

OPINION OF ADVOCATE GENERAL
FENNELLY

delivered on 25 November 1999 *

1. In the present appeals, the Commission is challenging three judgments of the Court of First Instance annulling Commission decisions in each case on the sole ground of their irregular authentication.

ket with CFK, a German producer, and imposed on it a fine of ECU 3 million;

I — Facts and procedural background

2. On 19 December 1990, the Commission¹ adopted a number of decisions concerning the market for synthetic soda ash, a chemical mainly used in the manufacture of glass. Of these, the following are germane to the present proceedings:

— Decision 91/299/EEC, by which the Commission found that Solvay held, and had abused, a dominant position in the Western European market for soda ash, and imposed on it a fine of ECU 20 million;

— Decision 91/298/EEC, by which the Commission found that Solvay SA (hereinafter 'Solvay') had been engaged in market-sharing on the German mar-

— Decision 91/300/EEC, by which the Commission found that Imperial Chemical Industries plc (hereinafter 'ICI') held, and had abused, a dominant position in the United Kingdom market for soda ash, and imposed on it a fine of ECU 10 million.²

* Original language: English.

1 — For convenience, the appellant is referred to as 'the Commission' throughout, while the respondents are referred to collectively as 'the applicants' in the context of the proceedings before the Court of First Instance, and 'the respondents' in the context of the present proceedings.

2 — Hereinafter collectively 'the contested Decisions'; OJ 1991 L 152, p. 16, p. 21 and p. 40 respectively.

3. On 2 May 1991, Solvay initiated annulment proceedings to challenge Decisions 91/298/EEC and 91/299/EEC (Cases T-31/91 and T-32/91), while on 14 May 1991, ICI initiated annulment proceedings against Decision 91/300/EEC (T-37/91).

4. During the course of the oral hearing before the Court of First Instance in the so-called 'PVC' cases,³ which ended on 10 December 1991, the Commission stated that it did not authenticate the acts it adopted, and had not done so for 25 years. In its judgment of 27 February 1992 in these cases, the Court of First Instance declared the Commission Decisions in the PVC proceedings non-existent. In their written replies, submitted respectively on 20 December 1991 (T-31/91 and T-32/91) and 23 December 1991 (T-37/91), neither of the applicants made any allusion to the authentication issue which had emerged at the oral hearing in the PVC cases. However, following the judgment in PVC, Solvay submitted a 'supplementary application' in each case on 10 April 1992, relying on the statements of the Commission representatives in PVC, and on press articles which appeared in the *Wall Street Journal* on 28 February 1992 and in the *Financial Times* of 2 March 1992, and raising a new plea in law that the contested decision should be declared non-existent. ICI sought to do likewise in a 'supplement to its reply' submitted on 2 April 1992.

5. The Commission submitted written observations on the new pleas raised by Solvay in a separate document on 4 June 1992, and in its rejoinder of 7 May 1992 in ICI. In each case, the Commission argued that the plea was inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance as no matter of fact or law regarding alleged textual discrepancies between the versions notified and those published had come to light in the course of the proceedings.

6. In March 1993, the Court of First Instance put a number of questions to the parties on matters not directly related to the new plea, to which the parties replied in May 1993.

7. In its judgment of 15 June 1994 on the appeal against PVC, the Court of Justice held that the Commission Decisions in question, though not non-existent, were void, on the ground that the Commission's failure to authenticate the Decisions in accordance with Article 12 of its Rules of Procedure constituted a breach of an essential procedural requirement.⁴

3 — Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF AG and Others v Commission* [1992] ECR II-315.

4 — Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555 (hereinafter 'PVC Appeal').

8. Following that judgment, on 6 July 1994 the Court of First Instance sent a number of questions to the parties inviting them to give their views on the inferences to be drawn from the *PVC Appeal*. The Commission was requested to produce the extracts of the minutes of the Commission meeting at which the contested Decisions were adopted and the text of those Decisions 'authenticated at that time, in the languages in which they are authentic, by the signatures of the President and the Secretary-General and annexed to the minutes'. In its reply, the Commission took the view that the merits of the plea regarding authentication should only be examined after the Court had ruled on its admissibility, and declined to produce the documents requested.

9. In an unpublished Order of 25 October 1994, the Court of First Instance recited the fact that the Commission had been requested to produce the authenticated text of the Decisions by a measure of organisation of procedure and had refused. It cited the ruling of the Court in the *PVC Appeal*, and a number of other judgments, to the effect that 'the Community judicature may of its own motion consider a breach of essential procedural requirements'. On the grounds that 'it is necessary to extend its inquiry into the cases to include consideration of its own motion of the plea alleging a failure to authenticate the contested decisions', the Court of First Instance ordered the Commission to produce the text of the Decisions 'authenticated at that time' in each case by 15 November 1994.

10. The Commission replied on 11 November 1994, enclosing 'the authenticated texts'⁵ of the contested Decisions in French, English and German, with an undated form of authentication signed by the President and Secretary-General of the Commission.

11. The Court of First Instance annulled the three Commission decisions by judgments given on 29 June 1995, against which the Commission is now appealing:

— Case T-31/91 *Solvay v Commission*, concerning Decision 91/298/EEC (on appeal, Case C-287/95 P);

— Case T-32/91 *Solvay v Commission*, concerning Decision 91/299/EEC (on appeal, Case C-288/95 P), and

— Case T-37/91 *Imperial Chemical Industries v Commission*, concerning Decision 91/300/EEC (on appeal, Case C-286/95 P).⁶

5 — The reply, drafted in French only, reads '[la] Commission a l'honneur de produire des textes authentifiés des quatre décisions en cause dans les langues faisant foi'. The Commission can scarcely have failed to note that it had been required to produce texts 'authenticated at [the] time' of their adoption. In its applications to this Court the Commission again claims that it was able to produce 'the texts duly authenticated', which rather begs one of the questions here at issue.

6 — Hereinafter 'the judgments under appeal': [1995] ECR II-1821 (summary publication), II-1825 and II-1901 respectively.

12. In each of the judgments under appeal, the Court of First Instance made the following findings:

- the statements made by representatives of the Commission in *PVC* that this institution had failed over several years to authenticate acts adopted by the college of Commissioners is a fact upon which the applicants could rely;
- as even a careful reading of the text notified would not have revealed the failure to authenticate, the applicants could not have been expected to rely on it at the time they lodged their applications;
- Article 48(2) of the Rules of Procedure of the Court of First Instance lays down neither a time-limit nor any particular formality for the submission of a new plea in law; in the absence of an express, unequivocal rule requiring that a new submission be made immediately, or within a particular period, after the matters of fact or of law to which it refers come to light, the applicants were entitled to raise the authentication issue before the oral hearing;
- even if this provision did require that a new matter be raised as expeditiously as possible, the applicants had, in the circumstances, satisfied this requirement;
- even if the applicants were not entitled to raise the issue of authentication, an allegation of an infringement of an essential procedural requirement could in any case be raised by the Court of its own motion;
- the mere failure to observe the essential procedural requirement constitutes the infringement, regardless of whether there were any discrepancies between the texts, or whether such discrepancies were material;
- regardless of the above, in the present cases authentication was carried out after the originating application was brought; an institution may not, without infringing legal certainty and the rights of the parties affected, cure a material defect by effecting a retro-active regularisation.

II — The relevant procedural provisions

the version in force at the material time,⁸ are as follows:

13. Article 12 of the Commission's Rules of Procedure, in the version in force at the time of the adoption of the contested Decisions, reads as follows:

Article 48(2)

'Acts adopted by the Commission ... shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.

'No new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

The texts of such acts shall be annexed to the minutes in which their adoption is recorded.

The President shall, as may be required, notify acts adopted by the Commission to those to whom they are addressed.'⁷

If in the course of the procedure one of the parties puts forward a new plea in law which is so based, the President may, even after the expiry of the normal procedural time-limits ... allow the other party time to answer on that plea.

14. The relevant provisions of the Rules of Procedure of the Court of First Instance, in

Consideration of the admissibility of the plea shall be reserved for the final judgment.'

⁷ — OJ, English Special Edition, Second Series, VII, p. 3. Article 16 of the current Rules of Procedure provides that '[instruments] adopted by the Commission ... shall be attached ... in such a way that they cannot be separated, to a summary note prepared at the end of the meeting at which they were adopted [and] authenticated by the signatures of the President and the Secretary-General on the last page of the summary note' (OJ 1999 L 252, p. 45).

⁸ — OJ 1991 L 136, p. 1.

Article 65

- (2) Evidence may be submitted in rebuttal and previous evidence may be amplified.'

'Without prejudice to ... Articles 21 and 22 of the EEC Statute ... the following measures of inquiry may be adopted:

...

III — The present appeal

- (b) a request for information and production of documents;

... '

Article 66

- '(1) The Court of First Instance, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved The order shall be served on the parties.

15. The Commission relies on the same two grounds of appeal in each case, concerning respectively the admissibility of the plea relied upon by the applicants before the Court of First Instance regarding the authentication of the contested Decisions, and the assessment by the Court of First Instance of the purpose of authentication and the consequences of a failure to authenticate the Decisions at the time of their adoption. Each of these grounds has three limbs which are presented separately. The Commission has also made a number of preliminary observations which seek to distinguish the present cases from the circumstances of the *PVC* cases, and to show that the judgments under appeal are not consistent with other judgments of the Court and with judgments of the Court of First Instance on the authentication issue; I will deal with these as need be in examining the arguments of the parties on the principal pleas.

16. In its second plea, the Commission is, in effect, challenging the qualification by the Court of First Instance of the authentication requirement as an ‘essential procedural requirement’ within the meaning of the first paragraph of Article 173 of the EEC Treaty (now, after amendment, the second paragraph of Article 230 EC), and its finding that authentication must take place before notification of the measure. As the legal character of this requirement is central to a consideration of the procedural issues, I propose to deal first with this question, which is raised in the first and third limbs of the Commission’s second plea.

(a) *Authentication as an essential procedural requirement*

17. According to the Commission, the Court of First Instance has infringed Community law:

— by holding that authentication is a formal requirement which must be observed independently of whether there is any evidence capable of casting doubt on the authenticity of the notified text of the decisions, and

— by failing to consider whether the alleged defect was such as to affect the interests of the addressee of the

decision, and by not giving reasons for its failure to so consider.

18. In the contested paragraphs, the Court of First Instance cited the finding of the Court in paragraph 76 of the *PVC Appeal* that ‘authentication constituted an essential procedural requirement within the meaning of Article 173 of the EEC Treaty’, and continued:

‘[it] should be pointed out that it is the mere failure to observe the essential procedural requirement in question which constitutes that infringement. It is therefore unconnected with the question whether there are discrepancies between the texts adopted, notified and published and, if so, whether or not those discrepancies are material [, which is why it is irrelevant that the textual discrepancies pointed out by the applicant ... are to be regarded as insignificant].’⁹

19. The Commission relies on the *PVC Appeal*, and particularly on paragraph 75 thereof, to argue that lack of authentication is a breach of an essential procedural requirement only when it is combined with one or more defects in the notified text. Had the Court intended to rely solely on the failure to authenticate, it would not

⁹ — Case T-31/91, paragraphs 39 and 41; Case T-32/91, paragraphs 50 and 52, and Case T-37/91, paragraphs 89 and 91; all are cited in footnote 6 above. The phrase in [] appears only in the former two judgments.

have examined in such detail the other alleged defects, and in particular textual discrepancies, in paragraphs 62 to 73 of the judgment. Paragraph 73 shows that the authentication requirement cannot be separated from the need to be able to identify with certainty the full text of the acts adopted by the college of Commissioners. In the absence of any indication that the text of the contested Decisions had been altered after their adoption, the question of whether they had been authenticated is of no interest in verifying whether or not the principle of collegiality had been respected. This view is, the Commission argues, in line with other judgments of the Court of First Instance¹⁰ and the Opinion of Advocate General Lenz in *Spain v Commission*.¹¹ The ruling of the Court of First Instance in the judgments under appeal would have even more negative effects than its finding of non-existence in *PVC*, which was at least limited to the very specific facts of the case.

20. The Commission further contends that the qualification 'essential' in the term 'essential procedural requirement' is an expression of the principle of proportionality, in other words, that the sanction for a breach of such a requirement must bear a relation to the seriousness of the error. To justify annulment, the applicants would have had to show that the measures could have been different in the absence of the procedural defect, as demonstrated by the

judgments in *Distillers Company*¹² and *Van Landewyck*,¹³ and particularly in the *PVC Appeal*, where the Court considered whether the defects in the procedure for adopting the PVC decision could have affected its content. In the present cases, the Court of First Instance erred in failing to consider whether the interests of the applicants could have been affected by the lack of contemporaneous authentication.

21. The Commission's interpretation of the term 'essential procedural requirement' is, in my view, erroneous. The Commission fails to distinguish between essential procedural requirements and other formal requirements. This is demonstrated by the very wording of the first limb of its second plea, where it describes the Court of First Instance as having held that 'authentication is a formal requirement',¹⁴ when that Court spoke in express terms of an 'essential procedural requirement'.¹⁵ It is also clear from the terms of its remarks seeking to distinguish this case from *PVC*, to the effect that the applicants were required to demonstrate in what respect the alleged infringement affected their interests.

22. While the Court has tended to avoid abstract definitions of the term 'essential

10 — Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441; Case T-35/92 *John Deere v Commission* [1994] ECR II-957, and Case T-29/92 *SPO v Commission* [1995] ECR II-289.

11 — Case C-135/93 [1995] ECR I-1651.

12 — Case 30/78 *Distillers Company v Commission* [1980] ECR 2229.

13 — Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125.

14 — Or, in the *Solvay* cases, 'l'authentification est une condition de forme'.

15 — See the citation in paragraph 18 of the present Opinion.

procedural requirement', it seems to me from the case-law that this notion is reserved for procedural requirements which are intrinsically linked to the formation and expression of the intention of the adopting authority, and that, as is clear from Article 173 of the EEC Treaty, any breach of such a requirement necessarily justifies the annulment of the measure as a whole. As the breach concerns the measure in its entirety, it is neither necessary, nor in most cases possible, for the party relying on it to show a particular adverse effect on its subjective rights or interests; the breach constitutes a failure to respect so fundamental a rule affecting the adoption or form of the measure that it cannot be considered to be the valid and authentic act of the institution.

23. That procedural rules should in general be accorded such an important place in the Community legal order is not the result of an excessive attachment to formalism, but reflects rather the fact that these rules guarantee a minimum degree of input into the decision-making process for each of the participating institutional actors (institutions, ancillary bodies, Member States). It is in this respect that Advocate General Tesouro compared to a fundamental right 'a Member State's ... right to the observance of those procedural rules which it had previously accepted, and not other rules'.¹⁶ While the circumstances in which an individual may rely on such procedural rules against the Commission may be more limited, the Court has long recognised that

the respect by this institution of the rules governing its functioning can also constitute 'a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies',¹⁷ a fact reflected in the requirement of Article 218(2) EC¹⁸ that the Commission's Rules 'ensure that both it and its departments operate in accordance with the provisions of this Treaty'.

24. The duty imposed on an adopting authority to consult other Community institutions or ancillary bodies, or the Member State concerned, clearly illustrates the nature of an essential procedural requirement. In *France v High Authority*, the first case decided by the Court of Justice of the European Coal and Steel Community, the Court considered of its own motion whether the defendant had failed to consult the Council as it would have been obliged to in adopting a particular provision if, when read in conjunction with an earlier Decision, this provision constituted 'in disguised form, an addition to the definition of prohibited practices'.¹⁹ Similarly in *Italy v High Authority*,²⁰ the Court verified the adequacy of the consultation of the Consultative Committee of the ECSC, on the ground that if the plea alleging non-

17 — Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133, p. 152.

18 — As the facts of this case predate both the Treaty on European Union and the Amsterdam Treaty, for Treaty articles on which I base an argument, as opposed to those which apply to the facts of these cases, I shall in this Opinion generally refer to the current numbering.

19 — Case 1/54 [1954-1956] ECR 1, p. 15.

20 — Case 2/54 [1954-1956] ECR 37, pp. 51 and 52.

16 — Case 30/88 *Greece v Commission* [1989] ECR 3711, paragraph 14 of his Opinion.

consultation 'were well founded the Court would be justified in annulling the decision of its own motion on the ground of infringement of the Treaty or of an essential procedural requirement'. The Court has subsequently treated consultation of the European Parliament 'in the cases provided for by the Treaty',²¹ and consultation of advisory,²² management²³ and regulatory²⁴ committees, as constituting essential procedural requirements: indeed, in the latter group of cases, the Court went to great lengths to identify whether the legislator intended to make such consultation a requirement of the validity of the measure and insisted on a scrupulous respect by the Commission of the Rules of Procedure of the committee consulted.²⁵ The requirement laid down in various legislative measures that the Commission consult the Member State concerned before taking funding decisions is equally treated as an essential procedural requirement. Thus in the *Social Fund* cases, the Court annulled the contested Decisions as the Commission had failed in each case to consult the Portuguese Government as required by the applicable provisions of the European Social Fund Regulation: '[having] regard to the central role of the relevant Member

State and to the importance of the responsibilities which that State assumes [such consultation was] an essential procedural requirement the disregard of which renders the contested decision void'.²⁶

25. A number of other essential procedural requirements, some of even more direct relevance to that at issue in the present proceedings, may be found in the case-law. In the *Hormones* case, for example, the Court held that the Council was obliged to comply with Article 6(1) of its own Rules of Procedure governing recourse to a written procedure for the adoption of Council acts, which required the unanimous assent of the Member States: '[the Council] cannot depart from that rule, even on the basis of a larger majority than is laid down for the adoption or amendment of the Rules of Procedure, unless it formally amends those rules'.²⁷ In the *Laying Hens* case, the published text of a Council Directive differed in three respects from that which had been adopted; though the Court explicitly recognised that 'the alterations made by the Council's General Secretariat concern only the statement of reasons on which the directive is based and do not affect the body of the measure itself', it held that the 'statement of reasons is an essential part of a measure', and as the alterations went beyond simple corrections of spelling

21 — Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, paragraph 33; see also Case 139/79 *Marzani v Council* [1980] ECR 3393, paragraph 34; together known as the '*Isoglucose*' cases.

22 — Case C-212/91 *Angelopharm* [1994] ECR I-171 (the Scientific Committee for Cosmetology).

23 — Case 278/84 *Germany v Commission* [1987] ECR I (Agriculture Management Committee, Cereals sector); Germany's complaint was rejected on the facts. See also Case C-241/95 *The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef and Others* [1996] ECR I-6699 and Case C-244/95 *Moskov v EOK* [1997] ECR I-6441.

24 — Case C-263/95 *Germany v Commission* [1998] ECR I-441 (Standing Committee on Construction), hereinafter '*Construction Products*'.

25 — See respectively *Angelopharm* and *Construction Products*, cited in footnotes 22 and 24 above.

26 — Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, paragraph 17, and Case C-304/89 *Oliveira v Commission* [1991] ECR I-2283, paragraph 21.

27 — Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 48; the contested Directive was adopted by a qualified majority, while only a simple majority was required for the adoption by the Council of its Rules of Procedure (Article 5 of the Merger Treaty (now, after amendment, Article 207(3) EC) read with Article 148(2) of the EEC Treaty (now Article 205(2) EC)).

and grammar, the Directive was annulled.²⁸ More generally, the Court has long held that the requirement to state the reasons for binding acts of the Community institutions is an essential procedural requirement.²⁹ In a large number of cases, starting with *Generalised Tariff Preferences for 1986*, the Court has held that both the identification of the legal basis in the text of a measure, and, where the procedural requirements fixed by competing Treaty articles are different, the choice of the appropriate legal basis, are essential procedural requirements.³⁰

adopting institution may re-enact a measure annulled for failure to comply with such a requirement does not affect its qualification as 'essential'. Indeed, the Council did so following both the annulment of the 1979 Isoglucose Regulation and the 1985 Hormones Directive; in each case the validity of the replacement measure was upheld by the Court.³² Nor can an institution escape the consequences of failing to comply with such a requirement by seeking to demonstrate that compliance would have added nothing to its examination of the measure under consideration.³³

26. In none of these cases did the Court enquire as to the concrete effects on the interests of the complainant of the breach of the essential procedural requirement, or whether the outcome might have been any different if that requirement had been respected. In some cases, it is clear that there was no such effect, or that the outcome would not in any case have been any different. In the context of infringement proceedings, for example, the Court has held that the requirement that a Member State be given the opportunity to present its observations is an essential procedural requirement 'even if the Member State does not consider it necessary to avail itself thereof'.³¹ The fact that the

27. The difference between essential and non-essential procedural requirements is well illustrated by the judgments cited by the Commission in this regard. In *Distillers Company*, the applicant complained that the Advisory Committee on Restrictive Practices and Monopolies did not have available to it either the minutes of the hearing before the Commission or certain documents submitted by the applicant, and that the Commission had supplied the applicant with an incomplete copy of the intervener's complaint. The applicant sought to rely upon these as 'essential procedural requirements' justifying the annulment of the contested decision as a whole, and they were even described as such in the Opinion of the Advocate General.³⁴ The Court, on the other hand, treated the complaints as 'procedural irregularities' throughout, and in this context

28 — Case 131/86 *United Kingdom v Council* [1988] ECR 905.

29 — For the ECSC Treaty, see Case 18/57 *Nold v High Authority* [1959] ECR 41; for the E(E)C Treaty, see Case 158/80 *REWE v Hauptzollamt Kiel* [1981] ECR 1805.

30 — Case 45/86 *Commission v Council* [1987] ECR 1493; for a useful summary of the case-law in this area, see Joined Cases C-164/97 and C-165/97 *Parliament v Council* [1999] ECR I-1139.

31 — Case 211/81 *Commission v Denmark* [1982] ECR 4547, paragraph 9.

32 — See, respectively, Case 114/81 *Tunnel Refineries v Council* [1982] ECR 3189 and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023.

33 — Case C-392/95 *Parliament v Council* [1997] ECR I-3213, paragraphs 21 to 23.

34 — Case 30/78, cited in footnote 12 above, Opinion of Advocate General Warner, pp. 2279 and 2290.

held that it need consider the allegations only if it were shown that 'in the absence of those irregularities the administrative proceedings could have led to a different result'.³⁵ In *Van Landewyck*, the Court similarly treated the applicant's complaint that the Commission had disclosed confidential information to a third party as being a formal irregularity which, even if established, would only justify annulment if the contested decision might otherwise have been different.³⁶

28. It seems to me to follow from the reasoning implicit in these cases that, if a particular procedural requirement is, on a proper interpretation of the legal provisions imposing it, 'essential', then it can be raised by any applicant with the requisite standing before the Court without the further necessity of showing that the situation of the applicant could have been different if the requirement had been complied with, or that the breach adversely affected his rights or interests. A measure which is fundamentally flawed in that sense offends against the objective standards of legality of Community law, rather than the subjective interests of a party; as I will show subsequently, the breach can be raised by the Court on its own motion, to ensure that the measure is not allowed to continue in force any longer than is unavoidable. The objective character of such procedural requirements is clear from the Court's finding in the *Hormones* case that 'the rules regarding the manner in which the Community

institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves'.³⁷ The same is equally true *mutatis mutandis* of other procedural rules which the institutions have either adopted for themselves or, in the case of the Commission when exercising implementing powers, have had imposed on them.

29. Not every provision of the Rules of Procedure of the Community institutions and bodies which participate in the political or administrative decision-making process can, however, be considered an essential procedural requirement. In *France v Parliament*, the applicant Member State argued that the Parliament had violated Rule 48 of its own Rules of Procedure in adopting the contested Resolution under the urgent procedure, when the subject of the Resolution was neither topical nor urgent. The Court rejected this submission on the ground that 'the Parliament's decision to hold in plenary a topical and urgent debate on a motion for a resolution on a given subject relates to the internal organisation of its work and cannot, therefore, be the subject of judicial review'.³⁸ Similarly in *Nakajima v Council*, the Court rejected a contention that the Council had failed to respect its Rules of Procedure by including on its agenda the examination of a Commission proposal which had not been made available to members in good time and in all the requisite language versions. The Court noted in particular that 'the purpose of the rules of procedure of a Community

35 — *Ibid.*, paragraphs 25 to 29.

36 — Joined Cases 209/78 to 215/78 and 218/78, cited in footnote 13 above, paragraph 47.

37 — Case 68/86, cited in footnote 27 above, paragraph 38.

38 — Joined Cases 358/85 and 51/86 [1988] ECR 4821, paragraph 17.

institution is to organise the internal functioning of its services in the interests of good administration. The rules laid down, particularly with regard to the organisation of the deliberations and the adoption of decisions, have therefore as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution. It follows that natural or legal persons may not rely on an alleged breach of those rules since they are not intended to ensure protection for individuals'.³⁹

relating to the adoption of the contested regulation.⁴² In any case, *Nakajima* is in my view clear authority for the proposition that where the internal rules of an institution are 'intended to ensure protection for individuals', or Member States as the case may be, as in the *Hormones* or *Construction Products* cases cited above,⁴³ then such rules do constitute essential procedural requirements.⁴⁴ This proposition was reaffirmed in spectacular circumstances in the *PVC* case-law.

30. The Court did not deal in this case with the question of whether the particular provisions of the Council's rules were essential procedural requirements. However, it is clear from the Opinion of Advocate General Lenz in that case⁴⁰ that the applicant's claim was unfounded, as the Council's rules permitted the late inclusion of items on the draft agenda if the members agreed unanimously to this course of action,⁴¹ and that the documents were in fact available in all the necessary language versions for the vote. The terms in which the Court answered this contention can be explained as being intended to discourage potential litigants from raising speculative arguments about the internal operation of the institutions; the applicant here had requested the Court to order the Council to produce the preparatory documents

31. The correctness of the Commission's reliance on the *PVC Appeal* to show that lack of authentication is only a breach of an essential procedural requirement when it is combined with one or more defects which affect the notified text depends on the interpretation of that judgment. The Commission claims that failure to authenticate only constitutes such a breach when a discrepancy can be shown between the text adopted and that which is authenticated. In paragraphs 62 to 73 of the judgment, the Court did not, as the Commission claims, 'conduct ... a detailed examination of the other defects found by the Court of First Instance in its judgment of 27 February 1992, which concerned in particular the textual discrepancies and the question of the "*habilitation*"'. Instead, the Court recalled its case-law on the principle of

39 — Case C-69/89 [1991] ECR I-2069, paragraphs 49 and 50.

40 — *Ibid.*, paragraphs 13 to 15, pp. 2118 and 2119.

41 — This is still the case; see Article 2(6) of Council Decision 1999/385/EC, ECSC, Euratom of 31 May 1999 adopting the Council's Rules of Procedure, OJ 1999 L 147, p. 13.

42 — Case C-69/89, cited in footnote 39 above, Report for the Hearing, paragraph 96, p. 2095.

43 — Respectively Case 68/86, cited in footnote 27 above, and Case C-263/95, cited in footnote 24 above.

44 — It is also clear from Case C-58/94 *Netherlands v Council* [1996] ECR I-2169 that the Rules of Procedure of an institution can confer rights on individuals.

collegiate responsibility (paragraphs 62, 63 and 71), held that '[compliance] with this principle ... must be of concern to the individuals affected by the legal consequences of [Commission] decisions' in competition matters (paragraphs 64 and 65), and demonstrated the importance of the statement of reasons of such decisions (paragraphs 65 to 69), before ruling that 'reducing the act to writing is the necessary expression of the intention of the adopting authority' (paragraph 70). The Court went on to hold that Article 12 of the Commission's Rules of Procedures reflected its 'obligation ... to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty' and that 'the authentication of acts ... is intended to guarantee legal certainty by ensuring that the text adopted ... becomes fixed in the languages which are binding. Thus in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author' (paragraphs 73 to 75). It was in the light of these observations that the Court held, at paragraph 76, that:

'[authentication] of acts referred to in the first paragraph of Article 12 of the Commission's Rules of Procedure therefore constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty breach of which gives rise to an action for annulment.'

32. Having established the nature of the Commission's duty to authenticate, the Court concluded that 'the Commission acted in breach of the first paragraph of

Article 12 of its own Rules of Procedure by failing to authenticate the contested decision in the way provided for by that article' and annulled this decision for 'infringement of [an] essential procedural requirement' (paragraphs 76 and 77).

33. The finding of the Court on this point seems to me to be clear and unequivocal. The Court did not indicate in paragraph 76 that authentication was only an essential procedural requirement if the party which sought to rely on it could show evidence of defects or of a breach of the principle of unalterability; indeed, having summarised the arguments of the applicants seeking annulment of the contested decision (paragraphs 56 and 57) in this regard, it expressly held that it was unnecessary to examine them (paragraph 78). In the passages relied upon by the Commission (paragraphs 62 to 73), the Court was merely establishing why a provision in the internal Rules of Procedure of an institution, which the Commission had claimed was 'a mere formality for archival purposes' (paragraph 75), should be classified as an essential procedural requirement; as noted above, not all procedural rules of the institutions are so classified.

34. The suggestion made by the Commission at the hearing that authentication is only such a requirement 'in the event of a dispute' seems to me to be based on circular reasoning. Proof that the text authenticated differs from that adopted amounts to substantial proof of lack of authenticity. It is meaningless to add that, in such an event, the failure of formal authentication is a breach of an essential procedural requirement; this is tantamount to depriving the

notion of an 'essential procedural requirement' of any meaning. It is a term with a precise meaning, associated under the Treaty with the consequence of annulment. The Court in the *PVC Appeal* chose its words with care, and the Court of First Instance drew the correct conclusions in the passage I have quoted in paragraph 18 of the present Opinion.

35. The Commission's argument that no doubt had been raised about the matters which authentication guarantees, and that, unlike in *PVC*, there was no evidence that the text had been altered, therefore misses the point. As the Commission was unable to produce the original of the contested Decisions authenticated at the time, there was no 'authenticated original', and the Court of First Instance had no way of knowing whether there were any discrepancies between the decisions adopted and those notified and, correctly in my view, held as much. Like the requirement to state reasons, the requirement to authenticate serves to assist the Court in carrying out its task of judicial review of Commission decisions 'in the event of a dispute'.

36. As to the pertinence of the other cases cited by the Commission in which allegations of non-authentication were made before the Court of First Instance, it seems to me that even if an inconsistency were to be shown between a judgment of that Court which has not been appealed and one which has, that would not constitute *per se* a ground for annulment of the latter judgment. Moreover, as the respondents

have pointed out, the significant difference between the cases cited by the Commission and the present proceedings is that in the former the contested Decisions were all adopted either after the hearings (*SPO*, 5 February 1992, and *John Deere*, 17 February 1992) or after the judgment (*Dunlop Slazenger*, 18 March 1992) in the *PVC* cases.⁴⁵ The Commission has expressly acknowledged that it had begun to take steps to deal with 'the *PVC* problem' in early 1992, and that it relied upon this change of practice in *SPO*.⁴⁶

37. For the same reason, *Spain v Commission*⁴⁷ does not support the Commission's case. The contested decision in those proceedings was adopted in December 1992, well after the Commission's change of practice regarding authentication; furthermore, the applicant's complaint in this regard was one of improper notification, rather than a breach of the duty of authentication. It was in this context that Advocate General Lenz correctly concluded that 'there [was] no evidence whatsoever' of a failure by the Commission to respect its rules of procedure.⁴⁸

38. I am therefore of the opinion that in the cases under appeal the authentication

45 — Respectively Cases T-29/92, T-35/92 and T-43/92, cited in footnote 10 above.

46 — The Commission also claims in its reply in Case C-286/95 P to have relied on its change of practice before the Court of First Instance in the present case. I do not see how a change of practice in 1992 could have availed the Commission in respect of a decision adopted in December 1990.

47 — Case C-135/93, cited in footnote 11 above.

48 — *Ibid.*, paragraph 76 of the Opinion.

requirement of Article 12 of the Commission's Rules of Procedure, in the version which applied at the time of the adoption of the contested Decisions, was an essential procedural requirement. It follows that the Court of First Instance was correct not to examine the questions of the existence and material character of any textual discrepancies; the reasons for its finding in this regard were sufficiently explained by the classification of the procedural defect as the violation of an essential procedural requirement. This being so, the first and third limb of the Commission's third plea must be rejected.

(b) *The content of the obligation to authenticate*

39. There remains the second limb of the Commission's second plea. This alleges that the Court of First Instance infringed Community law and made a mistake of reasoning in holding that authentication must take place before the act is notified, and in finding that the authentication was defective in the cases under appeal.

40. In this regard the Commission contends that the Court of First Instance wrongly viewed authentication as part of the procedure for the adoption of the decision. The adoption is complete when the college adopts the draft of the decision; this takes effect outside the Commission by its notification. Possible defects arising after the adoption of the decision cannot affect its

validity; hence possible defects in the notification can be corrected. It is paradoxical to attribute such absolute importance to an internal procedure. It would be impossible in practice for the Commission to authenticate urgent acts before notification. As the 'authenticated original' of the text shown to the Court of First Instance corresponded exactly⁴⁹ to the notified text, that Court was not entitled to hold that the applicants' right to legal certainty was not guaranteed. The Court of First Instance was inconsistent in that it accepted that the same authentication *ex post facto* was evidence that paragraph 63 of Decision 91/299/EEC (Solvay, abuse of a dominant position) had been adopted by the college of Commissioners, but not that the decision as a whole had been so adopted. It also erred in allowing the applicants to raise a plea *ex post facto* but refusing to allow the Commission to authenticate its decisions *ex post facto*.

41. The Commission's case on the content of the authentication obligation is in my view entirely devoid of merit. The duty to authenticate acts before notification arises from the text of Article 12 of the Commission's Rules of Procedure, cited above, which clearly intends that authentication precede the attachment of the acts as an annex to the minutes of the Commission's meetings and their notification, as the Court of First Instance held in the judgments under appeal.⁵⁰ In the *PVC Appeal*, the contested decision was annulled because the Commission had failed to

49 — Subject to the matter of the missing paragraph 63 of Decision 91/299/EEC; see T-32/91 *Solvay v Commission*, cited in footnote 6 above, paragraphs 46 to 48.

50 — Case T-31/91, paragraph 38; Case T-32/91, paragraph 49, and Case T-37/91, paragraph 88; all are cited in footnote 6 above.

authenticate it 'in the way provided for by that article'.⁵¹ This is also the only interpretation which would be consistent with the second paragraph of Article 192 of the EEC Treaty (now Article 256 EC), which provided that the designated authority of the Member States must enforce Commission decisions imposing a pecuniary obligation, such as the decisions at issue in the present cases, 'without other formality than verification of the authenticity of the decision'. Unless authentication of such decisions takes place in every case, there is at least formally a danger that they may not be enforced, and the clear intention of Article 192 was that authentication be systematic.⁵²

affect their validity, as was the case, for example, in the *Laying Hens* case.⁵³ The failure to authenticate in *PVC* took place after the adoption of the contested decision, and the same can be said in the present case. Nor is it in any way 'paradoxical' to give such importance to a rule such as that in Article 12 of the Commission's Rules of Procedure. As is clear from the *PVC Appeal*, that provision 'is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding'.⁵⁴ The circumstances which gave rise to that case and the present proceedings show the utility of such a rule.

42. The Commission is also wrong to claim that the Decision is 'complete and perfect' once it has been adopted by the college of Commissioners. The second paragraph of Article 191 of the EEC Treaty (now Article 254(3) EC) provided that 'decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows that Commission decisions of the type at issue in the present proceedings are of no legal effect without notification. The decisions which affect the legal situation of the respondents are composite acts, requiring both adoption in accordance with the principle of collegiate responsibility and proper notification. Though the adoption may be 'complete and perfect' from the moment the college has finished its deliberations, the decisions are not so as regards their addressees at this point, and subsequent actions can therefore

43. The possible practical necessity urgently to notify certain categories of decision does not seem to me to contradict the requirement that decisions be authenticated before notification. The institution of a suitable procedure to deal with this problem would not, I think, in any case, be beyond the Commission's imagination.⁵⁵ Moreover, in the present case, a delay of nearly two and a half months from the adoption of the contested Decisions to their notification does not betoken any great urgency.

44. I am equally unimpressed by the charges of inconsistency within the judgments under appeal, in that the Court of First Instance, according to the Commis-

51 — Case C-137/92 P, cited in footnote 4 above, paragraph 77.

52 — See also Article 5 of the contested Decisions as published in the Official Journal, each of which specifies that the decision 'is enforceable pursuant to Article 192 of the EEC Treaty'.

53 — Case 131/86, cited in footnote 28 above.

54 — Case C-137/92 P, cited in footnote 4 above, paragraph 75.

55 — See Article 16 of the current Rules of Procedure of the Commission, cited in footnote 7 above.

sion, accepted the contested ‘authentication’ as evidence that paragraph 63 of Decision 91/299/EEC had been adopted by the college of Commissioners but not as evidence that the texts as a whole had been so authenticated. This argument misrepresents the finding of the Court of First Instance at paragraph 47 of the judgment in Case T-32/91, where it held as follows (*italics added*):

‘[the] Commission’s explanation is confirmed by the wording of the authentication subsequently appended to the text of the decision, which stated that “point 63 set out in the annex hereto was adopted by the Commission at its 1 040th meeting ...”. *Even though that authentication has not been effected in accordance with the Commission’s Rules of Procedure (...)* the Court considers that it should be admitted as evidence to show that the college actually adopted point 63.’

45. It is clear from the words italicised that there is no inconsistency between the limited finding that the text adopted by the Commission contained the paragraph - which was missing from the text of the Decision subsequently notified and the more general finding that the text as a whole had not been authenticated at the time.

46. The Commission’s complaint that the Court of First Instance allowed an applicant to add a new plea *ex post facto* while it was ‘precluded from completing *ex post*

facto its internal procedure’ confuses two entirely different matters, one relating to the assessment of evidence, the other relating to the admissibility of a new argument. The two are therefore in no way comparable, as Article 48 of the Rules of Procedure of the Court of First Instance does allow, in certain circumstances, the admission of new pleas, while Article 12 of the Commission’s Rules of Procedure clearly entails authentication before notification for the reasons given above.

47. It follows that, in my view, the Court of First Instance was correct in holding that the Commission was required to authenticate the contested Decisions before notification and that that requirement had not been respected in the circumstances of the cases under appeal.

(c) *The admissibility of the plea regarding authentication*

48. Should the Court agree with my analysis of the authentication issue, that would suffice to dispose of the appeal; the proposition that the Court of First Instance may raise on its own motion breaches of an ‘essential procedural requirement’ is clearly established by the case-law cited by that Court, and particularly *France v High Authority*, *Italy v High Authority* and *Nold*, discussed above in relation to the definition of this concept.⁵⁶ However,

⁵⁶ — See paragraph 24 of the present Opinion.

should the Court not follow my recommendation on the substantive issue, I must express a view on the question of whether the Court of First Instance was entitled to admit the authentication issue or to raise it of its own motion in the judgments under appeal. The Commission indicated at the hearing that the latter was the principal matter on which it was seeking guidance from the Court and which had motivated its submitting the present appeal.

49. In the first limb of its plea on the admissibility of the authentication argument, the Commission is contending that the Court of First Instance erred in law by holding that the statements made by its representatives during and after the *PVC* case could be a new fact for the purposes of Article 48(2) of its Rules of Procedure. The Commission expressly argues that it was a fundamental part of its case that authentication is not a self-standing essential procedural requirement. On the other hand, if the Court were to find that the Commission's duty to authenticate was an essential procedural requirement, then, as the agent for the Commission fairly conceded in response to a question at the hearing, the parties could, in accordance with Article 48(2) of the Rules of Procedure of the Court of First Instance, rely on available credible evidence that no such authentication had taken place.

50. The Commission, however, argues that its statements regarding a general practice of not authenticating its acts were insufficiently specific to be qualified as a 'fact'. It

seeks support for this view in the *Polypropylene* cases, in which the Court of First Instance rejected pleas based on the same statements.⁵⁷ Unlike the present cases, in *PVC* the new plea had its roots in a plea which had been raised by some applicants in their applications.

51. ICI notes that the Commission does not deny the veracity of the statements made by its representatives during and after the *PVC* proceedings. Both respondents argue that the statements of the Commission were material to their proceedings before the Court of First Instance as a matter of fact founding a new plea in law. When deciding on the *Polypropylene* cases before it, the Court of First Instance did not decide that the statements did not constitute a new fact, while paragraph 60 of the *PVC Appeal* shows that such a plea, raised in the course of the proceedings, is admissible 'since it is based on matters of fact which came to light in the course of the procedure'.⁵⁸ Solvay argues that the decision of the Court of First Instance was to refuse the

57 — Cases T-9/89, T-10/89, T-11/89, T-12/89, T-13/89, T-14/89, and T-15/89 *Hüls and Others v Commission* [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155, and II-1275. The judgments on appeal in these cases, and in a number of other related cases in which the authentication issue had not been raised at first instance, were handed down on 8 July 1999. The issue of whether the Court of First Instance was obliged to admit the plea concerning authentication was not raised in identical terms in each case; for convenience, I shall refer only to Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287 (hereinafter '*Hüls*'), which covers the relevant points fully.

58 — Case C-137/92 P, cited in footnote 4 above.

applicants' requests to reopen the oral procedure in these cases, requests which are subject to stricter criteria of admissibility than a simple new plea raised in the course of the procedure.

Article 125 of the Rules of Procedure of the Court of First Instance. While conceding that Article 48(2) does not prescribe a single deadline as the appropriate time for raising a new plea during the proceedings may depend on a multitude of circumstances, the Commission argues that any new plea must be raised without delay, and that in the present case the applicants could have raised the plea some months before they did in fact do so.

52. The Commission's complaint regarding the unspecific nature of its statements made in *PVC* is founded on its principal argument that absence of authentication is not a breach of an essential procedural requirement where there is no evidence of any discrepancy between the text adopted and that notified to the parties. On that basis, I would agree that a merely general concession of lack of authentication does not sufficiently prove such a discrepancy. However, on the contrary assumption which I make, namely that proof of a discrepancy is not required, an announcement such as that at issue carries quite different implications and in this case the statements are capable of constituting a matter of fact within the meaning of the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance.

54. I do not find the Commission's attempt to write a deadline into Article 48(2) of the Rules of Procedure of the Court of First Instance convincing. The text does not provide for such a deadline, for the simple reason that the oral procedure provides a natural cut-off point after which the parties are no longer entitled to rely on Article 48(2).⁵⁹ Furthermore, the Commission's reliance on Article 173 of the EEC Treaty seems to me to be misplaced; the two-month deadline definitively determines which acts may be challenged in annulment proceedings, but not the pleas which may be raised in such proceedings. I would add that the decision of the Court of First Instance in a particular case to admit a 'new plea in law' is a matter assigned to the discretion of that Court, and not that of the appellate Court. The exercise of such discretion can be reviewed on appeal only if the appellant establishes an error of law. The autonomy of procedure of the court hearing the case at first instance requires

53. In the second limb of its plea on the admissibility of the authentication issue, the Commission argues that the Court of First Instance erred in holding that there is no time-limit for raising a new plea under Article 48(2) of its Rules of Procedure. In its view, such an interpretation infringes the principle of legal certainty, which is reflected in the strict time-limits for the initiation of annulment proceedings laid down in Article 173 of the EEC Treaty, and for the revision of a judgment under

59 — See further paragraph 73 below.

that a wide margin of discretion be allowed in admitting points of law as well as in investigating the facts.

55. The third limb of the Commission's first plea alleges that, in ordering the Commission to produce the text of the decision as authenticated, the Court of First Instance infringed Community law, in so far as its order was based on a mistaken view of the rules governing the procedure and the rules of proof and evidence; the Court of First Instance also made a mistake of reasoning in that it failed to explain why it had concluded that it should order the Commission to produce that text.

56. According to the Commission, the Court of First Instance cannot look of its own motion for evidence of procedural defects; it must decide on the basis of the evidence supplied by the parties, and cannot, any more than the Commission in competition cases, set out on a mere 'fishing expedition'. In the absence of any evidence to the contrary, the Court of First Instance presumed that the contested decision was formally flawed and left the Commission to prove the contrary. The Order of 25 October 1994 does not provide any reasons why the Commission should produce the documents to which it refers. Nor could the Court raise the matter of its own motion, as this possibility is limited to matters of admissibility and does not extend to raising new grounds.

57. Both Solvay and ICI submit that this limb of the plea is inadmissible because the Court of First Instance Order of 25 October 1994 was not a decision in respect of which an appeal is possible under Article 49 of the Protocol on the Statute of the Court of Justice of the EC (hereinafter 'the EC Statute of the Court of Justice'). Furthermore, Article 21 of the EC Statute of the Court of Justice and Article 66 of the Rules of Procedure of the Court of First Instance demonstrate that the Court of First Instance is not bound to decide only on the evidence supplied by the parties, but enjoys a wide discretion in deciding on measures of instruction.

58. ICI further contends that the Court of First Instance did not presume that the contested Decisions were procedurally flawed, but merely sought to carry out its duty to examine the plea relating to non-authentication. In so far as the Court of First Instance was bound by Article 190 of the EC Treaty (now Article 253 EC), the Order of 25 October 1994 was sufficiently reasoned, and the case-law cited therein amply supports the unexceptionable proposition that the Community judicature can, of its own motion, consider breaches of essential procedural requirements.

59. In so far as the Commission could be said to be challenging the validity of the Order of the Court of First Instance of 25 October 1994, in particular on the grounds that it contains an insufficient statement of reasons, I agree with the respondents that this limb of the first plea is inadmissible. However, it is in my view open to the Commission to argue that the measure of inquiry contained in the Order

was vitiated on one of the grounds set out in Article 51 of the EC Statute of the Court of Justice; as it is not disputed that the judgments handed down by the Court of First Instance were based on the information obtained as a result of that Order, any flaw in the decision of the Court of First Instance to order the production of that information would affect the validity of judgments themselves. The Commission is in effect challenging the power of that Court to take account of the failure to authenticate the contested Decisions before the annulment proceedings were commenced before that Court, and is therefore entitled in my view to contest the grounds on which the Court of First Instance admitted this plea. This analysis is implicitly confirmed by the Order of the Court in *Commission v ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher Tierzüchter*,⁶⁰ where the Court dismissed as outside the scope of Article 49 of the EC Statute of the Court of Justice, and hence manifestly inadmissible, an appeal by the Commission against an order of the Court of First Instance to produce certain documents the Commission considered to be covered by the obligation of professional secrecy set out in Article 287 EC.

accordance with that provision. The Commission has failed to point to any rule of law which would deprive the Court of First Instance of the power to raise such a new plea of its own motion.

61. Furthermore, the right of an intervener to raise a new plea in annulment proceedings is long established in the case-law of the Court; thus in *Steenkolennijnen v High Authority*, the Court held that 'the intervention procedure would be deprived of all meaning if the intervener were to be denied the use of any argument which had not been used by the party it supported'.⁶¹ If an intervener acting perforce in pursuit of its own interests may raise such issues, then the Court must in my view have jurisdiction to consider such a late plea. In any case, as the Court held in *Quijano y Lloréns*, Article 48 of the Rules of Procedure of the Court of First Instance is 'a rule which applies to the parties and not to the Court of First Instance'.⁶²

60. The principal question which arises in examining this limb of the first plea is that of the jurisdiction of the Court of First Instance to consider a new plea, rather than that of the application of the rules of evidence. It is clear, particularly from the wording of Article 48(2) of its Rules of Procedure, that the Court of First Instance is competent to examine new pleas where properly raised by one of the parties in

62. The Commission has sought to challenge the conclusions on the power of the Community judicature to raise new pleas in law of its own motion which were drawn by the Court of First Instance from a number of judgments of this Court cited in the Order of 25 October 1994. It considers *Nold*⁶³ irrelevant because the procedural requirement at issue was the obligation to provide reasons, and the

61 — Case 30/59 [1961] ECR I, pp. 17 and 18.

62 — Case C-252/96 P *European Parliament v Quijano y Lloréns* [1998] ECR I-7421, paragraph 30.

63 — Case 18/57, cited in footnote 29 above.

60 — Case C-349/99 P [1999] ECR I-6467.

failure to respect it was obvious from the face of the document without recourse to measures of inquiry; furthermore, compliance with that requirement serves to allow the Court to carry out its task. Similarly in *France v High Authority*,⁶⁴ *Italy v High Authority*,⁶⁵ and the *Social Fund* cases⁶⁶ the procedural defect was in each case manifest. It follows, in the Commission's view, from *Amylum*⁶⁷ that the power of the Court to raise matters of its own motion is limited to questions of admissibility.

63. I do not find the Commission's analysis of this case-law convincing. In *France v High Authority*⁶⁸ and *Italy v High Authority*,⁶⁹ the Court's decision to examine of its own motion the alleged breach of the duty of consultation was based on the sole ground that such consultation was an essential procedural requirement, not that the defect was manifest. In the latter case, the Court issued an order to the High Authority to transmit to it within 24 hours the relevant minutes and documents relating to the consultation of the Consultative Committee. In *Nold*, the Court held that the applicant's plea concerning the failure properly to state reasons was inadmissible, but went on to hold that 'the obligation under Article 15 of the ECSC Treaty on the High Authority to state the reasons for its decisions is not only for the protection of the interested parties, but also has as its objective to enable the Court to review the decisions fully from the legal point of view as required by the Treaty. As a result the

Court can and must of its own motion take exception to any deficiencies in the reasons which would make such review more difficult'.⁷⁰ In this case, the Court considered not only that it was able, but that it was under an obligation, to raise of its own motion a new point of law regarding the failure to provide proper reasons, as the matter went to the exercise of its jurisdictional functions. The Commission has explicitly recognised in the present proceedings that authentication serves a purpose 'in the event of a dispute', and it would therefore be inconsistent to deny that the Court can raise the breach of this obligation of its own motion.

64. In *Amylum*, the applicant had in his reply submitted a plea that the Council was not competent to adopt the contested regulation. Though the plea was out of time, the Court none the less held that 'since the submission relates to the powers of the author of the contested measure, [it] should state the reasons why the Council was competent to adopt' this measure.⁷¹ I do not see how this finding can be read as limiting to questions of admissibility the Court's power to raise matters of its own motion, as the Commission maintains. The issue raised by the Court on its own motion in *Amylum* itself did not concern the admissibility of the action, nor indeed were the issues raised in the case-law on essential procedural requirements cited above

64 — Case 1/54, cited in footnote 18 above, p. 15.

65 — Case 2/54, cited in footnote 19 above, pp. 51 and 52.

66 — Case C-291/89 *Interhotel v Commission* and Case C-304/89 *Oliveira v Commission*, both cited in footnote 26 above.

67 — Case 108/81 *Amylum v Council* [1982] ECR 3107.

68 — Case 1/54, cited in footnote 19 above.

69 — Case 2/54, cited in footnote 20 above.

70 — Case 18/57, cited in footnote 29 above, pp. 51 and 52.

71 — Case 108/81, cited in footnote 67 above, paragraph 28.

restricted to the question of admissibility either.

65. In my opinion, these judgments establish the competence of the Court to raise new points of its own motion, at least where the point, if well founded, would go to the validity of the act in its entirety. Significantly, in *France v High Authority*,⁷² the Court examined the breach of an essential procedural requirement even after having annulled the contested provision on other grounds. On the other hand, these cases do not show, as the Commission has claimed, that the Court can only examine new pleas in law where the breach of the obligation by the adopting institution is manifest; thus in *France v High Authority*, *Italy v High Authority* and *Amylum*, far from the alleged breach being manifest, none was in fact established. As measures of inquiry seek to prove or disprove the existence of a fact upon which a plea in law may then be based, rather than the existence of a possible plea in law, the fact that the Court did not need to adopt any such measures in *Nold* does not appear to me to be relevant to the question of the Court's jurisdiction to consider the new plea in law. Furthermore, as Solvay has remarked, the Commission's argument would lead to the patently untenable situation that the power of the Court of First Instance to raise a new plea in law would depend on the care with which an institution disguised the breach of its obligations under Community law.

66. If the Court of First Instance may examine new pleas based on new matters of law or fact, it follows that it must be able to consider the evidence which proves or disproves such pleas. This view is confirmed both by the EC Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance. Thus the power the Community Courts enjoy by virtue of the first paragraph of Article 21 of the EC Statute of the Court of Justice to 'require the parties [to a direct action] to produce all documents and to supply all information which the Court considers desirable' is not restricted to those documents and that information which merely support pleas already made by the parties to the action in their initial application or defence. Similarly, the power of the Court of First Instance under Article 66 of its Rules of Procedure to prescribe 'the measures of inquiry which it considers appropriate' is not restricted to measures which are intended to confirm the parties' pleas. *Italy v High Authority* is also authority for the proposition that the Court can investigate suspected breaches of an essential procedural requirement of its own motion, having recourse to measures of inquiry as need be.⁷³

67. In its arguments on this limb, the Commission seems to proceed on the basis of a mistaken comparison between its own role in competition matters and the judicial function of the Court of First Instance. As the Commission acts in effect in this area both as the investigating authority and as the administrative authority empowered to find undertakings in breach of Articles 81 EC and 82 EC, it is only normal that its

72 — Case 1/54, cited in footnote 19 above.

73 — Case 2/54, cited in footnote 20 above.

powers should be hedged around with rules and procedures which are intended to ensure the rights of the defence, including the prohibition against what the Commission terms ‘fishing expeditions’. The role of that Court, as it emerges from the EC Statute of the Court of Justice and its Rules of Procedure, is rather different, and the provisions of these two instruments show that it is not, contrary to the affirmations of the Commission, restricted to basing its judgments on the sole evidence presented by the parties, or on the pleas in law which they have submitted.

68. I might add that, in the circumstances, the Commission’s qualification of the procedural steps taken by the Court of First Instance as ‘a mere “fishing expedition”’ is rather gratuitous. At the time the Court of First Instance ordered the production of the authenticated text of the contested Decisions, the suspicion that the Commission had not authenticated any decisions finding breaches of the Community’s competition law, including those at issue in the contested judgment, was in the public domain, and had been confirmed, as regards the PVC decisions, by the Court in the *PVC Appeal*. Contrary to my understanding of the somewhat pejorative term ‘fishing expedition’, the Court of First Instance had a very precise idea of the documents it wanted and the purpose for which they were required. The presumption of the validity of acts of the Community institutions may not be allowed to stand in the way of an authoritative ruling by the competent Court that an act has been adopted in violation of an essential procedural requirement, or to prevent the procedural steps which can establish the relevant facts being taken. In the present case,

only the Commission had access to the documents which would show whether or not the contested Decisions had been authenticated in accordance with its Rules of Procedure, and the course of action followed by the Court of First Instance cannot be criticised on this ground.⁷⁴

(d) *The pertinence of the ‘Polypropylene’ judgments*

69. Consideration of the present appeal was for a time deferred pending the outcome of the judgments on appeal in the *Polypropylene* cases, in which the authentication of Commission decisions adopted before 1992 had also been raised.⁷⁵ The Court noted that measures of organisation of procedure ‘have as their purpose to ensure the 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’, and hence ‘form part of the various stages of the procedure before the Court of First Instance’. After the oral procedure has taken place, such measures may only be requested where that Court decides to reopen the oral procedure. Similarly, a request for measures of inquiry made at that stage of the procedure ‘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

⁷⁴ — See the Opinion of Advocate General Cosmas in Case C-199/92 P *Hüls*, cited in footnote 57 above, paragraph 54.

⁷⁵ — Case C-199/92 P *Hüls*, cited in footnote 57 above.

close of the oral procedure'. While stressing that the Court of First Instance has a discretion in this regard, the Court held, in accordance with established case-law, that that Court is not obliged to accede to a request to reopen the oral procedure unless the same two conditions are fulfilled.⁷⁶

70. It was in this procedural context that the Court ruled that:

'[indications] of a general nature concerning an alleged practice of the Commission and emerging from a judgment delivered in other cases, or 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.'

71. A decision by the Court in the present case that the Court of First Instance could examine the authentication of the contested Decisions might at first blush appear to contradict its own ruling in the *Polypropylene* appeals. The same statements which were considered 'not decisive' in *Polypro-*

pylene would be relied upon, and indeed would be 'decisive', in 'Soda ash'.

72. I do not, however, consider this to be the case. The principal difference between the situations in these two sets of proceedings is that in *Polypropylene*, the new issue was raised by the parties after the oral procedure was over, while in the present proceedings, the issue of authentication of the contested Decisions was raised both by the applicants during the course of the written procedure and by the Court of First Instance of its own motion. Furthermore in *Polypropylene*, the appellants sought to rely on a purported *obligation* on the Court of First Instance to order measures of organisation of procedure, to order measures of inquiry and/or to reopen the oral procedure, while in the present proceedings the Commission is seeking to overturn the exercise by the Court of First Instance of its *discretion* in considering a new plea in law.

73. The explanation for the undoubted difference in treatment of the two sets of applicants before the Court of First Instance seems to me to lie in the provisions of the EC Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance concerning the organisation of its judicial business. From the initiation of the procedure until the oral hearing, the parties enjoy a certain latitude to bring to the attention of the Court of First Instance any matter which they consider may be relevant, in their application or defence, in

⁷⁶ — *Ibid.*, paragraphs 123, 125 and 128.

their reply or rejoinder, by means of an offer of further evidence submitted late for justifiable reasons, through a new plea in law based on a matter of law or of fact which has come to light in the course of the proceedings, by requesting a measure of organisation of procedure or a measure of inquiry, and at the oral hearing.⁷⁷ Once the oral hearing is closed, however, this latitude no longer exists; the case is henceforth entirely in the hands of the Court itself and, apart from the rather extreme possibility that a party could draw to the attention of the Court the existence of an absolute bar to proceeding with the case,⁷⁸ the parties are in effectively the same position, as regards the procedural steps they may take, as they would be if the case had already been decided.

inquiry submitted after the oral procedure has closed,⁷⁹ and to requests to reopen the oral hearing.⁸⁰ This does not take away from the discretion of the Court of First Instance in either of these matters; it does however follow that the oral procedure is the cut-off point beyond which the Court is under no obligation to comply with a request to reopen the oral procedure, unless the strict conditions of Article 41 of the Statute are fulfilled.

74. Once judgment has been given, a party may apply for revision ‘only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision’, in accordance with Article 41 of the EC Statute of the Court of Justice. In its case-law, the Court has applied this provision by analogy both to requests for measures of

75. I do not consider that by accepting a new plea in law, or raising such a point of its own motion, in the judgments under appeal the Court of First Instance was treating as ‘decisive’ statements of a general nature which the Court has held in *Polypropylene* not to be decisive for the purposes of requiring the Court of First Instance to reopen the oral procedure. In the first place, by ordering the production of the contested Decisions the Court of First Instance was not taking any position on whether such statements were, or could have been, decisive; after all, by the time it came to pronounce judgment in these cases, the Court of First Instance could rely on the findings of the Court in the *PVC Appeal*.⁸¹ Furthermore, that Court had by then been able to examine the documents relating to

77 — Rules of Procedure of the Court of First Instance, cited in footnote 8 above, Articles 43 to 49.

78 — *Ibid.*, Article 113.

79 — Case 77/70 *Prelle v Commission* [1971] ECR 561, paragraph 7 and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 53.

80 — C-199/92 P *Hüls*, cited in footnote 57 above, paragraph 128.

81 — Case C-137/92 P *BASF and Others*, cited in footnote 4 above.

the contested Decisions which the Commission had produced, and was able to find as an uncontested matter of fact that they had not been authenticated until after the introduction of the originating applications. The Court of First Instance was therefore relying not on 'indications of a general nature', but on documentary evidence specific to the contested Decisions, which was exactly what was missing in the *Polypropylene* cases.⁸² It is significant in this regard that the Court held that the 'indications of a general nature ... could not *as such* be regarded as decisive for the purposes of the determination of the case then before the Court of First Instance'.⁸³

76. One final difference between the present cases and those in *Polypropylene* is that in the latter cases the Court held that the applicants were 'in a position to provide the Court of First Instance with at least the 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'.⁸⁴ In the present cases, the Court of First Instance has found as a fact that '[the] text of the decision ... would not, even on a careful reading, have

revealed that the original of the decision had not been authenticated at the relevant time'.⁸⁵ As this constitutes the appraisal by the Court of First Instance of the evidence before it, it is not, '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'.⁸⁶

77. While I would concede that, juxtaposed with that of the applicants in the judgments under appeal, the treatment of the applicants in *Polypropylene* might seem rather harsh, the latter find themselves in the same position as hundreds of other undertakings which have been fined for breaches of competition law over a quarter of a century up to the end of 1991 and who were not able to rely on the statements alleging that the Commission did not during this period authenticate its decisions, including the applicants in other cases challenging the same Commission decision concerning the polypropylene market which had been decided prior to the hearing in *PVC*.⁸⁷

82 — Case C-199/92 P *Hüls*, cited in footnote 57 above, paragraph 131.

83 — *Ibid.*, paragraph 130, emphasis added.

84 — *Ibid.*, paragraph 132.

85 — Case T-31/91, paragraph 32, Case T-32/91, paragraph 38, and Case T-37/91, paragraph 83, all cited in footnote 6 above.

86 — Case C-199/92 P *Hüls*, cited in footnote 57 above, paragraph 64, referring to C-53/92 P *Hilti v Commission* [1994] ECR I-667, paragraphs 10 and 42.

87 — See, for example, Cases T-1/89, T-2/89, and T-3/89 *Rhône-Poulenc and Others v Commission* [1991] ECR II-867, II-1087 and II-1177.

IV — Conclusion

78. In the light of the foregoing, I recommend to the Court that it:

- Reject the appeals against the judgments of the Court of First Instance in Case C-286/95 P *Commission of the European Communities v Imperial Chemical Industries plc* and Joined Cases C-287/95 P and C-288/95 P *Commission of the European Communities v Solvay SA* as unfounded; and
- Order the appellant to bear the costs of the three appeals.