JUDGMENT OF THE COURT (Sixth Chamber)

8 July 1999 *

In Case C-200/92 P,

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

appellant,

supported by

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

intervener in the appeal,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 10 March 1992 in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, seeking to have that judgment set aside,

* Language of the case: English.

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Sixth Chamber),

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

Advocate General: G. Cosmas,

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

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1997,

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

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 15 May 1992, Imperial Chemical Industries plc ('ICI') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 10 March 1992 in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021 ('the contested judgment').

Facts and procedure before the Court of First Instance

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

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

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

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

5 ICI was one of the big four producers which supplied the market in 1977, with a market share on the West European market of between 10.6 and 11.4%.

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

7 At the end of that procedure, the Commission adopted the Polypropylene Decision, in which it found that ICI had infringed Article 85(1) of the Treaty by participating, with other undertakings, and in ICI's case from mid-1977 until at

least November 1983, in an agreement and concerted practice originating in mid-1977 by which the producers supplying polypropylene in the territory of the EEC:

— contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;

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

— agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings and from late 1982 a system of 'account management' designed to implement price rises to individual customers;

— introduced simultaneous price increases implementing the said targets;

— shared the market by allocating to each producer an annual sales target or 'quota' (1979, 1980 and for at least part of 1983) or in default of a definitive agreement covering the whole year by requiring producers to limit their sales in each month by reference to some previous period (1981, 1982) (Article 1 of the Polypropylene Decision).

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

9 ICI was fined ECU 10 000 000, or GBP 6 447 970 (Article 3 of the Polypropylene Decision).

10 On 6 August 1986, ICI lodged an action for annulment of that decision before the Court of Justice which, by order of 15 November 1989, referred the case to the Court of First Instance, pursuant to Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

11 Before the Court of First Instance, ICI sought annulment of the Polypropylene Decision in so far as it concerned ICI, and cancellation or reduction of the fine imposed on it. It also asked the Court of First Instance, if ICI were obliged to pay the fine without being able to suspend payment, to order the Commission to repay to ICI the fine paid or the appropriate proportion thereof, together with interest at the rate of 1% over the lending rate set by the bank, referred to in Article 4 of the Polypropylene Decision, into which it had to pay the fine. ICI lastly asked that the Commission be ordered to pay its costs.

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

13 By a letter lodged at the Registry of the Court of First Instance on 4 March 1992, ICI asked the Court of First Instance to reopen the oral procedure and order measures of inquiry as a result of the statements made by the Commission at the hearing before it in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 ('the *PVC* judgment of the Court of First Instance') and at the press conference held by the Commission on 28 February 1992 after judgment was delivered in those cases.

The contested judgment

14 In dealing with the request to reopen the oral procedure, referred to in paragraph 399, having again heard the views of the Advocate General, the Court of First Instance considered, at paragraph 400, that it was not necessary to order the reopening of the oral procedure in accordance with Article 62 of its Rules of Procedure or to order measures of inquiry as requested by ICI.

15 At paragraph 401 of the grounds of the judgment the Court of First Instance held as follows:

'It must be stated that the judgment delivered in the abovementioned cases (judgment of 27 February 1992 in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315) does not in itself justify the reopening of the oral procedure in this case. The Court observes that a measure which has been notified and published must be presumed to be valid. It is thus for a person who seeks to allege the lack of formal validity or the non-existence of a measure to provide the Court with grounds enabling it to look behind the apparent validity of the measure which has been formally notified and published. In this case the applicants have not put forward any evidence to suggest that the measure notified and published had not been approved or adopted by the members of the Commission acting as a college. In particular, in contrast to the *PVC* cases (judgment in Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, cited above, paragraph 32 et seq.), the applicants have not put forward any evidence that the principle of the inalterability of the adopted measure was infringed by a

change to the text of the Decision after the meeting of the College of Commissioners at which it was adopted.'

16 The Court of First Instance reduced the amount of the fine imposed on the applicant in Article 3 of the Polypropylene Decision, setting the amount at ECU 9 000 000, or GBP 5 803 173. For the rest, it dismissed the application and ordered ICI to pay the costs.

The appeal

17 In its appeal ICI requests the Court to:

— set aside the contested judgment;

— give final judgment in this appeal by annulling the Polypropylene Decision and by ordering the Commission to pay ICI's costs in the proceedings before the Court of Justice and the Court of First Instance;

— in the alternative, refer the appeal back to the Court of First Instance on the issue of whether the Polypropylene Decision should be annulled, and to order the Commission to pay ICI's costs in that aspect of the matter.

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

— annul the contested judgment;

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

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

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

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

19 The Commission contends that the Court should:

— declare the appeal inadmissible in so far as it relates to the finding by the Court of First Instance that ICI had produced no evidence that the

Polypropylene Decision had been modified after its adoption and reject the appeal as unfounded as to the remainder;

— in the alternative, reject the appeal in its entirety as unfounded;

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

— reject the intervention as a whole as inadmissible;

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

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

20 In support of its appeal ICI puts forward pleas alleging breach of procedure and infringement of Community law, based on the fact that the Court of First Instance refused to reopen the oral procedure and to order the necessary measures of organisation and inquiry for establishing whether there were defects in the procedure by which the Polypropylene Decision was adopted which would entail its non-existence or warrant its annulment.

21 At the Commission's request and despite ICI's objection, by decision of the President of the Court of Justice of 28 July 1992 proceedings were stayed until 15 September 1994 to enable the appropriate conclusions to be drawn from the judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, 'the *PVC* judgment of the Court of Justice', which was delivered on the appeal against the *PVC* judgment of the Court of First Instance.

Admissibility of the intervention

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

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

24 The Commission also objects in particular to the admissibility of DSM's submission that the judgment of the Court of Justice should include provisions

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

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

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

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

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

29 It is true that in its written observations on DSM's statement in intervention, ICI withdrew some of its pleas in law in order to take account of the *PVC* judgment of the Court of Justice on the question of non-existence.

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

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

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

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

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

34 In support of its appeal, ICI, referring to paragraphs 399 to 401 of the grounds of the contested judgment, argues that, inasmuch as it held, on the one hand, that the Polypropylene Decision should not be annulled and, on the other hand, rejected ICI's request that the oral procedure be reopened and the necessary measures of organisation and inquiry ordered, the Court of First Instance committed an infringement of Community law and a breach of procedure adversely affecting ICI's interests, within the meaning of the first paragraph of Article 51 of the EC Statute of the Court of Justice.

35 ICI states that it never maintained that the *PVC* judgment of the Court of First Instance 'in itself' justified reopening the oral procedure before that Court. It states that reopening was justified by the Commission's explicit admission at the *PVC* hearing in the Court of First Instance and by various other statements attributed to the Commission by the press to the effect that all its recent decisions had been taken in the same way as in the *PVC* cases, in breach of Article 12 of the Commission's Rules of Procedure. The dismissal by the Court of First Instance of BASF's application for revision (T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591) can, moreover, be explained by the fact that BASF was appraised of the relevant facts prior to the expiry of the period allowed for an appeal to the Court of Justice against that judgment.

36 ICI challenges the contention of the Court of First Instance that the apparent validity of a notified and published measure can be reviewed only after the applicant has put forward grounds for doing so. According to ICI, the documents which were necessary to support its arguments relating to the means by which the Polypropylene Decision was adopted were not made available to it. It would therefore be unfair and contrary to the principles of equal treatment and legal certainty to prevent the validity of a decision from being challenged because those affected by it did not have the information to challenge it in time.

37 ICI points out that, inasmuch as it was effectively required to produce sufficient evidence to show that the Commission had committed an infringement, it has largely discharged that obligation. In that respect, the Commission's explicit statement to the effect that the prescribed procedures had not been complied with should have been sufficient. In the light of that admission, the Court of First Instance should not have rejected ICI's request that the oral procedure be reopened. The fact that in the *PVC* cases the Commission had sought to defend its practice gave reasonable grounds for suspicion that the Commission had acted in the same way when it took the earlier Polypropylene Decision.

38 ICI acknowledges that it has not been able to produce any evidence to show that the Commission had made changes to the text of the Polypropylene Decision after its adoption. It states, nevertheless, that the text of the decision transmitted to it did not indicate that there might have been subsequent changes to the text and that the absence of evidence is explained by the attitude of the Commission and of the Court of First Instance which did not allow ICI to make the relevant comparisons. In any event, the absence of evidence of changes to the texts should not have been fatal to the request to reopen the oral procedure in the Court of First Instance when the most serious infringement, the lack of notification, was admitted by the Commission itself.

39 Lastly, according to ICI, the Court of First Instance infringed Community law and acted in breach of its own procedures in that it wrongly considered the Polypropylene Decision to be valid, despite the existence of strong evidence to the

contrary; it thus failed in its duty to annul that decision; it also wrongly refused to stay the proceedings, to reopen the oral procedure and to order the necessary measures of organisation and inquiry; it therefore disregarded its legal obligation to raise of its own motion the matters referred to in ICI's request of 4 March 1992; lastly, it overstated the degree of evidence which it was incumbent upon an applicant to adduce in order to raise a point before the Court of First Instance and to have that point decided on the best evidence available.

40 DSM states that new developments have taken place in other cases before the Court of First Instance. They confirm that it is incumbent on the Commission to prove that it has followed its own essential procedural requirements and that, to clarify the issue, the Court of First Instance must, of its own motion or at the request of a party, order measures of inquiry in order to examine the relevant documentary evidence. In the '*Soda-Ash*' cases (T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847), the Commission contended that the Supplement to Reply lodged by ICI in those cases after the *PVC* judgment of the Court of First Instance contained no evidence that the Commission had infringed its Rules of Procedure, and that the request for measures of inquiry lodged by ICI amounted to a new plea in law. The Court of First Instance nevertheless put questions to the Commission and ICI as to the conclusions to be drawn from the *PVC* judgment of the Court of Justice and also asked the Commission, by reference to paragraph 32 of the *PVC* judgment of the Court of Justice, whether it was able to produce extracts from the minutes and the authenticated texts of the contested decisions. Following other developments in the procedure, the Commission finally admitted that the documents produced as authenticated were only authenticated after the Court of First Instance had ordered their production.

41 According to DSM, in the '*Low-density polyethylene* ("*LdPE*")' cases (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729), the Court of First Instance also ordered the Commission to produce a certified copy of the original version of the contested decision. The Commission admitted that authentication had not taken place at the meeting at which the College of

Commissioners adopted that decision. DSM observes that the procedure for authenticating acts of the Commission must therefore have been introduced after March 1992. It follows that the same defect of lack of authentication must affect the Polypropylene Decision.

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

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

44 DSM considers that the Commission's defence in this case is based on procedural arguments that are irrelevant, given the content of the contested judgment, which in essence turns on the burden of proof. According to DSM, if, in the *Polypropylene* cases, the Commission has not itself produced evidence as to the

regularity of the procedures followed, that is because it is not in a position to show that it complied with its own Rules of Procedure.

45 The Commission points out, first, that since the question of the non-existence of the decision no longer arises after the *PVC* judgment of the Court of Justice, the appeal must be confined to the question whether the Court of First Instance should have annulled the Polypropylene Decision. It also follows that it is for the parties to produce cogent evidence of the alleged defects, that they must do so at the proper time, and the proper time is in the application, unless the matters in question come to light during the procedure.

46 According to the Commission, ICI is complaining that the Court of First Instance did not simply reproduce the *PVC* judgment of the Court of Justice as though it were of universal application. In the *PVC* cases, however, contrary to the situation in the *Polypropylene* cases, some of the parties had pointed out in their original application the various discrepancies which had come to light during the proceedings. The Court of First Instance has already confirmed such an analysis in Cases T-34/92 *Fiatagri and New Holland Ford* v *Commission* and T-35/92 *John Deere* v *Commission*, cited above.

47 The Commission considers that, in view of the *PVC* judgment of the Court of Justice, there is no ground for annulment in this case either. In the procedure giving rise to the contested judgment, the appellant did not satisfy any of the procedural requirements mentioned by the Court of First Instance in that judgment and confirmed in the *PVC* judgment of the Court of Justice. The supposed discrepancies existed by definition in April 1986, so that the appellant should have raised them at the outset, rather than at a late stage. Although Article 62 of the Rules of Procedure of the Court of First Instance does not lay it down explicitly, reopening of the oral procedure, like revision of a judgment, is conditional on discovery of a new and significant fact, since otherwise Article 48(2) of the Rules of Procedure would be deprived of its effectiveness. The appellant claims that it does not rely on the *PVC* judgment of the Court of First Instance but on the statements made by the Commission during the PVC hearings before the Court of First Instance, which were actually made in November 1991. However, the fact that the request to reopen the oral procedure was lodged only after the *PVC* judgment of the Court of First Instance shows that

the appellant is relying on that judgment as a new fact and that, even if its reliance on the statements in November and December 1991 were well founded, the application to reopen came too late.

48 The Commission then points out that the issue of the existence of a new fact has already been examined in the order in *DSM* v *Commission*, cited above. The Court of First Instance rightly pointed out in particular that the supposed discrepancies in the texts existed in 1986 and could have been brought up at that time. Furthermore, the *PVC* judgment of the Court of First Instance cannot constitute a new fact, since a judgment is not a fact, but the application of law to facts already known to the court and to the parties. The same reasoning enables the argument that the Court of First Instance should have reopened the procedure to be rejected.

49 In so far as ICI complains that the Court of First Instance wrongly concluded that there was no proof of a supposed procedural irregularity, the Commission contends that the appeal is partially inadmissible. ICI expressly admits that it never produced any evidence of changes allegedly made to the Polypropylene Decision after its adoption. In the light of that admission, paragraph 401 of the contested judgment is not, according to the Commission, open to criticism and the appeal contains no point of law in that respect.

50 The Commission states that the appeal is unfounded in so far as it criticises the Court of First Instance as regards proof of defects relating to the adoption of the Polypropylene Decision. To claim that the Court of First Instance should have examined the possibility that the contested decision was vitiated by such defects is to distort the presumption of the validity of Community acts, confirmed by the Court in the *PVC* judgment, and its necessary consequence that it is only when the applicant raises serious doubts as to the regularity of the procedure that there can be any question of inquiring into such allegations and evidence supporting them.

51 Although the contested judgment does not refer expressly to Article 48(2) of the Rules of Procedure of the Court of First Instance, it was based in part on the fact that the request that the procedure be reopened and for measures of inquiry had

been made late without good reason. Since it is not permitted to produce evidence at a late stage without good reason, *a fortiori* it is unacceptable that a party request the Court of First Instance at a late stage to order measures of inquiry in order to find the evidence which the party is not able to provide. Lastly, the Court of First Instance cannot be criticised for having required too high a standard of evidence when such a requirement was easily satisfied in the *PVC* cases.

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

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

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

55 The pleas in law put forward by ICI must be examined together. The infringement of Community law alleged by ICI relates to the infringements that the Court of

First Instance is alleged to have committed in refusing to reopen the procedure and order measures of inquiry, and it therefore overlaps with the plea alleging breach of procedure.

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

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

58 It follows that, in so far as they challenge the appraisal by the Court of First Instance of the evidence placed before it in connection with the request that the oral procedure be reopened, the appellant's complaints cannot be examined in an appeal.

59 On the other hand, the Court of Justice must examine the question whether the Court of First Instance committed an error of law in refusing the applicant's request to reopen the oral procedure and order measures of inquiry.

60 As regards the request for measures of inquiry, the case-law of the Court (see, in particular, Case 77/70 *Prelle* v *Commission* [1971] ECR 561, paragraph 7, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 53) makes it clear that, if made after the oral procedure is closed, such a request may be admitted only if it

relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure.

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

62 In this case, the request for the oral procedure to be reopened and measures of inquiry ordered was based on the *PVC* judgment of the Court of First Instance and on statements made by the Commission's Agents at the hearing in the *PVC* cases, or at a press conference which took place after that judgment was delivered.

63 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.

64 Secondly, even when submitting its application, the applicant was in a position to identify the documents sought and to provide the Court of First Instance with at least minimum evidence of the expediency of those measures of inquiry or measures of organisation of procedure for the purposes of the proceedings, in order to prove that the Polypropylene Decision had been altered after its adoption by the College of the Members of the Commission, as some of the applicants in

the *PVC* cases had done (see, to that effect, the judgment in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 93 and 94).

65 Contrary to ICI's submission drawn from the order in *BASF* v *Commission*, cited above, the delay in presenting factual evidence which could have led the Court of First Instance to order measures of inquiry constituted an additional reason for rejecting its request and does not contradict the reasoning set out by the Court of First Instance in the contested judgment.

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

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

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

69 It is clear in particular from paragraphs 48 to 50 of the *PVC* judgment of the Court of Justice that acts of the Community institutions are in principle presumed

to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

70 However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

71 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.

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

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

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

Costs

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

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders Imperial Chemical Industries plc (ICI) to pay the costs;

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

Kapteyn Hirsch Mancini

Murray Ragnemalm

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber