form of implementing their results.

173 The Commission reiterates the arguments which it put forward in connection with Hüls's participation in the meetings and submits that it is for a party seeking to rely on wholly atypical conduct to produce concrete evidence in support of its case. However, purely general assertions concerning its mental reservations and feigning intention are not enough. The Commission adds that the Court of First Instance rightly drew attention to the fact that the price instructions given by Hüls were not purely internal. As regards the probative force of the information supplied by ICI, the Commission points out that that is a question of the assessment of evidence, and such a complaint is inadmissible on appeal.

174 The Court holds first of all that the Court of First Instance was entitled to consider, without improperly reversing the burden of proof, that since the Commission had been able to establish that Hüls had taken part in the meetings at which price initiatives were decided on, organised and monitored, it was

incumbent on Hüls to produce evidence to support its claims that it had not subscribed to those initiatives.

175 Secondly, it is not for the Court of Justice, in an appeal, to question the assessment made by the Court of First Instance, at paragraph 173 of the contested judgment, concerning the fact that the price instructions sent to the sales offices by Hüls's head office were intended to produce external effects.

176 Lastly, Hüls's arguments seeking to show that its conduct on the market was independent of the price initiatives or that the findings of the Court of First Instance in that connection concerned only part of the period referred to in the Polypropylene Decision are irrelevant.

177 The Court of First Instance considered, in paragraph 291 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Hüls and the other polypropylene producers, which related in particular to price initiatives, as agreements within the meaning of Article 81(1) EC.

178 It is settled case-law that, for the purposes of applying Article 81(1) EC, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1964] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15).

179 It does not, therefore, appear that the Court of First Instance infringed the rules of evidence or failed to comply with the obligation to state reasons in holding that

the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom there emerged common intentions concerning the price initiatives mentioned in the Polypropylene Decision, that these were part of a system and that those price initiatives continued to have effects until November 1983. Hüls's complaints concerning that part of the contested judgment must therefore be dismissed.

The measures designed to facilitate the implementation of the price initiatives

180 According to Hüls, the Court of First Instance wrongly accepted, in paragraphs 189 to 199 of the contested judgment, in particular at paragraph 190, that Hüls had, in participating in certain meetings, also subscribed to measures designed to facilitate the implementation of the price initiatives, without indicating what those measures were, who had participated in them and when, and how the allegations had been proved. Hüls claims that, according to the Court of First Instance, its participation in all those measures followed from the fact that it had not adduced any evidence to prove the contrary. Hüls observes that such reasoning fails to satisfy not only the obligation to state reasons but also the conditions governing assessment of the evidence, taking into account the legal arguments it put forward and the facts on which they were based.

181 With regard to 'account leadership', Hüls contends that there were simply proposals and discussions which never resulted in that type of agreement. The documents produced by the Commission do not enable any conclusion to be drawn regarding implementation of a system of leadership. The terms in which the judgment of the Court of First Instance is couched show that no binding agreement was implemented, and in fact that no agreement was reached. This also shows that the producers were not ready to commit themselves in a binding way to anti-competitive measures and their implementation and at the meetings practised a combination of mental reservations and disinformation. The passage cited in paragraph 191 of the contested judgment only sets out the general problems concerning 'customer tourism' and cannot support the conclusions of the Court of First Instance with regard to the allocation of customers to certain producers and the naming of 'account leaders'. In that connection, Hüls states that it never was the leader for the four customers allocated to it with regard to

quantities or prices, even if was their supplier in isolated cases. That differentiated conduct with regard to deliveries is diametrically opposed to the hypothesis that Hüls exercised 'account leadership'.

182 According to the Commission, paragraph 190 of the contested judgment must be read in its context. Hüls's submissions concerning the non-implementation of the 'account leadership' system are at odds with the evidence cited by the Court of First Instance in paragraphs 192 and 193, from which it is clear that that system operated at least partially for two months, even if those concerned were not satisfied with it.

183 The Court holds that it need merely point out here that, contrary to Hüls's submissions, at paragraphs 190 to 192 and 197 to 198 of the contested judgment, the Court of First Instance gave sufficient reasons concerning the existence and nature of the measures for facilitating the implementation of the price initiatives and concerning the identity of the undertakings which participated in those measures.

184 The assessment made by the Court of First Instance of the evidence before it, in particular the notes of the meetings and the replies by ICI and Hüls to the request for information, is not open to review by the Court of Justice.

185 Lastly, for the reasons set out in paragraph 178 above, the arguments intended to show that Hüls did not implement the 'account leadership' system are irrelevant since the Court of First Instance held, at paragraph 291 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Hüls and the other polypropylene producers which related to measures to facilitate the implementation of the price initiatives as agreements within the meaning of Article 81(1) EC.

186 It follows that the Court of First Instance did not infringe the rules of evidence or neglect its obligation to state reasons in holding that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom there had emerged common intentions concerning the measures designed to facilitate the implementation of the price initiatives mentioned in the Polypropylene Decision. Hüls's complaints in that respect likewise cannot be upheld.

Target tonnages and quotas

187 With regard to the target tonnages and quotas which are dealt with in paragraphs 231 to 261 of the contested judgment, Hüls indicates that the Court of First Instance first made the mistaken finding that it participated regularly in the periodic meetings of producers. The Court of First Instance then found that Hüls's name appeared in various tables, thus suggesting that the mention of its name constituted additional evidence going beyond presence at the meetings. Hüls complains that the Court of First Instance wrongly concluded from the fact that its name appeared in tables that it had participated regularly in the periodic meetings and had thus given the false impression that there was a whole series of items of evidence concerning its participation, whereas all the allegations could be linked merely to the appearance of its name in some tables. Lastly, those tables, whose authors and date of preparation cannot be ascertained, in no way corroborate the existence of conduct contrary to the competition rules.

188 The Commission states that the contested judgment provides a detailed assessment of the evidence. Hüls ignores, in its criticisms, the existing evidence. The complaint is inadmissible, because it relates to the assessment of evidence, and unfounded, because it contradicts the existing evidence which was closely assessed by the Court of First Instance.

189 On this point, it need merely be stated that, in so far as Hüls's complaints relate to the findings of the Court of First Instance on the question of its participation in the regular meetings, they must be rejected for the reasons set out in paragraphs 151 to 167 of this judgment.

190 In so far as they relate to the assessment made by the Court of First Instance of the evidence presented to it, in particular the tables of participants at the meetings, Hüls's complaints are inadmissible on appeal.

191 It does not, therefore, appear that the Court of First Instance infringed the rules of evidence or its duty to state reasons in considering that the Commission had established to the requisite legal standard that Hüls was one of the polypropylene producers amongst whom common purposes emerged in relation to sales volume targets for 1979, 1980 and the first half of 1983 and to the restriction of their monthly sales by reference to a previous period for the years 1981 and 1982 which are mentioned in the Polypropylene Decision and which formed part of the quota system. On that point, too, Hüls's complaints must be rejected.

Individual responsibility of the participants in an infringement and calculation of the fine

192 Lastly, Hüls claims that the Court of First Instance was not able to establish exactly the extent, in time and in relation to the facts, of the participation of each economic operator. Where a number of undertakings have taken part in an infringement of the provisions of Article 81 EC, each must have its participation in each isolated act proved with the same degree of certainty as if it were the sole perpetrator of an infringement. Each can only be held responsible within the

proven limits of its participation and the degree of complicity of each participant taken individually should be established separately.

193 In particular, the fine should be calculated individually, on the basis of the facts to which its participation is linked. The Commission and the Court of First Instance did not comply with those principles, in particular when they set the fine on the basis of Hüls's turnover, without taking into account the particular details of its situation.

194 In that connection, it follows, first, from the foregoing that, contrary to Hüls's contention, the Court of First Instance did not commit any error of law when it imputed to it participation in the infringement in question or when it assessed the duration and degree of that participation.

195 Secondly, according to consistent case-law (see, *inter alia*, Joined Cases 100/80 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 120, and Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 37), in determining the fine, account may be taken both of the overall turnover of the undertaking, which gives some indication, however approximate and imperfect it may be, of the size and economic strength of that undertaking, and of the part of that turnover represented by the goods concerned in the infringement which therefore serves to provide an indication of the extent of that infringement.

196 It is clear from paragraph 361 of the contested judgment, which refers to points 108 and 109 of the Polypropylene Decision, that the polypropylene deliveries in the Community and turnover of each undertaking were taken into account. The Court of First Instance did not therefore commit any error of law in that respect.

197 Moreover, it is not for the Court of Justice, where it is deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community law (see, *inter alia*, Case C-320/92 P *Finsider* v Commission [1994] ECR I-5697, paragraph 46).

198 It follows that the complaints concerning the assessment of the individual responsibility of the participants in the infringement and determination of the amount of the fine cannot be upheld. The third limb of the plea in law based on infringement of Community law must also be dismissed.

199 Since none of the pleas in law put forward by Hüls have been upheld, the appeal must be dismissed in its entirety.

Costs

200 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 Hüls'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 Hüls AG to pay the costs;**

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

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass P.J.G. Kapteyn

Registrar President of the Sixth Chamber