JUDGMENT OF THE COURT
15 June 1994 *

In Case C-137/92 P,

Commission of the European Communities, represented by C. Timmermans, Deputy Director-General of the Legal Service, J. Amphoux, Principal Legal Adviser, G. Marenco and G. zur Hausen, Legal Advisers, J. Currall and B. J. Drijber, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment delivered by the Court of First Instance of the European Communities on 27 February 1992 in 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 [1992] ECR II-315 to have that judgment set aside and the cases referred back to the Court of First Instance so that it may adjudicate on the other pleas raised by the applicants and not dealt with in the judgment,

the other parties to the proceedings being

BASF AG, whose registered office is in Ludwigshafen (Federal Republic of Germany), represented by F. Hermanns, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 11 Rue Goethe,

* Languages of the case: Dutch, English, French, German and Italian.

Limburgse Vinyl Maatschappij NV (LVM), whose registered office is in Tessenderlo (Belgium), represented by I. G. F. Cath, of the Hague Bar, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a Rue des Bains,

DSM NV and DSM Kunststoffen BV, whose registered office is in Heerlen (Netherlands), represented by I. G. F. Cath, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a Rue des Bains,

Hüls AG, whose registered office is in Marl (Federal Republic of Germany), represented by H. Herrmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 11 Rue Goethe,

Elf Atochem SA, formerly Atochem SA, whose registered office is in Puteaux (France), represented by X. de Roux and Ch.-H. Léger, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Messrs Hoss & Elvinger, 15 Côte d'Eich,

Société Artésienne de Vinyle SA, whose registered office is in Paris, represented by B. Van de Walle de Ghelcke, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 11 Rue Goethe,

Wacker Chemie GmbH, whose registered office is in Munich (Federal Republic of Germany), represented by H. Hellmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 11 Rue Goethe,

Enichem SpA, whose registered office is in Milan (Italy), represented by M. Siragusa, of the Rome Bar, and G. Scassellati Sforzolini, of the Bologna Bar, with an

address for service in Luxembourg at the Chambers of Messrs Arendt & Medernach, 4 Avenue Marie-Thérèse,

Hoechst AG, whose registered office is in Frankfurt am Main (Federal Republic of Germany), represented by H. Hellmann, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch & Wolter, 11 Rue Goethe,

Imperial Chemical Industries PLC (ICI), whose registered office is in London, represented by D. A. J. Vaughan QC and D. W. K. Anderson, Barrister, instructed by V. O. White and R. J. Coles, Solicitors, with an address for service in Luxembourg at the Chambers of L. H. Dupong, 14a Rue des Bains,

Shell International Chemical Company Ltd, whose registered office is in London, represented by K. B. Parker QC, instructed by J. W. Osborne, Solicitor, London, with an address for service in Luxembourg at the Chambers of J. Hoss, 15 Côte d'Eich,

Montedison SpA, whose registered office is in Milan (Italy), represented by G. Aghina and G. Celona, of the Milan Bar, and by P. A. M. Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of G. Margue, 20 Rue Philippe II,

THE COURT,

composed of: O. Due, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 March 1993, at which Enichem SpA was represented by M. Siragusa and F. Moretti, of the Bologna Bar,

after hearing the Opinion of the Advocate General at the sitting on 29 June 1993,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 29 April 1992, the Commission of the European Communities brought an appeal under Article 49 of the Statute of the Court of Justice of the EEC against the judgment of 27 February 1992 in 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 in which the Court of First Instance declared non-existent the measure entitled 'Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV 31.865, PVC)' notified to the applicants and published in the *Official Journal of the European Communities* L 74 of 17 March 1989 (p. 1) and dismissed as inadmissible the actions for annulment brought before it against that decision.

The facts and the course of the procedure before the Court of First Instance

2 It appears from the judgment of the Court of First Instance that the respondent undertakings, active in the polyvinylchloride ('PVC') sector, sought the annulment of Decision 89/190 by which the Commission found that they had infringed Article 85 of the Treaty by participating in an agreement and/or concerted practice. According to that decision, the producers supplying the common market with PVC had attended periodic meetings in order to set 'target' prices and 'target' quotas, to plan concerted initiatives for raising prices and to monitor the implementation of those collusive arrangements (Article 1). Those undertakings were directed to bring to an end the infringements found, to refrain in future from the practices in question (Article 2) and to pay individual fines (Article 3).

3 Since the applicants had contested the procedure for adoption and notification of the decision on several grounds, the Court of First Instance undertook detailed preparatory inquiries, ordering the Commission as a first step to produce the minutes of the meeting of the Commissioners of 21 December 1988 and the text of the decision as adopted on that date.

4 The Commission having produced pages 41 to 43 of those minutes and three decision drafts in English, French and German dated 14 December 1988, the Court of First Instance heard argument on those documents and ordered the Commission to produce a certified copy of the original of the contested decision, as adopted on 21 December 1988 and authenticated in accordance with the Commission's Rules of Procedure in each of the language versions in which the decision had been adopted.

5 The Commission then produced the following documents, certified as true copies of their originals by its Secretary-General:

— pages 41 to 43 of the minutes of the meeting of the Commission of 21 December 1988, COM (88) PV 945;

— the cover page of those minutes bearing the signature of the President and Secretary-General of the Commission;

— the draft decision, dated 14 December 1988, in English, French and German;

— a document entitled 'Modifications to be included in point 27-PVC, in point 34-LDPE', which had been annexed to the minutes of the special meeting of Chefs de Cabinet, dated 19 December 1988 and mentioned in the minutes of the meeting of the Commission.

6 According to a certificate drawn up by the Secretary-General of the Commission and the letter accompanying those documents, signed by one of the agents who represented the Commission before the Court of First Instance, the text of the decision adopted on 21 December 1988 is to be found in all of those documents read together.

7 Examination of the documents produced and the submissions made thereon enabled the Court of First Instance to find a number of facts and to draw the legal consequences described below.

Judgment of the Court of First Instance

Breach of the principle that a measure may not be altered once it has been adopted

8 First, the Court of First Instance found (in paragraphs 39 to 49 of the judgment) that:

(a) the decision adopted in German contained discrepancies compared with the decision adopted in English and French and with the decision as notified and published;

(b) in the decisions notified and published in the *Official Journal of the European Communities*, a paragraph which did not appear in the draft decisions adopted by the college of Commissioners had been added to paragraph 27 of the reasons in the English, French and German versions;

(c) in the actual operative part of the measures as notified and published, the reference indicating that Société Artésienne de Vinyle SA belonged to the Entreprise Chimique et Minière Group ('EMC Group'), which appears in the drafts adopted by the college on 21 December 1988, had disappeared.

9 From the fact that all those changes had been made after 21 December 1988 by persons who were clearly not Commissioners, the Court, relying on the judgment of the Court of Justice in Case 131/86 *United Kingdom* v *Council* ('Battery Hens') [1988] ECR 905, concluded that there had been a breach of the principle of the inalterability of administrative measures. According to that principle, once a measure has been adopted by the competent authority in accordance with the procedure laid down, no amendments, other than corrections to spelling or grammar, may be made except in accordance with the same procedure. Failing this, the amendments must be regarded as irregular, and there is no need to assess their scope, significance or substance (paragraphs 40, 42, 47 and 49).

Lack of competence ratione materiae *and* ratione temporis *of the Commissioner responsible for competition*

10 Second, the Court found that the Commission had adopted the contested decision only in its English, German and French versions, leaving it to the Commissioner then responsible for competition, Mr Sutherland, to adopt the text of the decision in the other official languages of the Community.

11 The Court held that, since the decision concerned is one which is addressed to a number of legal persons for whom different languages must be used, Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59) and the first paragraph of Article 12 of the Rules of Procedure of the Commission of 9 January 1963 (OJ, English Special Edition, Second Series, VII, p. 3, hereinafter referred to as 'the Rules of Procedure'), read together, show that it is for the college of Commissioners to adopt the measure in all the languages which are binding. The first of those provisions provides: 'Documents which an Institution ... sends to ... a person subject to the jurisdiction of a Member State shall be drafted in the language of such State'. The second provision provides: 'Acts adopted by the Commission, at a meeting or by written procedure shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary'. Consequently, in the present case, the decision ought to have been adopted by the Commissioners in Dutch and Italian as well, since Mr Sutherland clearly had no competence *ratione materiae* to do so (paragraphs 54, 55 and 60).

12 The Court held that the Commission could not rely, in order to show that Mr Sutherland had the relevant competence, on Article 27 of its Rules of Procedure, as amended by Commission Decision 75/461/Euratom, ECSC, EEC of 23 July 1975 (OJ 1975 L 199, p. 43), which provides: 'Subject to the principle of collegiate responsibility being respected in full the Commission may empower its Members to take, in its name and subject to its control, clearly defined measures of management or administration'. The Court found (in paragraph 59): 'A decision which establishes an infringement of Article 85 of the Treaty, issues orders to a number of undertakings, imposes large fines upon them and is directly enforceable

for these purposes clearly affects the rights and obligations and the property of those undertakings. It cannot be regarded merely as a measure of management or administration whose adoption falls within the powers of a single Member of the Commission since this would be directly contrary to the principle of collegiate responsibility expressly referred to in Article 27'.

13 The Court also found that there was at the foot of the decision as notified the typed statement 'For the Commission, Peter Sutherland, Member of the Commission'. The Court accepted that, whilst the Commissioner responsible for competition cannot alone adopt the authentic language versions of a decision applying Article 85(1) of the Treaty, he does have authority, for purposes of notification to the addressees, to sign the copies of the decision adopted by the college of Commissioners (paragraph 61).

14 However, in this case, it was established that no text ready for notification and publication was available prior to a date falling between 16 January 1989 and 31 January 1989 whilst Mr Sutherland's mandate had expired on 5 January 1989. It follows that Mr Sutherland did not have competence *ratione temporis* to sign the measures notified to the applicants (paragraphs 61 to 63).

Non-existence of the measure in question

15 At this point in its reasoning the Court of First Instance held (in paragraph 65) that 'the various defects mentioned above exhibited by the measure, namely the amendments to the statement of reasons and the operative part of the measure made after its adoption by the Commission according to the terms of the minutes of meeting No 945 and the lack of competence of the authority issuing the measure, should entail the annulment of the contested decision on grounds of lack of powers and the infringement of essential procedural requirements'. However, the Court considered that 'before annulling the measure, it should examine the last plea

put forward by the applicants concerning the non-existence of the measure. If that plea is well founded, the applications should be dismissed as inadmissible (judgment in Joined Cases 1/57 and 14/57 *Société des Usines à Tubes de la Sarre* v *High Authority* [1957] ECR 105)'.

16 After pointing out (in paragraph 68) that 'the Community judges, guided by principles derived from national legal systems, will declare non-existent a measure which is vitiated by particularly serious and manifest defects' and that this plea, being a matter of public interest, 'may be relied upon by the parties at any time during the proceedings and must be raised by the Court of its own motion', the Court found (in paragraph 70) that in the instant case the Commission had been compelled to admit that it was unable to produce a copy of the original measures in authenticated form in accordance with its Rules of Procedure, of which Article 12, besides providing for acts to be authenticated, provides, in its second paragraph, that the texts of such acts are to 'be annexed to the minutes in which their adoption is recorded'.

17 The Court went on to state that: 'The procedure for authenticating measures provided for by that provision of the Commission's Rules of Procedure, which derive their legal basis directly from Articles 15 and 16 of the Merger Treaty of 8 April 1965, which in addition provide that the rules are to be published, constitutes an essential factor contributing to legal certainty and stability of legal situations in the Community legislative system. Only that procedure can guarantee that measures issued by an institution have been adopted by the competent authority in accordance with the procedural rules laid down by the Treaty and the provisions adopted in implementation thereof, in particular the requirement to provide a statement of reasons laid down by Article 190 of the Treaty. By guaranteeing the inalterability of the measure adopted, which may be amended or repealed only in accordance with those requirements, it allows those subject to the law, whether they be natural or legal persons, Member States or other Community institutions to know with certainty and at any given time the precise extent of their rights and their obligations and the reasons which led the Commission to adopt a decision with respect to them' (paragraph 72).

18 The Court explained that: 'All those rigorous formal requirements governing the drawing up, adoption and authentication of measures are necessary in order to guarantee the stability of the legal order and legal certainty for those subject to measures adopted by Community institutions. Such formalism is strictly necessary for the maintenance of a legal system based on the hierarchy of rules. It guarantees observance of the principles of legality, legal certainty, and sound administration (judgment of the Court of Justice in Joined Cases 53/63 and 54/63 *Lemmerz-Werke* v *High Authority* [1963] ECR 239 and in Joined Cases 23/63, 24/63 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 217). Any infringement of those rules would create a system that was essentially precarious, in which the description of the persons subject to measures adopted by the institutions, the extent of their rights and obligations and the authority issuing the measures could be known only approximately, thereby jeopardizing the exercise of judicial review' (paragraph 76).

19 Finally, the Court held that 'in the case of measures such as these which impose a fine, the concept of an enforceable measure assumes particular significance under Article 192 of the Treaty' (paragraph 80). The Court then found that 'since it is apparent from the evidence before it that authentication of the measure in accordance with the first paragraph of Article 12 of the Commission's Rules of Procedure is impossible, the procedure for verifying the authenticity of the measure, that is to say the original authenticated measure, provided for in the second paragraph of Article 192 of the Treaty could not be implemented in this case' (paragraph 81).

20 The Court thus came to the conclusion that: 'Where the Court can neither determine with sufficient certainty the precise date from which a measure was capable of producing legal effects and hence of being incorporated into the Community legal order nor, owing to the amendments made to it, ascertain with certainty the precise terms of the statement of reasons which it must contain under Article 190 of the Treaty nor define and verify clearly the extent of the obligations which it imposes on its addressees or the description of those addressees nor identify with certainty the authority which issued the definitive version, and where it is established that the authentication procedure provided for by the Community rules was completely disregarded and that the procedure laid down by the second paragraph of Article 192 cannot be implemented, such a measure cannot be regarded as a

decision for the purposes of Article 189 of the Treaty. Such a measure is vitiated by particularly serious and manifest defects rendering it non-existent in law' (paragraph 96).

21 The Court therefore declared the contested decision non-existent and consequently dismissed the actions as inadmissible.

The Commission's appeal

22 The Commission states at the outset that it does not deny that the review by the Court of First Instance revealed certain weaknesses in the procedure leading to the adoption of the PVC decision, attributable partly to pressure of time when the Commission's term of office was about to expire and, in particular, the departure of the Commissioner responsible for competition was imminent. But the Commission does not believe that the judgment of the Court of First Instance adequately reflects the importance of the various points in issue. Moreover, it considers that the conclusions drawn by the Court of First Instance, which led it to declare the measure non-existent, are excessive and out of all proportion to the defects found.

23 The Commission relies on four pleas in law in support of its appeal.

The first plea

24 The Commission considers that the judgment under appeal is vitiated by errors of law and defective reasoning as regards application of the principle of the inalterability of administrative acts and, in particular, the analysis of the changes made to the contested decision.

25 First, the Court of First Instance erred in law in holding that it was not necessary to consider whether the changes made to the German version of the notified decision were substantial and in holding that those changes affected the lawfulness of the decision as a whole, in relation to all the applicants.

26 Second, the Court erred on a point of reasoning in considering that the paragraph added to point 27 of the decision in all the language versions of the acts as notified had not been approved by the college of Commissioners and that there could be no doubt as to the substantial nature of that paragraph. It also erred in law in holding, first, that it was unnecessary to analyse the significance of that paragraph and, second, that its inclusion affected the lawfulness of the decision in its entirety.

27 Finally, the Commission submits that the Court was mistaken on a point of reasoning in holding that the deletion from the operative part of the decision as notified of the indication that Société Artésienne de Vinyle SA belonged to the EMC Group was such as to alter the scope of the decision, and on a point of law, in holding that the deletion affected the lawfulness of the decision in its entirety and in relation to all the applicants.

The second plea

28 The Commission submits that the judgment under appeal is vitiated by an error of law concerning the Treaty requirements as to the manner in which Commission measures are adopted in that it did not accept that Mr Sutherland was competent to issue the Dutch and Italian versions of the adopted measure.

29 To require the college of Commissioners to adopt all the language versions in which measures are binding is, in the Commission's view, clearly far too strict a reading of the relevant provisions of the Treaty relating to the principle of colle-

giality. A certain degree of flexibility in its functioning is indispensable for the accomplishment of the multifarious and wide-ranging tasks conferred upon it. Such flexibility is reflected in the fact that it may use three different types of procedure: formal adoption at a meeting, written procedure and delegation of authority to the competent Commissioner. The Court of Justice has held, in particular in its judgment in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, that the procedure for the delegation of authority is compatible with the principle of collegiality and that its use is consequently lawful.

30 The Court of First Instance disregarded the fact that in each decision a distinction must be drawn between the intellectual component or the component of principle, which underlies the collective intention and is a matter for the college, and the formal component, which is necessarily subsequent and which comprises the drafting of the text of the decision, its translation, finalization, notification and publication — all purely executory steps. It must be possible for such steps to be taken without the intervention of the college and without any specific delegation, on the authority of the appropriate Commissioner, without this in any way adversely affecting the rights of the persons concerned or any of the procedural guarantees which they enjoy.

The third plea

31 The Commission's third plea is that the Court of First Instance committed an error of law as regards the meaning and scope of Article 12 of its Rules of Procedure, which concerns the authentication of acts adopted by that institution.

32 According to the Commission, the judgment of the Court of First Instance again takes a formalistic approach and misinterprets the purpose and scope of the authentication of acts pursuant to Article 12, which in any case has long since fallen into desuetude. Such a formality, like the approval and authentication of the Commission's minutes, is not essential to the adoption and existence of the acts, their function being purely archival.

33 Finally, the Commission contends that the Court of First Instance disregarded both the letter and the purpose of Article 192 of the EEC Treaty in so far as it considered that the existence of the original of a decision is indispensable for its implementation. Such an approach would mean in practice that verification of the authenticity of the decision, as mentioned in that article, would require, in every case, production of the original texts whereas such verification should be a purely formal matter applying only to the presence and authenticity of the seals and signatures applied to the document on behalf of the Commission.

The fourth plea

34 Fourthly, the Commission contends that the Court of First Instance misapplied the doctrine of the non-existent act.

35 According to the Commission, in most Member States the law recognizes that an irregular act, if seriously flawed, may be treated as having no legal effect whatsoever, even provisional, so that, without any judicial intervention, neither the addressee nor the author need comply with it. Moreover, a declaration that such an act is of no effect may be made outside the normal limitation period.

36 However, the Commission goes on to say that, given the gravity of those consequences, it is not sufficient, in order for the doctrine of non-existence to apply, that the irregularity found be particularly serious: it must be so plain as to be immediately identifiable by anyone. That is not the case here since the addressee of the decision was not in a position to know what internal procedures led to it.

Admissibility of the appeal

37 All the respondents, with the exception of Shell International Chemical Industries PLC and Montedison SpA, raise an objection of inadmissibility against the appeal on the ground that it was lodged after the two-month period laid down in the first paragraph of Article 49 of the Statute (EEC) of the Court of Justice had expired. They contend that, since the judgment of the Court of First Instance was served on the Commission on 28 February 1992, the appeal ought to have been lodged by 28 April 1992 at the latest, in accordance with Article 80(b) of the Rules of Procedure. However, the Commission did not lodge its appeal at the Registry of the Court of Justice until 29 April 1992.

38 According to the respondents, the Commission is not entitled to rely on the Decision of the Court of Justice on extension of time-limits on account of distance appearing in Annex II to its Rules of Procedure. Under Article 1 of that Decision, parties habitually resident in the Grand Duchy of Luxembourg are not to be granted extensions of procedural time-limits on account of distance. Since the question of the seat of the institutions had still not been settled at the time when the appeal was lodged, the habitual residences of the institutions are to be taken to be their 'provisional places of work', as laid down in Article 1 of the Decision of 8 April 1965 of the Representatives of the Governments of the Member States on the provisional location of certain Institutions and Departments of the Communities (Journal Officiel 1967 No 152, p. 18), namely Luxembourg, Brussels and Strasbourg.

39 In their submission, it follows that at the time when the appeal was lodged the Commission also had habitual residence in Luxembourg, where it performs a large number of its tasks and has many departments employing a considerable number of officials.

40 It is to be noted that the procedural time-limits meet requirements of legal certainty whilst the various extensions of time provided for by the Decision on extensions on account of distance are intended to take account of the difficulties faced

by parties owing to the fact that they may be a fairly long way away from the seat of the Court of Justice and thereby to put them on an equal footing. Extensions of time-limits on account of distance must therefore be granted according to the place where parties are habitually established and where the decisions relating to their activities are taken.

41 In the present case, it is significant to note that before the decision taken by common agreement between the representatives of the governments of the Member States on the location of the seats of the institutions and of certain bodies and departments of the European Communities (OJ 1992 C 341, p. 1) located the seat of the Commission at Brussels, that institution was already run from there, being one of the provisional places of work of the institutions. The fact that some of its departments were located and remain located in Luxembourg is irrelevant.

42 It follows from the foregoing that in lodging its appeal the Commission was entitled to two additional days, as provided for by the Decision on extensions of time-limits on account of distance for persons having their habitual residence in Belgium.

43 Since its appeal was lodged on 29 April 1992 and the last day of the allowable period calculated in that way was 30 April 1992, the objection of inadmissibility for exceeding the time-limit raised by the respondents must be dismissed.

The merits of the Commission's appeal

44 A reading of the judgment under appeal shows that the reasoning of the Court of First Instance proceeds step by step, arriving at the conclusion that the contested decision must be declared non-existent after finding that some irregularities, such as breach of the principle of the inalterability of measures and lack of competence of the person establishing the measure, would in themselves justify annulment of the contested decision on grounds of lack of competence and breach of essential procedural requirements.

45 The final declaration of the non-existence of the decision was itself made after the finding of yet another irregularity, failure to authenticate the measure in accordance with Article 12 of the Commission's Rules of Procedure. Since the consequences of such a declaration are more extensive and far-reaching than those of annulment, which was also envisaged by the Court of First Instance, it is appropriate to begin by examining the Commission's fourth plea which specifically concerns the declaration of non-existence.

46 The Commission submits that the Court was wrong in law in proceeding to a quite exceptional sanction, a declaration of non-existence, on the basis merely of findings of irregularity tainting the contested decision, which it considered to be particularly serious. In arriving at that result, it overlooked in its reasoning the other essential requirement for the application of the doctrine of the non-existence of administrative acts, as developed in the national law of the various Member States, namely that such irregularities should be immediately obvious, particularly to the addressees of such acts.

47 Relying on the judgment of the Court of Justice in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, the Commission points out that the irregularities in question, assuming that they may be regarded as such, concern only the internal procedure for drawing up the contested decision, so that its addressees could not have identified them merely by reading the text which had been duly notified to them. The alleged irregularities were therefore not sufficiently obvious for the contested decision to be treated as non-existent.

48 It should be remembered that acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

49 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 that 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.

50 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.

51 In this case, the Court of First Instance did not question that at the meeting of 21 December 1988, as is shown by the relevant minutes, the Commission did decide to adopt the operative part of a decision as set out in those minutes, whatever defects may have affected that decision.

52 In any event, whether considered in isolation or even together, the irregularities of competence and form found by the Court of First Instance, which relate to the procedure for the adoption of the Commission's decision, do not appear to be of such obvious gravity that the decision must be treated as legally non-existent.

53 The Court of First Instance therefore erred in law in declaring Decision 89/190 non-existent.

54 The judgment under appeal must consequently be set aside.

55 According to the second sentence of Article 54 of the Statute (EEC) of the Court of Justice, if the decision of the Court of First Instance is set aside, the Court of Justice may itself give final judgment in the matter where the state of the proceedings so permits. The Court considers that this is the case.

The actions for annulment brought before the Court of First Instance against the Commission's decision

56 In their actions for annulment, the applicant companies raised a number of pleas which may be summarized as follows: the pre-litigation procedure was defective in a number of ways; the contested decision was not reasoned or was insufficiently reasoned; the rights of the defence were not observed; the evidential basis adopted by the Commission was questionable; the contested decision was contrary to Article 85 of the Treaty and to general principles of Community law; the decision was in breach of limitation rules; it was vitiated by misuse of power; and the fines imposed were unlawful.

57 In support, in particular, of the plea that the contested decision was not reasoned or was insufficiently reasoned, the applicant companies submitted, in substance, that the reasons for the decision which had been notified to them probably differed on several points, some vital, from the decision adopted by the Commissioners at their meeting on 21 December 1988. Their belief was based, *inter alia*, on the fact that a considerable period of time elapsed between the adoption of the decision and its notification and that the typographical appearance of the notified decision clearly showed that vital passages had been added or corrected.

58 From the Commission's arguments in its defence some applicants also concluded that the decision had not been adopted in two of the languages which were bind-

ing, namely Dutch and Italian, since only drafts in English, French and German had been submitted to the college of Commissioners.

59 In those circumstances, at the request of the applicant companies, the Court of First Instance, considering that the evidence of irregularities which had been provided to it was serious and convincing, ordered the Commission to produce documents relating to the adoption of the contested decision, which it had itself offered to do. Having regard to the documents produced by the Commission, the applicants contended that it was not certain that the decision had been authenticated in accordance with the rules laid down in Article 12 of the Commission's Rules of Procedure. The Court then ordered the Commission to produce a certified copy of the original of the contested decision, which it was unable to do. In the final stage of their argument, the applicant companies contended that Article 12 of the Commission's Rules of Procedure had not been observed.

60 Although this plea was raised in its full form only in the course of the proceedings, it is still admissible by virtue of Article 48(2) of the Rules of Procedure of the Court of First Instance since it is based on matters of fact which came to light in the course of the procedure.

61 The substance of the plea so raised must therefore be examined.

62 As the Court of Justice held at paragraph 30 of its judgment in the *AKZO* case, cited above, the functioning of the Commission is governed by the principle of collegiate responsibility laid down in Article 17 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities (Journal Officiel 1967, 152, p. 2, hereinafter referred to as 'the Merger Treaty'), which has now been replaced by Article 163 of the EC Treaty. This provides that: 'The Commission shall act by a majority of the number of members

provided for in Article 10. A meeting of the Commission shall be valid only if the number of members laid down in its rules of procedure is present'.

63 In the same judgment the Court held (in paragraph 30) that the principle of collegiate responsibility so laid down was based on the equal participation of the Commissioners in the adoption of decisions, from which it followed in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted.

64 Compliance with that principle, and especially the need for decisions to be deliberated upon by the Commissioners together, must be of concern to the individuals affected by the legal consequences of such decisions, in the sense that they must be sure that those decisions were actually taken by the college of Commissioners and correspond exactly to its intention.

65 This is particularly so, as here, in the case of acts, expressly described as decisions, which the Commission finds it necessary to adopt under Articles 3(1) and 15(2)(a) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) with regard to undertakings or associations of undertakings for the purpose of ensuring observance of the competition rules and by which it finds an infringement of those rules, issues directions to those undertakings and imposes pecuniary sanctions upon them.

66 Such decisions must state the reasons on which they are based, in accordance with Article 190 of the EEC Treaty. It is settled law that this requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can

exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied.

67 The operative part of such a decision can be understood, and its full effect ascertained, only in the light of the statement of reasons. Since the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, it is for the college of Commissioners alone to adopt both the operative part and the statement of reasons, in accordance with the principle of collegiate responsibility.

68 As the Court held in its judgment in the *Battery Hens* case, cited above, that means that only simple corrections of spelling and grammar may be made to the text of an act after its formal adoption by the college of Commissioners, any further alteration being the exclusive province of the college.

69 It follows that it is impossible to accept the Commission's argument that in the decision-making process the college of Commissioners can confine itself to making clear its intention to take certain action without having to become involved in the drafting and finalization of the act giving effect to its intention.

70 Since the intellectual component and the formal component form an inseparable whole, reducing the act to writing is the necessary expression of the intention of the adopting authority.

71 It must be added that, unlike decisions ordering undertakings to submit to an investigation, which, as a form of preparatory inquiry, may be regarded as straightforward measures of management (see the judgment in *AKZO Chemie* v *Commission*, cited above, at paragraph 38), decisions finding infringement of Article 85 cannot, without offending against the principle of collegiality, be the subject of a delegation of authority, under Article 27 of the Commission's Rules of Procedure, to the Commissioner responsible for competition policy.

72 As far as the Rules of Procedure are concerned, Article 16 of the Merger Treaty (a provision which has now been replaced by Article 162(2) of the EC Treaty) requires the Commission to adopt its rules of procedure so as to ensure that both it and its services operate in accordance with the provisions of the treaties and that those rules are published.

73 It follows that the Commission has an obligation, *inter alia*, to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty.

74 For that purpose, the first paragraph of Article 12 of the Rules of Procedure in force at the relevant time provided that: 'Acts adopted by the Commission, at a meeting or by written procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary'.

75 Far from being, as the Commission claims, a mere formality for archival purposes, the authentication of acts provided for in the first paragraph of Article 12 of its Rules of Procedure is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding. Thus, in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author.

76 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.

77 In the present case, it is not disputed that, on its own admission, the Commission acted in breach of the first paragraph of Article 12 of its Rules of Procedure by failing to authenticate the contested decision in the way provided for by that article.

78 The decision must therefore be annulled for infringement of essential procedural requirements without it being necessary to examine the other pleas raised by the applicants.

The claims for damages

79 The claim for damages made by Montedison SpA must be dismissed since that company has not submitted in support of its claim any argument or calculated assessment, even approximative, of the alleged damage.

Costs

80 Article 122 of the Rules of Procedure provides that where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. According to Article 69(2), applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission's pleas have failed in all essential aspects, it must be ordered to bear its own costs and to pay all of the costs incurred by the respondents, both in the proceedings before the Court of First Instance and in the proceedings before this Court.

On those grounds,

THE COURT

hereby:

1. **Sets aside the judgment of the Court of First Instance delivered on 27 February 1992 in 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;**

2. **Annuls Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV-31.865, PVC);**

3. **Orders the Commission to bear its own costs and to pay the whole of the costs incurred by the respondents, both in the proceedings before the Court of First Instance and in the proceedings before the Court of Justice.**

Due Mancini Moitinho de Almeida

Diez de Velasco Edward Kakouris

Joliet Schockweiler Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 15 June 1994.

R. Grass

Registrar

O. Due

President