JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
6 April 1995 *

In Joined Cases,

T-80/89,

BASF AG, whose registered office is in Ludwigshafen (Germany), represented by Ferdinand Hermanns and Karl Kaiser, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

T-81/89,

Monsanto Company, whose registered office is in St Louis, Missouri (United States of America), represented by Clive Stanbrook QC and John Ratliff, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

T-83/89,

NV DSM and DSM Kunststoffen BV, whose registered offices are in Heerlen (Netherlands), represented by Inne G. F. Cath, of the Hague Bar, with an address for service in Luxembourg at the Chambers of Dupong and Konsbruck, 14A Rue des Bains,

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

T-87/89,

Orkem SA, whose registered office is in Paris, represented by Dominique Voillemot and Joëlle Salzmann, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

T-88/89,

Bayer AG, whose registered office is in Leverkusen (Germany), represented by Oliver Axster and Holger Wissel, Rechtsanwälte, Düsseldorf, Michel Waelbroeck, Denis Waelbroeck and Alexandre Vandencasteele, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

T-90/89,

Atochem SA, whose registered office is in Puteaux (France), represented by Xavier de Roux and Charles-Henri Léger, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

T-93/89,

Den Norske Stats Oljeselskap AS (Statoil), whose registered office is in Stavanger (Norway), represented by Graham Child, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

T-95/89,

Enichem SpA, whose registered office is in Milan (Italy), represented by Mario Siragusa, of the Rome Bar, Giuseppe Scassellati Sforzolini, of the Bologna Bar, and Gianfranco Arcidiacono, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

T-97/89,

Hoechst AG, whose registered office is in Frankfurt-am-Main (Germany), represented by Hans Hellmann and Hans-Joachim Voges, Rechstanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

T-99/89,

Imperial Chemical Industries plc (ICI), whose registered office is in London, represented by David Vaughan QC and David Anderson, Barrister, of the Bar of England and Wales, instructed by Victor White, Richard Coles and Andrew Ransom, Solicitors, with an address for service in Luxembourg at the Chambers of Dupong and Konsbruck, 14A Rue des Bains,

T-100/89,

Neste Oy, whose registered office is in Espoo (Finland), represented by Georges van Hecke, Avocat with right of audience before the Belgian Court of Cassation, and Gerwin Van Gerven, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 11 Rue Goethe,

T-101/89,

Repsol Química SA, whose registered office is in Madrid, represented by José Pérez Santos, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

T-103/89,

Shell International Chemical Company Ltd., whose registered office is in London, represented by Kenneth Parker QC, of the Bar of England and Wales, instructed by John Osborne, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

T-105/89,

Montedison SpA, whose registered office is in Milan (Italy), represented by Giuseppe Celona, Avvocato with right of audience before the Italian Court of Cassation, Giorgio Aghina, of the Milan Bar, and Piero Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe II,

T-107/89,

Chemie Holding AG, whose registered office is in Linz (Austria), represented by Otfried Lieberknecht, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 22 Côte d'Eich,

T-112/89,

The Dow Chemical Company, whose registered office is in Midland, Michigan (United States of America), represented by Arved Deringer, Rechtsanwalt, Cologne, Pierre Bos, of the Rotterdam Bar, and José Pérez Santos, of the Madrid

Bar, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

applicants,

v

Commission of the European Communities, represented by Julian Currall, Berend Jan Drijber and Francisco Enrique González Díaz, of its Legal Service, acting as Agents, assisted by Éric Morgan de Rivery, of the Paris Bar, Renzo Morresi, of the Bologna Bar, Nicholas Forwood QC, of the Bar of England and Wales, and Alexander Böhlke, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the office of Georgios Kremlis, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) (OJ 1989 L 74, p. 21),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, A. Saggio, C. P. Briët and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 16 June 1992,

gives the following

Judgment

The factual background, the contested decision and the general course of the procedure

1 As a result of investigations carried out in the polypropylene sector on 13 and 14 October 1983, pursuant to decisions adopted under Article 14 of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty, OJ, English Special Edition 1959-1962, p. 87), the Commission suspected the possibility of an infringement of Article 85 of the EEC Treaty (hereinafter 'the Treaty') in the low-density polyethylene (hereinafter 'LdPE') sector and opened a file concerning it; it also undertook various investigations at the premises of the undertakings concerned and sent them several requests for information.

2 On 24 March 1988 the Commission instituted, on its own initiative, a proceeding under Article 3(1) of Regulation No 17 against 18 LdPE producers, namely Atochem SA (hereinafter 'Atochem'), BASF AG (hereinafter 'BASF'), BP Chemicals Ltd (hereinafter 'BP Chemicals'), Bayer AG (hereinafter 'Bayer'), Chemie Holding AG (hereinafter 'Chemie Holding'), The Dow Chemical Company (hereinafter 'Dow Chemical'), DSM NV and DSM Kunststoffen BV (hereinafter

'DSM'), Exxon Chemicals International Inc. (hereinafter 'Exxon Chemicals International'), Enichem SpA (hereinafter 'Enichem'), Hoechst AG (hereinafter 'Hoechst'), Imperial Chemical Industries plc (hereinafter 'ICI'), Monsanto Company (hereinafter 'Monsanto'), Montedison SpA (hereinafter 'Montedison'), Neste Oy (hereinafter 'Neste'), Orkem SA (hereinafter 'Orkem'), Repsol Química SA (hereinafter 'Repsol Química'), Shell International Chemical Company Ltd (hereinafter 'Shell International Chemical Company'), and Statoil den Norske Stats Oljeselskap AS (hereinafter 'Statoil'). On 5 April 1988 the Commission sent each of those undertakings the statement of objections provided for in Article 2(1) of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), in which it stated that the 18 undertakings mentioned had participated in 'a basic agreement, executed and performed in a complex of agreements and/or concerted practices amounting to a cartel by which, from about 1974 to a date unknown between November 1984 and up to or including the present time, the producers of the bulk thermoplastic LdPE supplying the EEC market met in regular sessions in order to fix "target" and/or "minimum" prices, agree quotas or volume "targets", coordinate their market activities and monitor the implementation of the said collusive agreements'.

3 All the addressees of the statement of objections submitted written observations during June 1988. Following the reply from Exxon Chemicals International to the Statement of Objections, the Commission discontinued all proceedings against it. All the other undertakings to which the Statement of Objections was addressed, except for Shell International Chemical Company Limited, requested a hearing, which was held in Brussels from 12 to 16 November 1988 and on 19 September 1988. On 1 December 1988 the Advisory Committee on Restrictive Practices and Dominant Positions delivered its opinion on the Commission's draft decision.

4 On 17 March 1989 'Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE)' was published in the *Official Journal of the European Communities* (OJ 1989 L 74,

p. 21, hereinafter 'the Decision'). The Decision had been notified to the undertakings concerned in February 1989. The operative part of the Decision as notified and published contains *inter alia* the following three articles:

'*Article 1*

Atochem SA, BASF AG, BP Chemicals Ltd, Bayer AG, Chemie Holding AG, The Dow Chemical Company, DSM NV, Enichem SpA, Hoechst AG, Imperial Chemical Industries PLC, Monsanto Company, Montedison SpA, Neste Oy, Orkem SA (formerly CdF Chimie SA), Repsol Química SA, Shell International Chemical Co. Ltd, Statoil — Den Norske Stats Oljeselskap AS infringed Article 85 of the EEC Treaty, by participating (for the periods identified in this Decision) in an agreement and/or concerted practice originating in about September 1976 by which the producers supplying LdPE in the Community took part in regular meetings in order to fix target prices and target quotas, plan concerted initiatives to raise price levels and monitor the operation of the said collusive arrangements.

Article 2

The undertakings named in Article 1 which are still involved in the LdPE sector in the Community shall forthwith bring the said infringement to an end (if they have not already done so) and shall henceforth refrain in relation to their LdPE operations from any agreement or concerted practice which may have the same or similar object or effect, including any exchange of information of the kind normally covered by business secrecy by which the participants are directly or indirectly informed of the output, deliveries, stock levels, selling prices, costs or investment plans of other individual producers, or by which they might be able to monitor adherence to any express or tacit agreement or to any concerted practice covering prices or market-sharing inside the Community. Any scheme for the exchange of

general information to which the producers subscribe concerning the LdPE sector shall be so conducted as to exclude any information from which the behaviour of individual producers can be identified, and in particular the undertakings shall refrain from exchanging between themselves any additional information of competitive significance not covered by such a system.

Article 3

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

(i) Atochem SA: a fine of ECU 3 600 000;

(ii) BASF AG: a fine of ECU 5 500 000;

(iii) BP Chemicals Ltd: a fine of ECU 750 000;

(iv) Bayer AG: a fine of ECU 2 500 000;

(v) Chemie Holding AG: a fine of ECU 500 000;

(vi) Dow Chemical Company: a fine of ECU 2 250 000;

(vii) DSM NV: a fine of ECU 3 300 000;

(viii) Enichem SpA: a fine of ECU 4 000 000;

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

(x) Imperial Chemical Industries plc: a fine of ECU 3 500 000;

(xi) Montedison SpA: a fine of ECU 2 500 000;

(xii) Monsanto Company: a fine of ECU 150 000;

(xiii) Neste Oy: a fine of ECU 1 000 000;

(xiv) Orkem SA: a fine of ECU 5 000 000;

(xv) Repsol Química SA: a fine of ECU 100 000;

(xvi) Shell International Chemical Co. Ltd: a fine of ECU 850 000;

(xvii) Statoil — Den Norske Stats Oljeselskap AS: a fine of ECU 500 000.'

5 The 17 undertakings concerned by the Decision, except for BP Chemicals, brought actions for its annulment before the Court of Justice between 30 March 1989 and 10 May 1989. Pursuant to Article 3(1) and Article 14 of 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. 2), the Court of Justice referred the cases to the Court of First Instance by orders of 15 November 1989.

6 By order of 8 December 1989, the Court of First Instance (Second Chamber) reserved for the final judgment its decision on the Commission's objection that the application from Shell International Chemical Company in Case T-103/89 was inadmissible.

7 By way of measure of organization of procedure, on 3 December 1991 the Court asked the Commission to produce the minutes of the meeting of the college of Commissioners of 21 December 1988 and the text of the Decision in the form adopted by the college of Commissioners.

8 On 11 December 1991 a first meeting was held in preparation for the hearing, pursuant to Article 64(3) of the Rules of Procedure.

9 When the written procedure was closed, 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 were joined for the purposes of the oral procedure by order of 22 January 1992 of the President of the Second Chamber of the Court of First Instance.

10 By way of preparatory measure, on 10 March 1992 the Court ordered the Commission to produce, in the language versions in which it was adopted, a copy,

certified as conforming to the original, of the Commission decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE), as adopted by the college of Commissioners at its meeting of 21 December 1988 and authenticated in accordance with the Commission's Rules of Procedure.

11 By way of measure of organization of procedure, on 2 April 1992 the Court asked the applicants to submit their observations on the documents produced by the Commission in response to the measure of inquiry of 10 March 1992, having regard to the judgment of the Court of First Instance 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 and Others* v *Commission* [1992] ECR II-315 (the 'PVC case').

12 On 15 May 1992, a second meeting preparatory to the hearing was held.

13 The hearing was held on 16 June 1992.

14 After hearing the parties' submissions on this point at the hearing, the Court considers that all the cases should be joined for the purposes of the judgment.

Forms of order sought by the parties

15 The applicants claim in their applications that the Court should:

— primarily, annul the Commission decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) and, in the alternative, cancel or reduce the fine imposed by Article 3 of that decision;

— order the Commission to pay the costs.

In addition, Montedison claims that the Commission should be ordered to reimburse it in full for the costs incurred during the administrative procedure and to make good all the damage which it sustained as a result of the implementation of the Decision.

16 The Commission contends that the Court should:

— dismiss the application by Shell International Chemical Company as being out of time and hence inadmissible;

— dismiss the other applications as unfounded;

— order the applicants to pay the costs.

17 In addition to their initial claims, as set out in their original applications, the applicants claim, in the observations submitted by them in response to the request from the Court of 2 April 1992, that the Court should:

— declare that the act notified to the applicants and published in the *Official Journal of the European Communities* of 17 March 1989 (OJ 1989 L 74, pages 21 to 44) entitled 'Commission decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) (89/191/EEC)' is non-existent;

— in the alternative, declare that the abovementioned legal act is null and void;

— order the Commission to pay the costs.

The measures of organization of procedure and preparatory measures ordered by the Court

A — *The written arguments of the parties which led the Court to adopt the measure of organization of procedure of 3 December 1991*

18 In part A(IV) of its application under the heading 'Breach of the obligation to state the reasons on which the contested decision is based when it is adopted', BASF, referring to the judgment of the Court of Justice in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905 (the 'Laying hens case'), claims that under Article 190 of the Treaty the Commission is required, when taking a decision, to adopt the statement of the reasons which form an integral part of it. From this, the applicant infers that a decision is void where the reasons for it are not stated or where the reasons are insufficient or incomplete at the time of its adoption or where the reasons are altered after adoption of the decision.

19 The applicant observes that in this case the notified Decision is dated 21 December 1988 and is accompanied by a covering letter dated 5 January 1989 signed 'For the Commission, Peter Sutherland, Member of the Commission'. However, it states that on 21 December 1988 the Commission sent it a telex message in which it claimed to have adopted a decision on 22 December 1988. Whilst not ruling out the possibility that this was a clerical error, the applicant argues that on 21 December 1988 the statement of reasons for the decision was either non-existent or different from that appearing in the notified Decision. In support of its allegations the applicant claims that, in reply to its request that the Decision be notified to it, which was made between 21 December 1988 and 3 February 1989, the date of notification, Commission staff stated that the German text of the Decision was not yet ready and that consequently such notification was not possible. According to the applicant, the time which elapsed between the adoption of the Decision and its notification indicates that the statement of reasons contained in the Decision was re-drafted. In the applicant's view, it follows that the Decision is void.

20 Having observed that the Commission states that the Decision was adopted on the basis of the texts drawn up in English, French and German, the applicant maintains, in its reply, that both under the rules on the division of powers conferred on the Community institutions and on a proper construction of Article 235 of the Treaty, the Commission was not empowered to authorize the Member responsible for competition to adopt the text of the decision in the other authentic languages. In order to clarify all those points, its asks the Court to direct that the Commission produce the drafts of the Decision of 21 December 1988 and make them available to the parties.

21 In its application, Bayer infers from the time which elapsed between the date of adoption of the Decision, which fell shortly before the end of the term of office of the competent Member of the Commission, and its notification, on 10 February 1989, that the statement of the reasons on which the Decision was based was not yet ready by 21 December 1988. The applicant considers that the statement of reasons forms an integral part of a decision and that one of the preconditions for the

validity of a decision adopted under Articles 3 and 15 of Regulation No 17 is that it must be adopted as a whole, thus containing both a statement of reasons and an operative part. The applicant adds that once adopted, the reasons on which a decision is based may no longer be amended, even if amendments appear necessary. Referring to the judgment in *United Kingdom* v *Council*, cited above, the applicant maintains that an act of the Commission is void if the reasons on which it is based are not settled definitively when it is adopted. Therefore, the applicant suggests that the Commission be ordered to produce the draft decision as adopted by the college of Commissioners.

22 In its application Atochem wonders, in view of the time that elapsed between the telex message announcing the Decision and the notification thereof, whether the text notified in fact corresponds to the text decided on by the Commission.

23 Enichem claims in its application that a considerable period elapsed between the adoption of the Decision and its notification; consequently, the notified and published text may not correspond to the adopted text with the result that the decision notified to the parties would be void. Enichem asks the Court to order the Commission to produce the text in the Commission's working language on the basis of which it adopted the Decision of 21 December 1988. Enichem claims further that the Decision was adopted before the final minutes relating to the hearing of the applicants by the Commission were drawn up on 13 February 1989. Neither the Advisory Committee, nor the full Commission, nor the Member of the Commission responsible for competition can therefore have had knowledge of the definitive text of the minutes of the hearing, with the result that the hearing by the Commission was rendered meaningless.

24 Hoechst states in its application and reply that the statement of reasons for the Decision provided for in Article 190 of the Treaty should have set out clearly the main factual and legal considerations supporting the Decision. Moreover, that

statement should have existed at the time when the Decision was adopted. It is, in the applicant's view, incompatible with Article 190 of the Treaty to make subsequent amendments to that statement going beyond simple corrections of spelling (see the judgment in *United Kingdom* v *Council*). The applicant considers that it has grounds for believing that those principles have been infringed in this case. It also observes that on 21 December 1988 it received a telex message from the Commission containing the operative part of the Decision but not the statement of reasons for it and referring to a Decision of 22 December 1988. It considers that, in view of the information which it has received from other undertakings which were also addressees of the Decision, it is justified in expressing serious doubts as to whether the Decision was adopted on the basis of a complete proposal for a decision containing the necessary statement of reasons in the authentic language. Consequently, the applicant claims that the Commission should be ordered to produce to the Court the proposal for a decision on the basis of which the Decision was adopted on 21 December 1988. It infers from the Commission's defence that no decision was adopted in Dutch, Italian or Spanish. According to the applicant, the Decision should have been adopted in each of the addressees' languages. Consequently, it puts to the Court 'the question whether the Commission decision did not have to be adopted on the basis of the relevant texts'. Moreover, having regard to the statement of the facts made by the Commission in its defence, it raises the question whether the Member of the Commission responsible for competition could validly adopt or did validly adopt the decision in the other authentic languages, since his term of office expired on 5 January 1989, that is to say 11 days before the translations were submitted to the Secretariat-General of the Commission. It concludes that 'the Decision, which should have been adopted in the form of a single decision with respect to all the addressees, is open to challenge in its entirety'.

25 Chemie Holding, for its part, claims, also in reliance on the judgment in *United Kingdom* v *Council*, that, by virtue of Article 190 of the Treaty, the statement of reasons on which a decision is based forms an integral part of it, whereas in the present case the definitive version of the statement of reasons was not yet available on 21 December 1988, there being only a draft prepared by the rapporteur which was subsequently amended and translated into German. Therefore, the applicant considers that the Commission did not validly adopt the Decision.

26 In reply to those arguments the Commission states in its defence and rejoinder that this plea, alleging defects vitiating the procedure for adoption of the Decision, is entirely unfounded and is not supported by any serious evidence; it claims that the proposals for the Decision were submitted for deliberation by the college of Commissioners in six languages (Dutch, English, French, German, Italian and Spanish). It is apparent from the minutes of meeting No 945 of the Commission that the Decision was adopted in three languages, namely English, French and German, and that the college of Commissioners entrusted the Member responsible for competition with the task of adopting the Decision in the other authentic languages. According to the Commission, the delegation of such authority is in conformity with Article 27 of the Commission's Rules of Procedure, in the version then in force, as confirmed by the Court of Justice in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585 (at paragraph 40). According to the Commission, such authority necessarily covers the requisite linguistic harmonization. Following the deliberations of the college of Commissioners the Decision was translated into the three official languages in which it was not yet available, namely Danish, Greek and Portuguese. Those translations, it states, were submitted to the Secretariat-General on 16 January 1989, the date on which the various versions of the Decision, available in all the official languages of the Community, were submitted to the lawyer-linguists in order to ensure their uniformity. The work of harmonizing the language versions was itself completed at the end of January 1989. The Commission states that it is in a position to produce to the Court, if the latter so desires, the documents referred to in its pleadings. It adds that the delegation of authority was not to Mr P. Sutherland, designated by name, but to the Member of the Commission responsible for competition.

27 In the light of those conflicting written submissions the Court considered it necessary, in order to rule on the pleas put forward by the applicants, to compare the measure notified to the applicants and published in the *Official Journal of the European Communities* with the measure adopted. In view of this and also of the Commission's offer to produce evidence, the Court, exercising its power to adopt measures of inquiry (see the judgment in *AKZO Chemie*, cited above), invited the Commission on 3 December 1991, by way of measures of organization of procedure, to produce the minutes of the meeting of the college of Commissioners held on 21 December 1988 and the text of the Decision as adopted by the college of Commissioners.

28 In Annexes 4 and 5 to its response to the measure of organization of procedure, which was lodged at the Registry of the Court of First Instance on 10 February 1992, the Commission produced:

(a) pages 41 to 43 of the minutes, drawn up in French, of meeting No 945 of the college of Commissioners of 21 December 1988 (Document COM(88) PV 945 final). Those minutes are accompanied by a 'cover page' from which it appears, first, that pages 41 to 43 are included in Part I of the minutes of the meeting, which comprise 60 pages, and, secondly, that the minutes were approved by the college of Commissioners on 22 December 1988. That first page bears the signatures of the President and Secretary-General of the Commission. The copy produced is certified as conforming to the original by the Secretary-General of the Commission and is stamped with the Commission's emblem;

(b) an extract from a document (paragraph 15 of document SEC (88) 2033, OJ 945) dated 19 December 1988, entitled 'Memorandum to the members of the Commission', together with a document, marked Annex III, entitled 'modifications to be included in point 27 — PVC, in point 34 — LdPE';

(c) three draft decisions dated 14 December 1988 drawn up in English, French and German (Document C (88) 2498).

29 In its comments on the second of the documents mentioned above (SEC (88) 2033), set out on the cover page, the Commission states that it appears from the words 'subject to a modification to be made to the text cf. Annex III attached' that the text of the paragraph to be included in point 34 of the LdPE decision had been approved by the Chefs de Cabinet and submitted to the Commissioners with the rest of the draft Decision. The Commission also states that the minutes of the Commission meeting refer to those of the meeting of the Chefs de Cabinet and that there is nothing in the minutes of the Commission meeting to support the conclusion that the recommendations made by the Chefs de Cabinet were not followed

in full. According to the Commission, that proves that the additional paragraph was in fact submitted to the Commission, which approved it at its meeting on 21 December 1988.

30 As regards document C (88)2498, which sets out the versions in English, French and German of the draft Decision submitted to the college of Commissioners, the Commission states that the versions of that text in Dutch, Italian and Spanish were in fact available on 21 December 1988 and that that fact is not contradicted by the fact that those versions of the Decision did not reach the staff responsible for linguistic revision until 16 January 1989. According to the Commission, in accordance with internal practice, the nine language versions of the Decision were sent for linguistic revision at the same time. The Commission adds that, in the present case, that delay was due only to the fact that the versions in Danish, Greek and Portuguese were not available until mid-January 1989 (cover page to Annex 5 to the Commission's response of 6 February 1992).

B — *The circumstances which led the Court to order the measure of inquiry of 10 March 1992*

31 The Commission indicated in its pleadings, and confirmed at the hearing, that on 21 December 1988 a second draft decision relating to a proceeding pursuant to Article 85 of the Treaty in the polyvinyl chloride sector was submitted to the college of Commissioners (Decision 89/190/EEC; IV — 31.865, PVC). It stated that the decision relating to the PVC sector and the contested Decision were concerned with substantially similar infringements and that the verifications which disclosed them and the various phases of the administrative procedure were conducted in parallel. Similarly, it should be observed that, both in their pleadings and in the oral

procedure, the applicants stressed the similarity between the present dispute and the one brought before the Court of First Instance in the PVC case, cited above. In that case, the Court held:

'1. The measure notified to the applicants, published in the *Official Journal of the European Communities* L 74 of 17 March 1989 (p. 1) and 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)", is non-existent;

2. The applications are dismissed as inadmissible;

3. The Commission is ordered to pay the costs.'

32 In view of the similarity between the two disputes thus established and recognized and having regard to the documents produced by the Commission in response to the measure of organization of procedure considered above, on 10 March 1992 the Court required 'the Commission to produce, by no later than Tuesday 31 March 1992 at midday, a certified copy of the original of the Commission decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) (89/191/EEC), as it was adopted by the college of Commissioners at its meeting on 21 December 1988 and authenticated as provided for by the Rules of Procedure of the Commission, in the language versions in which the decision was adopted'.

33 On 31 March 1992 the Commission produced a certified true copy of what, according to it, constitutes the Commission decision of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE), in the six languages in which it was authentic, namely Dutch, English, French, German, Italian and Spanish. The cover page of each of the versions of that measure bears the authentication prescribed by Article 12 of the Commission's Rules of Procedure, as then in force. The authentication is undated. It is in French and reads

'la ... décision a été adoptée par la Commission lors de sa 945e réunion tenue à Bruxelles, le 21 décembre 1988'. It must also be noted that, for each of the language versions, the authentication indicates the number of pages which the measure concerned comprises. Similarly, on each of the language versions the authentication is followed by the signatures of the President and the Secretary-General of the Commission and each cover page is stamped with the Commission's emblem.

34 In the letter of 31 March 1992 accompanying the documents thus produced to the Court, the Commission indicates that the texts thus produced are identical to those notified to the applicants and that they therefore embody the linguistic changes made by the lawyer-linguists. The cover page is said to be a certified true copy of the authentication affixed in accordance with Article 12 of the Commission's Rules of Procedure. In the same letter the Commission recognized that that authentication was of recent date and was affixed solely in order to enable the Commission to comply with the Court's order.

35 It should also be borne in mind in that connection that the Commission maintained, in its response to the measure of organization of procedure of 3 December 1991, that the authenticity of the text of the Decision, as notified to the applicants, is guaranteed (a) by the signatures on the minutes of the Commission meeting of the President and the Secretary-General of the Commission, and (b) by the signature of the Secretary-General appearing on the last page of the Decision. Similarly, the Commission maintains, relying on the judgment of the Court of Justice in Joined Cases 97, 98 and 99/87 *Dow Chemical Ibérica* v *Commission* [1989] ECR 3165, paragraph 59, that there is no provision requiring the member of the Commission responsible for competition to sign the text of the Decision notified — on the contrary, he may confine himself to signing the covering letter (cover page to Annex 4 to the Commission's response of 6 February 1992).

C — *The measure of organization of procedure of 2 April 1992 and the parties' written observations as to the inferences to be drawn from the documents produced by the Commission*

36 On 2 April 1992 the Court forwarded to the applicants the abovementioned documents produced by the Commission in response to the measure of inquiry of 10 March 1992, together with the Commission's comments, and asked those applicants who had put forward the plea alleging discrepancies between the various language versions of the Decision, and between the draft decision in the Commission's possession on that date and the text notified to each of them, to inform it whether, having regard to the documents produced by the Commission, they maintained that plea, and, if so, inviting them to furnish in support of their allegations a table summarizing the differences complained of between the measure adopted and the measure notified.

37 The Court also invited the applicants, pursuant to Article 64(3)(b) of its Rules of Procedure, to make written submissions on the documents thus produced in response to the measure of inquiry, having regard to the judgment in the PVC case cited above.

38 Following that request, BASF, Bayer, Enichem, Chemie Holding, Hoechst, Atochem, The Dow Chemical Company, Neste and Shell International Chemical Company submitted to the Court analyses comparing the text of the measure notified to them with the text of the draft decision submitted to the college of Commissioners on 21 December 1988. For each of the language versions, analysed by the abovementioned applicants respectively, the latter concluded that both the statement of reasons and the operative part of the measure notified had been modified with the result that they differed from the draft submitted to the Commission, and that those modifications went far beyond simple grammatical or syntactical changes allowed by the judgment of the Court of Justice in *United Kingdom* v *Council*, cited above.

39 More specifically, all the applicants observed that a new paragraph had been inserted in point 34 of the contested measure, in each of the authentic language versions. Relying in particular on paragraphs 44 to 47 of the judgment in the PVC case concerning a similar addition in a measure in the PVC sector adopted on the same day, the applicants maintained that the Commission had not succeeded in establishing that the college of Commissioners had in fact approved the insertion of that paragraph, which made a substantial change to the contested measure — a change whose wording, in English and French, had been decided on at the special meeting of Chefs de Cabinet of 19 December 1988 (Doc. SEC(88) 2033).

40 Certain applicants, namely BASF, Hoechst, Bayer, Enichem and Chemie Holding, then (a) confirmed or maintained the plea in law thus put forward and (b) supplemented that plea, claiming that the said discrepancies were in breach of the principle that measures adopted by the Commission were inalterable. The other applicants stated that, having regard to the documents produced by the Commission, they alleged breach of the principle of the inalterability of measures.

41 All the applicants also put forward, in their observations, a first additional plea in law, alleging that the authority issuing the measure was not competent to do so. That first additional plea in law comprises two limbs.

42 First, the applicants contest the competence *ratione materiae* of the member of the Commission responsible for competition to adopt the measures notified and published in the Dutch, Italian and Spanish languages.

43 All the applicants maintain, in that regard, that the decision was never adopted by the college of Commissioners in the Dutch, Italian or Spanish languages since, at the meeting of 21 December 1988, the college had at its disposal only the English,

French and German versions of the draft decision. The applicants claim that, pursuant to Article 27(1) of the Commission's Rules of Procedure, in the wording then in force, which could not be interpreted extensively, the member of the Commission responsible for competition could not be authorized, acting alone, to adopt versions of the contested measure in the languages in which it was authentic, which were not yet available when the college held its meeting of 21 December 1988, since such authorization goes beyond the preparatory measures or measures of management and administration referred to in Article 27 of the Commission's Rules of Procedure and infringes the principle of collegiality.

44 Secondly, the applicants challenge, in the second limb of their first additional plea, the competence *ratione temporis* of the member of the Commission responsible for competition to adopt the measures notified to the applicants and published in the *Official Journal of the European Communities*. From their analysis of the Commission's explanations regarding the conduct of the procedure for the adoption and revision of the Decision, the applicants infer that all the language versions of that measure were not in fact available until 16 January 1989. They therefore conclude that all the measures, as notified in each of the six languages in which they were authentic, were necessarily adopted after 5 January 1989, the date of expiry of the term of office of Mr Sutherland, the member of the Commission responsible for competition. Relying on the judgment in the PVC case, the applicants maintain that even on the assumption that the typed statement 'For the Commission, Peter Sutherland, Member of the Commission' at the foot of the notified measures may, in the absence of any handwritten mark by Mr Sutherland, qualify as the latter's signature, it must clearly have been added either after Mr Sutherland's term of office had expired or before 5 January 1989, that is to say at a date on which the measures, as notified and published, did not exist. According to the applicants, the contested measure was therefore adopted by an authority that lacked competence *ratione temporis*.

45 In a second additional plea, the applicants state that, notwithstanding the order of the Court of First Instance of 10 March 1992 requiring it to produce such a doc-

ument in each of the authentic language versions, the Commission did not produce a certified true copy of the original Decision, authenticated in accordance with the conditions laid down in Article 12 of its Rules of Procedure as then in force, according to which 'Acts adopted by the Commission, at a meeting ..., shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary'.

46 On the basis that the measure declared non-existent by the judgment in the PVC case came into being in circumstances identical to those in which the measure contested in these proceedings came into being, the applicants claim that the Court should apply the reasoning followed in that judgment to the facts of the present case.

47 Relying on the abovementioned judgment, the applicants maintain, first, that only authentication of the decision, in accordance with Article 12 of the Rules of Procedure of the Commission, together with the minutes of the meeting of the Commission, drawn up and signed in accordance with Article 10 of the Rules of Procedure of the Commission, referring to the adoption of that measure, makes it possible to be wholly certain of the material existence of that measure and its content and that the measure corresponds with the will of the college of Commissioners. Secondly, authentication makes it possible, by the dating of the measure and the affixing of the signatures of the President and Secretary-General, to be certain that the authority issuing it was competent to do so. Thirdly, by rendering the measure enforceable, authentication ensures that it is fully embodied in the Community legal order.

48 In that connection, the applicants do not concede that the covering letter with the Decision, dated 5 January 1989 and signed by Mr Sutherland, can in any way take the place of the authentication provided for by the Commission's Rules of Procedure: in their view, that letter cannot be placed on the same footing as the Decision as such.

49 They make the same observation concerning the stamp reading 'ampliation certifiée conforme' (certified true copy), accompanied, without any date, by the signature of Mr Williamson, the Secretary-General of the Commission, appearing on the first page of each of the six authentic language versions of the Decision produced by the Commission on 31 March 1992.

50 In relation to a third additional plea, the applicants refuse to attribute any legal value to the authentication signed by the Secretary-General and Mr Delors, President of the Commission, affixed subsequently to the same documents produced on 31 March 1992.

51 Pointing out that the Commission admits that that authentication was added solely in order to enable it to comply with the order of the Court of First Instance of 10 March 1992, the applicants maintain that the validity of the authentication procedure is conditional upon its being carried out before notification to the addressees concerned and that the subsequent affixing of a belated authentication of that kind, on the contrary, increases the existing confusion as to the date and the content of the contested measure.

52 In that connection, certain applicants stress that that belated authentication bears no date whatsoever and that the same wording in French is affixed to all the language versions of the Decision although, in their view, by virtue of the abovementioned provision of the Commission's Rules of Procedure, the authentication must be expressed in the language corresponding to each of the language versions of the measure, as adopted.

53 Finally, the applicants put forward a fourth additional plea, alleging that, in the absence of a duly adopted and authenticated decision, the contested measure was not duly notified to them.

Admissibility

The admissibility of the application in Case T-103/89 Shell International Chemical Company v Commission

Arguments of the parties

54 The Commission has raised an objection of inadmissibility against the action by Shell International Chemical Company (T-103/89) on the ground that it was brought outside the time-limit of two months and ten days available to that company under the third paragraph of Article 173 of the Treaty and Annex II to the Rules of Procedure of the Court of Justice concerning extensions of time on account of distance.

55 In support of its objection, it has produced a record of delivery of a registered letter, signed and dated by an official of the United Kingdom postal authorities, showing that the Decision was notified to the applicant company on Saturday 11 February 1989. Applying the method of calculating time-limits laid down, in particular, in the judgment of the Court of Justice in Case 152/85 *Misset* v *Council* [1987] ECR 223, according to which a time-limit expressed in calendar months expires on the day which, in the month indicated, bears the same number as the day which marks the starting point of that time-limit, the Commission concludes that the period available to the applicant to bring an action, in this case two months and ten days, expired on Friday 21 April 1989 at 24.00 hours. The action brought on Monday 24 April 1989 is therefore out of time.

56 In its observations on the objection of inadmissibility, the applicant does not contest either the length of the period available for bringing an action or the method of calculating the time-limit advocated by the Commission. However, it denies that the Decision was notified to it on Saturday 11 February 1989. It states that the date

of 11 February 1989, which is the date on which the communication at issue was received by the postal authorities, was erroneously entered by a post office employee in the box on the record of delivery reserved for the addressee. It also maintains that the communication was delivered, and the Decision therefore notified, on Monday 13 February 1989. In support of those statements, the applicant has produced, *inter alia*, an affidavit signed by the Customer Service Manager of the South-East London Postal District.

57 In its further observations, the Commission admits that the applicant has produced strong prima facie evidence such as to prompt the Court to disregard the evidence of the post office record of delivery.

Findings of the Court

58 It is settled law that the strict application of Community rules on procedural time-limits serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (judgment of the Court of Justice in Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749, paragraph 10). It is also settled law that time-limits for initiating proceedings are not subject to the discretion either of the Court or of the parties and are a matter of public policy (judgments of the Court of First Instance in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 29, and of the Court of Justice in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619).

59 Where it is necessary to determine the date of notification of a decision which, pursuant to the third paragraph of Article 173 of the Treaty, sets time running for the purposes of the institution of proceedings before the Court of First Instance, it is settled law that a decision is duly notified once it has been communicated to the person to whom it is addressed and that person is in a position to take cognizance of it. In that context, the Court points out that, according to the case-law, a reg-

istered letter with acknowledgment of receipt is a suitable method of giving notice inasmuch as it enables the date from which time begins to run to be determined (judgment of the Court of First Instance in *Bayer* v *Commission*, cited above).

60 The Court finds, on examining the postal receipt produced by the Commission, that the box marked 'date and signature of addressee' contains the date 11 February 1989 but that there is no signature. Furthermore, the affidavit signed by the Customer Service Manager of the London South-East Postal District, and the exhibits thereto, prove sufficiently that the date 11 February 1989 was in fact entered in that box in error by a post office official when the envelope was received at a London post office and not by a representative of the applicant at the time of delivery of the envelope to it. It follows that the information contained in the postal record of delivery regarding the date of delivery of the envelope is incorrect and must therefore be disregarded.

61 The evidence produced by the applicant — in particular the abovementioned affidavit by a post office official — establishes that the communication containing the contested decision was delivered to the applicant on Monday 13 February 1989. That date was therefore the date of notification of the decision to the applicant within the meaning of the third paragraph of Article 173 of the Treaty.

62 Pursuant to the method of calculating time-limits upheld by the Court of Justice in *Misset v Council*, cited above, the period of two months and ten days available to the applicant in order to institute proceedings therefore expired on 23 April 1989. However, the Court notes that 23 April 1989 was a Sunday and that, pursuant to Article 80(2) of the Rules of Procedure of the Court of Justice as then in force, if a time-limit ends on a Sunday it is extended until the following working day. It follows that the applicant's application, received at the Court of Justice on Monday 24 April 1989, was lodged in due time.

63 The action in Case T-103/89 must therefore be declared admissible.

The admissibility of the additional pleas in law advanced by the applicants in the observations they submitted following the measure of organization of procedure of 2 April 1992

64 As stated above, the applicants put forward four new pleas in law in the observations lodged by them following the measure of organization of procedure of 2 April 1992. Those observations concern the inferences to be drawn from the documents produced by the Commission in response to the measure of inquiry of 10 March 1992.

65 Pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

66 The Court finds that the four new pleas are all based on matters of fact which, relating as they do to the internal functioning of the Commission, have been raised by the defendant in the course of the procedure, in particular in response to the measure of inquiry adopted by the Court.

67 It follows that the four additional pleas in law put forward by the applicants must, in any event, be declared admissible.

Substance

The claim that the measure notified to the applicants was non-existent or, in the alternative, that the contested decision was void

68 The Court notes that, in support of their claims, the applicants initially advanced, in their applications initiating the proceedings, three groups of pleas, alleging breach of fundamental rights, infringement of essential procedural requirements, and an insufficient or incorrect appreciation and legal characterization of the facts by the Commission for the purposes of Article 85(1) of the Treaty. As stated, in the observations they submitted following the measure of organization of procedure of 2 April 1992, they put forward four additional pleas in law.

69 The Court considers that it is appropriate first to respond to certain of the additional pleas put forward by the applicants. In that regard, it is necessary to examine first the plea as to breach of the principle of the inalterability of measures after their adoption, secondly the plea that the authority issuing the measure lacked competence and, thirdly, the plea alleging that the procedure for the authentication of the measure was vitiated. Fourthly, the Court will examine the plea that the measure is non-existent, having regard *inter alia* to the conclusions reached after examination of the other three pleas.

70 Before those pleas are considered, attention must be drawn to the fact that the Court of First Instance's judgment in the PVC case, cited above, was the subject of an appeal by the Commission to the Court of Justice on 29 April 1992. By judgment of 15 June 1994, the Court of Justice annulled the judgment of the Court of First Instance on the ground that the latter had erred in law in declaring the decision at issue non-existent. However, the Court of Justice annulled the decision which the Court of First Instance had declared non-existent, namely 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), on the ground that it had been adopted in breach of essential procedural requirements (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555).

A — The plea as to breach of the principle of inalterability of an adopted measure

71 A number of the applicants have maintained that there are discrepancies between the measure notified and published in the *Official Journal of the European Communities* and the measure adopted. According to the applicants, those discrepancies, which go beyond simple corrections of spelling and grammar, constitute a manifest breach of the principle of the inalterability of the measure adopted and render the Decision void in its entirety (see paragraphs 18 to 25 above).

72 Whilst recognizing that the changes to which the applicants have drawn attention were actually made, the Commission contends that they in no way affected the rights of the undertakings concerned, and the latter cannot therefore rely on them to contest the validity of the Decision. The Commission considers that the rights of the undertakings are determined exclusively by the measures as notified. The Commission also submits that the said changes affect only syntax and grammar or derive from the proposals put forward by the special meeting of Chefs de Cabinet of 19 December 1988. In support of that submission, it produced all the documents analysed above (see paragraphs 26 and 33 above).

73 The Court considers that the principle that a measure may not be altered once it has been adopted by the competent authority constitutes an essential factor contributing to legal certainty and stability of legal situations in the Community legal order, both for Community institutions and for persons whose legal or factual situation is affected by a decision adopted by those institutions. Only rigorous and absolute observance of that principle can guarantee that, subsequent to its adop-

tion, a measure may be amended only in accordance with the rules on competence and procedure and, consequently, that the notified or published measure constitutes an exact copy of the measure adopted, thus reflecting faithfully the intention of the competent authority.

74 In that regard, the Court notes that in its judgment in *Commission* v *BASF* the Court of Justice stated that compliance with the principle of collegiate responsibility, and especially the need for decisions to be deliberated upon by 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 (paragraph 64). The Court of Justice emphasized that that was particularly so 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 Regulation No 17 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 (paragraph 65).

75 In the same judgment, the Court of Justice also held that such decisions must state the reasons on which they are based, in accordance with Article 190 of the Treaty, and that it is settled law that this requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Community judicature can exercise its power of review and the Member States and nationals concerned know the basis on which the Treaty has been applied (paragraph 66).

76 The Court of Justice also made it clear that the operative part of a decision under the competition rules can be understood, and its full effect ascertained, only in the light of the statement of reasons, and that since the operative part of, and the state-

ment of reasons for, a decision therefore 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. Referring to its judgment in *United Kingdom* v *Council*, the Court pointed out that compliance with that obligation 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 (paragraphs 67 and 68).

77 Finally, the Court of First Instance observes that, on the basis of the foregoing considerations, the Court of Justice rejected the Commission's argument to the effect 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. The Court of Justice observed that 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 (paragraphs 69 and 70).

78 In this case the Court notes first that the documents produced by the Commission and examined above (see paragraphs 28 and 30 above) together show that the three drafts dated 14 December 1988 submitted for deliberation by the college of Commissioners are different in certain respects from the measures notified to the applicants and published in the *Official Journal of the European Communities*. The defendant does not deny those differences as such but considers that some of them are very minor and that the changes do not in any way affect the rights and obligations of the undertakings, as determined by the content of the measure notified.

79 The Court notes secondly that, according to actual terms of the minutes of meeting No 945 of the Commission, the latter, asked by Mr Sutherland, the member

responsible for competition on 21 December 1988, to consider certain draft decisions designated as C (88) 2498, on that date:

— decided that the 17 undertakings concerned in the LdPE case had infringed Article 85 of the Treaty, determined the amount of the fines which should be imposed on them and approved the principle that the undertakings should be ordered to put an end to the infringement;

— adopted a decision concerning Case IV\31.866 LdPE in English, French and German (the authentic versions for certain applicants), those decisions being 'embodied' in documents C (88) 2498 mentioned above;

— authorized the member of the Commission responsible for competition to adopt the text of the decision in the other official languages of the Community;

— took note of the results of the examination of the matter by the Chefs de Cabinet of the members of the Commission at their special meeting and their weekly meeting on 19 December 1988.

80 It is in the light of those findings of fact that the Court must make a legal appraisal of the plea concerning a breach of the principle that the measure adopted may not be altered, in the case of the versions in the English, French and German languages.

81 The Court finds that a comparison of the draft decisions of 14 December 1988, as adopted by the college of Commissioners according to the minutes of meeting No 945 in English, French and German, on the one hand, and the Decision as notified and published, on the other, shows that numerous changes were made after its adoption. That comparison confirms that the tables of discrepancies drawn up by BASF, Bayer, Enichem, Chemie Holding, Hoechst, Atochem and The Dow Chem-

ical Company, and not contested by the Commission, which merely contended that the changes made were not of a substantive nature, are correct.

82 A comparison of the three drafts of 14 December 1988, drawn up in English, French and German and adopted, according to the minutes of meeting No 945, by the Commission on 21 December 1988, shows that there were significant discrepancies between the decision adopted in English, French and German and the Decision as notified and published. Even on the assumption that the changes made to the measure adopted by the college of Commissioners in English, French and German were intended to harmonize the texts notified and published in the various authentic languages, those changes were none the less irregular since they were made after the adoption of the measure, in some cases they go far beyond mere corrections to spelling or syntax and they are therefore directly contrary to the principle that the measure adopted by the competent authority may not be altered.

83 Amongst the discrepancies noted in the joint submissions of the applicants, there are a number which cannot be regarded as mere corrections to spelling or syntax. The Court notes that they include, in particular, the following changes, made respectively to the German, English and French texts of the draft decision dated 14 December 1988, and, moreover, made after the Commission had adopted that draft, as is apparent from the abovementioned minutes of its 945th meeting:

(i) Changes to the text of the draft of 14 December 1988 adopted in the German language (the references given concern the version of the draft decision adopted in German, produced by the Commission on 7 February 1992 and dated 14 December 1988):

— page 19, point 14, fifth paragraph: in the text notified and published, the phrase 'Auch Repsol wurde offiziell eingeladen' ('Repsol was also formally invited') was added;

— page 24, point 31, seventh paragraph: the sentence 'Die Kommission erkennt nicht an, daß diese Hersteller ein solch umfangreiches Unternehmen ohne eine globale Koordinierung oder Leitung ihrer Preispolitik durchgeführt haben können' ('The Commission does not accept that these producers could have conducted such an important business with no overall co-ordination of direction of their pricing policy') was replaced in the act notified and published by the sentence: 'Die Kommission erkennt nicht an, daß diese Hersteller den Vertrieb eines derart preisanfälligen Erzeugnisses ohne interne Leitung ihrer Preispolitik durchgeführt haben können' ('The Commission does not accept that these producers could have conducted business in this price-sensitive product without any internal direction of their pricing policy');

— page 48, point 64, first paragraph: a fifth indent, not appearing in the text of the draft of 14 December 1988, '— die Sitzungen blieben äußerst geheim' ('— the meetings were held in conditions of great secrecy') was added to the text published and notified, whereas the text of the fifth indent in the draft decision was moved, becoming the second paragraph of point 64 of the text notified and published;

(ii) Changes to the text of the draft of 14 December 1988 adopted in the English language (the references given concern the version of the draft decision adopted in English, produced by the Commission on 7 February 1992 and dated 14 December 1988):

— page 2, point 2, first paragraph: in the second sentence of that paragraph, the phrase 'and in some cases produce inside the EEC', appearing in the draft, was deleted from the act notified and published;

— page 22, point 31, seventh paragraph: the second sentence of that paragraph: 'The Commission does not accept that these producers could have conducted

such an important business with no overall co-ordination of direction of their pricing policy' appearing in that draft was replaced by the following sentence: 'The Commission does not accept that these producers could have conducted business in this price-sensitive product without any internal direction of their pricing policy', appearing in the act notified and published;

— page 27, point 37, the second paragraph: 'In the present case, the continuing restrictive arrangements of the LDPE producers over a period of years are clearly referable in their essential characteristics to the proposal made in 1976 and constitute its implementation in practice' was replaced by the following text in the act notified and published: 'In the present case, the continuing restrictive arrangements of the LDPE producers over a period of years clearly originate in the proposal made in 1976 and constitute its implementation in practice';

(iii) Changes to the text of the draft of 14 December 1988 adopted in the French language (the references given concern the version of the draft decision adopted in French, produced by the Commission on 7 February 1992 and dated 14 December 1988):

— page 2, point 2, first paragraph: in the second sentence of that paragraph, the phrase 'et dans certains cas les y fabriquent' ('and in some cases produce there'), appearing in that draft, was deleted from the act notified and published;

— page 23, point 31, seventh paragraph: the second sentence of that paragraph, 'La Commission n'admet pas que ces producteurs puissent avoir mené des activités aussi importantes sans coordination globale de leur politique en matière de prix' ('The Commission does not accept that these producers could have conducted such an important business with no overall co-ordination of direction of their pricing policy'), appearing in that draft, were replaced by the following sentence: 'La Commission n'admet pas que ces producteurs puissent avoir mené des activités concernant ce produit sensible aux prix sans direction interne de leur politique en matière de prix' ('The Commission does not accept that these producers could have conducted business in this price-sensitive product without any internal direction of their pricing policy') in the act notified and published;

— page 34, point 46, third paragraph, second sentence: the phrase between dashes 'tels que le "gel" de la clientèle ou le renvoi de nouveaux clients' ('such as a freeze on customers or the turning away of new customers'), appearing in the draft was replaced by the phrase between dashes 'tels que le "gel" de la clientèle ou la fin de non-recevoir opposée à des demandes' ('such as a freeze on customers or turning away inquiries'), in the act notified and published.

84 Since those changes were made after the adoption of the measure on 21 December 1988 and do not merely relate to spelling or syntax, they must have been made by a person who was not empowered to do so and are therefore contrary to the principle that the measure adopted by the Commission may not be altered, there being no need to consider the scope, importance or substantial nature of those changes, as is apparent from the judgments in *United Kingdom* v *Council* and *BASF and Others* v *Commission*, cited above.

85 It is apparent from the documents put before the Court that, in addition to the abovementioned changes, certain changes, which appear in the measures notified to the applicants and published in the *Official Journal of the European Communities*, concern all the language versions adopted on 21 December 1988 according to the minutes of meeting No 945, that is to say the English, French and German versions.

86 The Court also notes that the fourth paragraph of point 34 of the statement of reasons appearing in the measures notified and published in the *Official Journal of the*

European Communities contains an entirely new paragraph, as is clearly apparent in certain authentic language versions, in particular the Italian version, from the fact that the passage in question has a different typographical presentation in the notified measure. The new paragraph concerns the question whether, in a case such as this where a proceeding under Article 85 of the Treaty concerns a number of undertakings, the Commission may accept, with regard to other undertakings concerned by the same proceeding, the waiver by one of the undertakings of confidentiality for information concerning it or whether, on the contrary, public policy considerations prevent the Commission in such circumstances from acceding to the request made by the undertaking benefiting from the confidentiality. That difficult and controversial issue was considered by the Commission at page 52 of its Eighteenth Report on Competition Policy.

87 According to the paragraph added in the notified decisions: 'It should be pointed out that any waiver by undertakings of confidentiality for their internal business documents is subject to the overriding public interest in ensuring that competitors are not informed of each other's commercial activities and intentions in such a way that competition between them is restricted'.

88 The minutes of the meeting of the Commission on 21 December 1988, produced to the Court, show that, whilst it is clear from the minutes of meeting No 945 that the Commission adopted the drafts dated 14 December 1988, which as adopted in each of the three authentic language versions do not contain the paragraph in question, it is merely established that the Commission took note of the results of the examination of the case by the Chefs de Cabinet at their special meeting on 19 December 1988. Whilst the Commission produced documents described as true copies of extracts from the original minutes of the special meeting of the Chefs de Cabinet on 19 December 1988 and whilst those documents include in Annex III a document reproducing in English and French the paragraph in question, the Court

considers that the documents produced do not in any way show that that amendment was adopted or proposed by the Chefs de Cabinet with a view to being submitted for deliberation by the Commission.

89 Even on the assumption that the amendment in question was submitted and proposed to the Commission at its meeting on 21 December 1988 — which cannot in any event have been the case as regards the German text of the Decision since, as stated above, Annex III is drafted only in English and French — it cannot be concluded from the minutes of the meeting themselves as described above (at paragraph 79) that the Commission, in adopting the drafts of 14 December 1988 which did not contain that paragraph, also intended to adopt that amendment. Consequently, the incorporation of the amendment in all the measures notified to the applicants and published in the *Official Journal of the European Communities* must necessarily have occurred after 21 December 1988 and constitutes a clear infringement of the principle that the measure adopted by the competent authority may not be altered. That addition to the statement of reasons for the decision, which relates neither to syntax nor to grammar, therefore affects the validity of all the measures notified and of the measure published in the *Official Journal of the European Communities*, by virtue of the judgment of the Court of Justice in *United Kingdom* v *Council*, and it is unnecessary to examine whether the amendment is of a substantial nature — a point which in any event is not in doubt.

90 It follows that the first additional plea in law, by which the applicants seek annulment of the Decision, must be upheld.

B — The plea of lack of competence of the authority issuing the measure

91 In their written submissions, some of the applicant undertakings expressly put forward a plea of lack of competence of the authority issuing the measures notified and published. Hoechst maintained that the Commission's defence to the plea

raised by the applicants concerning breach of the principle that the measure adopted is unalterable raised the question whether the Member of the Commission responsible for competition could validly adopt decisions in certain authentic languages. Those applicants also pointed out that Mr Sutherland's term of office expired on 5 January 1989, whereas according to the information supplied by the Commission the Decision was not submitted to the Secretariat-General of the Commission in the various official languages until 16 January 1989, that is to say 11 days later.

92 At the hearing, all the applicants referred, in support of that plea, to the reasoning adopted by the Court of First Instance on that point in the PVC case, in which it concluded, first, that the Member of the Commission responsible for competition lacked competence *ratione materiae* to adopt the measures notified to the applicants and published in the Italian and Dutch languages and, secondly, that he lacked competence *ratione temporis* to adopt the measures notified and published in the *Official Journal of the European Communities* (judgment in the PVC case, paragraphs 54 to 65).

93 For its part, the Commission contended, in its written submissions, that the measures were duly adopted by the college of Commissioners in three of the languages which were authentic and that Article 27 of its Rules of Procedure constituted the legal basis for the decisions adopted in Dutch, Italian and Spanish, which were thus adopted by the Member of the Commission responsible for competition within the limits of the powers duly conferred upon him by the full Commission. The Commission added that the mandate given to Mr Sutherland was not personal and that it was conferred upon the Member of the Commission responsible for competition.

94 At the hearing, the Commission also contended that, contrary to the express terms of the minutes of meeting No 945 of the Commission of 21 December 1988, the Commission adopted the Decision in all the languages in which it was binding.

95 As already stated, consideration of the first plea has revealed that discrepancies existed between the measures adopted and the measures notified and published and that those amendments must have been made by someone other than the full Commission after the latter had adopted the contested measures. It is in the light of those findings that the Court must examine the applicants' plea concerning the lack of competence of the authority issuing the notified and published measures. This plea, which in any event involves a matter of public interest, comprises two parts. It is necessary to distinguish between the material competence and the temporal competence of the authority issuing the notified and published measures which the applicants have referred to the Court.

1. The material competence of the Member of the Commission responsible for competition to adopt the measures notified and published in Dutch, Italian and Spanish

96 By virtue of Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the EEC (OJ, English Special Edition 1952-1958, p. 59), in the version then in force, as last amended by Point XVIII of Annex I to the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, as amended by the Decision of the Council of the European Union adjusting the instruments concerning the accession of the new Member States to the European Union (OJ 1995 L 1, p. 1) (hereinafter 'Regulation No 1'), 'documents which an institution of the Community sends to ... a person subject to the jurisdiction of a Member State shall be drafted in the language of such State'. Moreover, under the first paragraph of Article 12 of the Commission's Rules of Procedure, in the version then in force, a measure adopted by the Commission, at a meeting or by the written procedure, is to be authenticated in the language or languages in which it is binding by the signatures of the President and the Executive Secretary.

97 It follows from those provisions taken together that, where as in this case the Commission intends to adopt by a single measure a decision which is binding on a

number of legal persons for whom different languages must be used, the decision must be adopted in each of the languages in which it is binding in order to avoid making authentication impossible. In this case it is impossible to accept the Commission's contention at the hearing that the Decision was adopted in all the authentic languages since it is apparent from the actual minutes of meeting No 945 of the full Commission, approved by the Commission on 22 December 1988, that the Decision was not adopted by the full Commission in Dutch, Italian and Spanish, which are the only authentic texts as regards respectively DSM, Enichem and Montedison, and Repsol.

98 The first paragraph of Article 27 of the Commission's Rules of Procedure, in the version applicable to the facts of this case, provides that: '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'.

99 The Court finds that, in its judgment in *Commission* v *BASF*, the Court of Justice held 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, 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 Member responsible for competition policy (paragraph 71).

100 It is apparent from the first paragraph of Article 27 of the Commission's Rules of Procedure, in conjunction with the second paragraph thereof, concerning the powers which may be delegated to officials, that the full Commission may delegate authority to one of its Members to adopt the decision in those official languages of the Community, as defined in Article 1 of Regulation No 1, in which the text is not authentic (namely in this case Danish, Greek and Portuguese), since the

decisions adopted in those three languages do not produce any legal effect and are not enforceable against any of the undertakings mentioned in the operative part of the decision.

101 The effects flowing from the adoption of a decision in its authentic language version are entirely different. 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 of the Commission's Rules of Procedure.

102 It follows that the measure adopted in Dutch, Spanish and Italian by the Member of the Commission responsible for competition, in accordance with the terms of the mandate conferred upon him by the meeting of 21 December 1988, was issued by an authority lacking the necessary material competence.

2. The temporal competence of the Member of the Commission responsible for competition to adopt the measures notified to the applicants and published in the *Official Journal of the European Communities*

103 Whilst, as already stated, the Member of the Commission responsible for competition is not competent to adopt alone the authentic language versions of a decision

applying Article 85(1) of the Treaty, he undoubtedly has authority to sign the copies of the measure adopted by the full Commission for the purposes of notification of the measure to its addressees under the third paragraph of Article 12 of the Commission's Rules of Procedure, as then in force. However, in this case it appears from the Commission's pleadings and from the explanations given by it at the hearing that the various language versions of the measure (that is to say the six authentic languages and the three other official languages) were not finalized and sent to the Secretariat-General of the Commission — which then sent it to the lawyer-linguists for revision in accordance with the abovementioned judgment in *United Kingdom* v *Council* — until 16 January 1989, the lawyer-linguists completing their work at the end of January 1989.

104 Consequently, the Court concludes that the defendant, in reply to the applicants' specific claims, has been unable to establish the existence of a finalized measure capable of being notified and published prior to a date falling between 16 January 1989 and 31 January 1989. The measures notified in the six authentic languages must therefore be regarded as having been adopted after 5 January 1989, the date on which Mr Sutherland's term of office expired.

105 Therefore, even on the assumption that the typed statement 'For the Commission, Peter Sutherland, Member of the Commission' at the foot of the notified measures may, in the absence of any handwritten mark by Mr Sutherland, qualify as the latter's signature, it must clearly have been added either after Mr Sutherland's term of office had expired or before 5 January 1989, that is to say at a date on which the measures, as notified and published, did not exist. The fact that on 5 January 1989 Mr Sutherland signed the covering letter sending measures not definitively adopted

to the applicants has no legal significance, since that letter is not incorporated in the contested measure and does not produce any legal effect. Similarly, the Commission's claim that authority was conferred on the Member of the Commission responsible for competition and not on Mr Sutherland personally does not affect the reply to be given to this plea. Even if the defendant's argument is accepted, it would have been necessary for the Member of the Commission responsible for competition who was appointed to replace Mr Sutherland and whose term of office commenced on 6 January 1989 to sign the measures, on the assumption that he was competent to do so. That did not happen in this case. Consequently, the Court concludes that the measures notified to the applicants and published in the *Official Journal of the European Communities* on 17 March 1989 must have been issued by an authority lacking the temporal competence to do so.

106 That defect might be remedied only if the defendant established that it concerned only the copy notified to the addressees or the copy sent, for the purposes of publication in the *Official Journal of the European Communities*, to the Office for Official Publications of the European Communities and that the original decision was duly signed by a properly authorized person. In such circumstances the suggestion of a lack of authority on the part of the signatory of the notified and published measures might be refuted. Only the production of such evidence confirming the presumption of validity attaching to Community measures, which is a corollary of the formal rigour characterizing their adoption, would in this case have been capable of remedying the defect of manifest lack of competence vitiating the decision as notified to the applicants and published in the *Official Journal of the European Communities*. For the reasons given below, the Court is obliged to conclude that such evidence has not been produced by the defendant.

107 It follows that both parts of the second additional plea in annulment put forward by the applicants, alleging that the authority issuing the measure lacked competence, must be upheld.

C — The plea in law alleging irregularities vitiating the procedure for authentication of the measure adopted by the Commission

Arguments of the parties

108 In response to the production by the Commission on 31 March 1991 of a copy of the contested measure bearing, on each of the authentic language versions, an undated authentication in the French language, the applicants claim that the authentication provided for in Article 12 of the Commission's Rules of Procedure, as then in force, must be affixed before notification of the measure concerned.

109 More specifically, they maintain that the President and the Secretary-General of the Commission affixed their signatures to a copy of the contested measure belatedly, that they have no authority whatsoever to change subsequently the text of decisions which have been adopted by the Commission or to approve changes made by third parties, and that they may not endow that text with ostensible authenticity, thereby running the risk of misleading third parties as to the date of adoption of the contested measure and its content, as settled when it was adopted.

110 They therefore submit that in this case the belated authentication does not meet the requirements of Article 12 of the Commission's Rules of Procedure, as then in force.

111 The Commission contends that the authentication provided for by Article 12 of its Rules of Procedure is an internal procedure, of no concern to third parties, so that the latter have no right to criticize any irregularity in it.

112 The defendant also contends that Article 12 of its Rules of Procedure makes no mention of the date on which decisions must be authenticated and that, as far as third parties are concerned, the legal effects of a decision adopted by the Commission derive not from its authentication but from its notification to its addressees, in accordance with the second paragraph of Article 191 of the EEC Treaty.

113 According to the Commission, the authentication of a decision adopted by the Commission implies that it accepts that decision as having been duly adopted by it. It therefore contends that the present plea should be dismissed.

Findings of the Court

114 The Court notes that the authentication affixed to each of the authentic language versions of the contested measure bears no date whatsoever. Moreover, the Commission has expressly admitted that the authentication was affixed solely in order to enable it to comply with the measure of inquiry adopted by the Court in its order of 10 March 1992.

115 The Court also notes that the authentication was affixed to the Dutch, Italian and Spanish versions of the contested measure, even though the minutes of the 945th meeting of the Commission, lodged on 6 February 1992, establish that the drafts of the decision submitted to the college of Commissioners at that meeting had been adopted only in English, French and German.

116 The first paragraph of Article 12 of the Commission's Rules of Procedure, as then in force, provides that acts adopted by the Commission are to be authenticated in the language or languages in which they are binding by the signatures of the

President and the Executive Secretary. Furthermore, under the second paragraph of Article 12, the text of such acts is to be annexed to the minutes in which their adoption is recorded.

117 In its judgment in *Commission* v *BASF and Others*, cited above, the Court of Justice held that the authentication of acts referred to in the first paragraph of Article 12 of the Commission's 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 so that, 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 (paragraph 75). The Court of Justice also held in that judgment that it follows from the foregoing that the authentication of acts referred to in the first paragraph of Article 12 of the Commission's Rules of Procedure constitutes an essential procedural requirement within the meaning of Article 173 of the Treaty, breach of which may give rise to an action for annulment (paragraph 76).

118 It is common ground in the present case that the contested measure was not authenticated before the minutes of the Commission's 945th meeting were signed. On the contrary, it appears that the contested measure was authenticated not only after its notification to the undertakings concerned and after its publication in the *Official Journal of the European Communities* but also after commencement of the proceedings for annulment and notification of the order of the Court of First Instance of 10 March 1992.

119 It follows that the authentication of the documents produced to the Court on 31 March 1992 does not enable the date on which the contested measure was adopted, or its content, to be determined precisely and that it does not therefore meet the requirements of Article 12 of the Commission's Rules of Procedure.

120 Accordingly, belated authentication of that kind cannot be regarded as meeting the requirements of Article 12 of the Commission's Rules of Procedure. The Court

therefore concludes that there was no measure duly authenticated in accordance with the abovementioned provision of the Commission's Rules of Procedure on the date when it was notified to the undertakings concerned.

121 It follows from the foregoing that the third additional plea in annulment put forward by the applicants, alleging that the procedure for authentication of the Decision was vitiated, must be upheld.

D — The plea that the measure is non-existent

122 The Court accepts the applicants' view (see paragraphs 45 to 50 above) that the measure declared non-existent by the judgment of the Court of First Instance in the PVC case was drawn up and adopted in circumstances similar to those surrounding the adoption of the measure contested in this action. The applicants claim that the Court should therefore apply its reasoning in that judgment to the facts of this case and declare the said measure non-existent.

123 However, as stated above, the judgment of the Court of First Instance was the subject of an appeal and was set aside by the judgment of the Court of Justice in *Commission* v *BASF and Others*, cited above. In that judgment, the Court of Justice pointed out that the acts of 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 (paragraph 48). The Court held that, 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 (paragraph 49). However, it considered that, from the gravity of the consequences attaching to a finding that an act of a Community institution was non-existent, it was self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations (paragraph 50). Applying those principles to the PVC decision, the Court of Justice held first

that 'the Court of First Instance did not question that at the meeting of 21 December 1988, as 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' (paragraph 51). It went on to say that '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' (paragraph 52). The Court of Justice therefore considered that the Court of First Instance had erred in law in declaring the decision concerned non-existent (paragraph 53).

124 Applying the principles thus expounded by the Court of Justice to the facts of the present cases, this Court can but reject the applicants' claim that the Decision should be declared non-existent. As regards, first, the operative part of the Decision, the Court notes that the changes made to the text adopted by the college of Commissioners do not go beyond the corrections of spelling or grammar allowed by the case-law of the Court of Justice (*Commission* v *BASF and Others*, paragraph 68). As regards the other defects of competence and form found above in the present judgment, the Court considers that they are very similar to those found in the PVC case and cannot therefore justify a declaration that the measure concerned is non-existent.

E — The claim that the contested decision is void

125 It follows from what has been said above (see paragraphs 90, 107 and 121) that the Court regards as well founded the three additional pleas put forward by the applicants, alleging breach of the principle of inalterability of measures adopted, the lack of competence of the authority issuing the measure and irregularities vitiating the procedure for authentication of the measure. It also follows from the reasoning which has led the Court to conclude that those pleas are well founded that the

Decision was adopted in breach of the principle of collegiate responsibility for the adoption of decisions and the principle of legal certainty, and also in breach of Article 190 of the Treaty and of essential procedural requirements.

126 For all those reasons, Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) must be annulled.

Montedison's claim for compensation

127 The applicant in Case T-105/89, Montedison, asks that the Court order the Commission to reimburse it, by way of damages, for the costs incurred by it in the administrative procedure and to redress all damage resulting from implementation of the Decision or from the obligation, in the event of deferred payment, to provide guarantees.

128 Having examined the applicant's pleadings, the Court finds that that claim is not supported by any argument or by any evaluation of the alleged damage such as to enable it to give the requisite decision on that claim. Accordingly, that claim must be dismissed as inadmissible.

Costs

129 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1) Dismisses the objection of inadmissibility put forward by the Commission in Case T-103/89;

2) Annuls Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE);

3) Dismisses the claims for a declaration that Commission Decision 89/191/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.866, LdPE) is non-existent;

4) Dismisses as inadmissible the claim for compensation in Case T-105/89;

5) Orders the Commission to pay the costs.

Cruz Vilaça Barrington Saggio

Briët Biancarelli

Delivered in open court in Luxembourg on 6 April 1995.

H. Jung J. L. Cruz Vilaça

Registrar President

Contents