JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)
29 June 1995 *

In Case T-32/91,

Solvay SA, formerly Solvay et Cie SA, a company incorporated under Belgian law, established in Brussels, represented by Lucien Simont, Advocate at the Belgian Court of Cassation, and, during the oral procedure, by Paul-Alain Foriers and Guy Block, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber, of the Legal Service, acting as Agent, and Nicole Coutrelis of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg

defendant,

APPLICATION for the annulment of Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133/-C: Soda-ash — Solvay, OJ 1991 L 152, p. 21),

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber,
Extended Composition),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 and 7 December 1994,

gives the following

Judgment

Facts and procedure

Economic background

1 Soda-ash, the product with which these proceedings are concerned, is used in the manufacture of glass (dense soda-ash) and also in the chemical industry and metallurgy (light soda-ash). Natural (dense) soda-ash, produced mainly in the United States of America, should be distinguished from synthetic (dense and light) soda-ash, manufactured in Europe through a process invented by the applicant more than 100 years ago.

2 At the material time, the six Community producers of synthetic soda-ash were as follows:

— the applicant, the largest producer in the world and in the Community, with a Community market share of almost 60% (and even 70% in the Community excluding the United Kingdom and Ireland);

— Imperial Chemical Industries PLC, the second largest Community producer, with over 90% of the United Kingdom market;

— the 'small' producers, Chemische Fabrik Kalk and Matthes & Weber (Federal Republic of Germany), Akzo (Netherlands) and Rhône-Poulenc (France), with an aggregate share of approximately 26%.

3 The applicant operated plants in Belgium, France, Germany, Italy, Spain, Portugal and Austria and had sales organizations in those countries as well as in Switzerland, the Netherlands and Luxembourg. It was, moreover, the principal producer of salt in the Community and was therefore very favourably placed with respect to the supply of the main raw material for the manufacture of synthetic soda-ash.

4 At the material time, the Community market was characterized by separation along national lines, producers generally tending to concentrate their sales in the Member States where they had production facilities.

Administrative procedure

5 Following investigations carried out without warning in 1989 at the premises of the main soda-ash producers in the Community and supplemented by requests for

information, the Commission sent to the applicant, by letter of 13 March 1990, a statement of objections in several parts concerning *inter alia* an infringement of Article 86 of the EEC Treaty, which the applicant was alleged to have committed.

6 On 28 May 1990 the applicant submitted its written observations on that statement of objections. By letter of 29 May 1990 the Commission invited the applicant to take part in a hearing planned for 25 to 27 June 1990. By letter of 14 June 1990 the applicant declined that invitation.

7 According to the documents before the Court, at the end of the abovementioned procedure the college of Commissioners adopted Decision 91/299/EEC relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay OJ 1991 L 152, p. 21, hereafter 'the decision') at its 1 040th meeting held on 17 and 19 December 1990. In substance, the decision finds that the applicant held a dominant position on the continental Western European market for soda-ash and had abused that position, within the meaning of Article 86 of the Treaty, from about 1983, and consequently imposes on it a fine of ECU 20 million.

8 The decision was notified to the applicant by registered letter of 1 March 1991. It is apparent from the documents before the Court that point 63 of the decision does not form part of the notified text and that, as regards the numbering of that text, point 64 immediately follows point 62.

9 It is common ground (see paragraph 31 below) that the text of the notified decision had not been previously authenticated by the signatures of the President of the Commission or its Executive Secretary in accordance with the first paragraph of Article 12 of the Commission's Rules of Procedure 63/41/EEC of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9) provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (OJ 1967 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (OJ 1986 L 72, p. 34) which were then in force (hereafter 'the Rules of Procedure').

Procedure before the Court

10 Those are the circumstances in which the applicant brought this action, lodged at the Registry of the Court of First Instance on 2 May 1991.

11 The written procedure before the Court followed the normal course. After closure of the written procedure the applicant submitted, on 10 April 1992, a 'supplementary application' in which it put forward a new plea in law to the effect that the contested decision should be declared non-existent. Referring to two articles in the *Wall Street Journal* of 28 February 1992 and in the *Financial Times* of 2 March 1992 it claimed *inter alia* that the Commission had publicly stated that for years the practice of the college of Commissioners was not to authenticate acts adopted by it and that no decision in the past 25 years had been authenticated. Those statements by the Commission referred to cases then pending before the Court of First Instance, in which several actions had been brought against a Commission decision which found that there was a cartel in the polyvinylchloride sector and which led to the judgment of the Court of First Instance 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* (hereafter 'the PVC judgment').

12 In that same supplementary application the applicant stated that in a letter of 11 June 1991 the Secretary-General of the Commission had informed it that 'as a result of an error, point 63 of the decision does not appear in the text ... notified' and attached the text of that point, which referred to an abuse of a dominant position, as an annex to his letter. Point 63 is worded as follows.

(63) The special 1.5% group rebate given to the St Gobain companies was also discriminatory in nature. It is true that the St Gobain Group as a whole was by far the largest customer but under the agreements with Solvay the group's purchases were fragmented on a national basis. The group rebate does not in fact reflect any cost advantage attributable to the quantities delivered but is

(as Solvay itself stated in its own documents) intended to secure the loyalty of the group. The result is that the St Gobain subsidiary in one Member State may receive a substantially better price from Solvay than a competitor which actually takes a similar or even larger volume from the local Solvay factory.

13 The Commission submitted its written observations on the supplementary application within the period granted to it by the President of the First Chamber pursuant to Article 48(2) of the Court's Rules of Procedure.

14 After the Court of Justice had ruled on the appeal against the PVC judgment on 15 June 1994 in its judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, the Court of First Instance (First Chamber, Extended Composition) adopted measures of organization of procedure which included a request that the Commission produce *inter alia* the text of its decision as authenticated at the time in the languages in which they are authentic by the signatures of the President and the Secretary-General and annexed to the minutes.

15 The Commission stated in reply that it considered that as long as the Court had not ruled on the admissibility of the plea alleging a failure to authenticate the decision the correct course was to postpone consideration of the substance of that plea.

16 In those circumstances, the Court of First Instance (First Chamber, Extended Composition), by order of 25 October 1994, based on Article 65 of its Rules of Procedure, ordered the Commission to produce the abovementioned text.

17 Following that order the Commission produced on 11 November 1994 *inter alia* the text of the decision in French whose covering page bears an undated form of authentication signed by the President and the Executive Secretary of the Commission. It is agreed that that form of authentication, which explicitly includes 'recital

63 annexed hereto' was affixed only after a period of more than six months after the bringing of the present action (see paragraph 31 below). The text of the decision covered by that form of authentication also contains, as an annex, the abovementioned point 63, which, according to the Commission, formed part of the decision adopted on 19 December 1990 by the college of Commissioners.

18 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance decided to open the oral procedure. At the hearing on 6 and 7 December 1994 the parties presented oral arguments and replied to the questions put by the Court. At the end of the hearing the President declared that the oral procedure was closed.

Forms of order sought

19 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, set the fine at a token amount or, at least reduce it fairly and substantially;

— in any event, order the Commission to pay the costs.

20 In its supplementary application the applicant claims that the Court should declare the contested decision non-existent, or at least void.

21 The Commission contends that the Court should:

— dismiss the application as unfounded;

— dismiss the plea put forward in the supplementary application as inadmissible or in any event unfounded;

— order the applicant to pay the costs.

22 It should be noted that following delivery of the judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF*, cited above, and in reply to a written question put by the Court of First Instance, the applicant stated that it no longer claimed that the decision should be declared non-existent, but merely sought its annulment. It also requested the Court to consider its pleas put forward in support of the form of order sought only with regard to annulment of the decision.

The claim that the decision should be annulled

23 In support of its claim that the decision should be annulled the applicant puts forward a series of pleas which can be divided into two separate groups. In the first group of pleas, relating to the regularity of the administrative procedure, the applicant alleges that a number of essential procedural requirements were infringed. In its supplementary application it claims that, contrary to Article 12 of the Commission's Rules of Procedure, the decision notified to it was neither signed by the President of the Commission nor authenticated in due time by him and the Secretary-General. Moreover, there was no valid notification for the purposes of Article 191 of the EEC Treaty and the third paragraph of Article 16 of the Rules of Procedure. Furthermore, the applicant complains that the Commission infringed the principle that measures adopted by the Community authorities are inalterable by amending the decision after the official date of its adoption, in particular through the addition of point 63, it being doubtful whether it was actually adopted by the college of Commissioners. In its application the applicant complains that the Commission failed to observe the principle of collegiate responsibility. It states that, contrary to Article 4 of the Commission's Rules of Procedure, discussion of the draft decision was not deferred, even though at least one of its members

requested such deferment to enable him properly to consider the file which had been sent to him at a late stage.

24 In the second group of pleas the applicant pleads infringement of Articles 86 and 190 of the EEC Treaty and of the rules on the treatment of evidence, since the Commission wrongly found that the applicant held a dominant position and that it had abused that position. Moreover, it claims that the requirement laid down in Article 2 of the decision that it should inform the Commission of details of any new system of rebates is unlawful since it is not based on any provision of the Treaty or of any regulation. Finally, it states that the amount of the fine imposed is excessive and out of proportion to the seriousness of the alleged infringement and that no proper statement of reasons for the imposition of that fine was given.

25 The Court considers it appropriate to examine first the plea raised in the supplementary application alleging irregular authentication and amendment of the act adopted by the Commission.

Irregular authentication and amendment of the act adopted by the Commission

Arguments of the parties

26 In its supplementary application the applicant complains that the Commission infringed Article 12 of its Rules of Procedure, since the decision notified to it did not bear the required form of prior authentication. In that regard, it refers to the two abovementioned press articles (see paragraph 10 above) annexed to the supplementary application and which appeared shortly after the delivery of the PVC judgment in which the Court found that there were serious procedural irregularities affecting the PVC decision at issue. Furthermore, the applicant claims that a comparison of the versions of the decision as notified and published shows a

fundamental discrepancy: whereas the wording at the end of the former reads '*pour* la Commission, Sir Leon Brittan, Vice-président', the latter has the wording '*par* la Commission ...'.

27 With regard more particularly to point 63, the applicant is in doubt about the actual content of the decision and whether point 63 was indeed adopted on 19 December 1990 by the college of Commissioners. In reply to a written question from the Court it pointed out that point 63 was sent to it only after its application had been lodged and argued that, if that point had not been duly adopted on 19 December 1990, the Commission's Secretary-General could neither amend nor supplement the reasoning of the decision adopted on that date. The applicant refers to the judgment of the Court of Justice in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, paragraph 37, and concludes from it that neither the Secretary-General nor any other official of the Commission therefore had the power to add point 63.

28 At the hearing the applicant, referring to the judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF*, cited above, stated that the authentication provided for by Article 12 of the Commission's Rules of Procedure had to take place before the contested act is notified. It stated that the belated authentication by the President and the Secretary-General in the present case had occurred after the decision had been notified, and indeed after the present action had been brought, and could therefore not be regarded as having validly cured the original procedural irregularity, otherwise the very notion of an essential procedural requirement would have no substance. The applicant added that, since authentication had occurred more than one year after the adoption of the decision, it was clear that it had no longer been humanly possible for the President and the Secretary-General of the Commission to be in a position to check whether what they had been asked to authenticate did indeed conform to what had been adopted.

29 The Commission contends primarily that the plea should be rejected as being out of time and thus inadmissible. With regard to point 63, it states that the sending of the corrigendum by the Secretary-General's letter of 11 June 1991 did not produce any reaction from the applicant. It claims that it has in its possession only one

letter from the applicant's lawyer, of 4 July 1991, acknowledging receipt of the correction. Neither in that letter from its lawyer nor in its reply were any conclusions drawn by the applicant from the late notification of point 63.

30 In reply to a written question put by the Court, the Commission stated that in this case there was no matter of fact or of law which had come to light during the course of the procedure within the meaning of Article 48(2) of the Court's Rules of Procedure. The PVC judgment could not in itself be regarded as a new fact (see the order of the Court of First Instance in Case T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591, paragraph 12). It was also doubtful whether the statements of the Commission's representatives made in the context of other proceedings could, as such, be classified as a 'new fact' in the context of the present proceedings. Furthermore, the mere reference to press articles relating to another case in which it was not involved could not generally allow a party to invoke a new fact, otherwise an opportunity would be given for all kinds of speculation. Finally, part of the procedure for adopting the decision in the PVC case had been subject to specific time constraints. Since that was not so in the present case, there was no justification for assuming that the procedure followed in the PVC case had been identical in every detail to the procedure followed in other cases challenging the application of Articles 85 and 86 of the EEC Treaty, and that the presumption of validity enjoyed by the present decision did not apply. As to the textual discrepancies to which the applicant refers, the Commission considers that they could have been raised at the very start of the proceedings.

31 As to the substance, the Commission stated at the hearing that it was now no longer possible to indicate the precise date on which the decision had been authenticated by the signatures of the President and the Executive Secretary. However, it was clear that that authentication had been carried out at the beginning of 1992 as a precautionary step after the issues of authentication had been raised before the Court of First Instance in the cases giving rise to the PVC judgment.

32 The Commission claimed, however, that authentication of a decision did not necessarily have to precede its notification. Authentication did not constitute an integral part of the procedure whereby the college adopts the decision itself and Article 12 of the Rules of Procedure did not lay down any precise date in that regard. Consequently, authentication carried out after notification was legally valid if it confirmed with a sufficient degree of certainty that the text of the decision adopted by the college of Commissioners was identical to that notified to the undertaking concerned. That was precisely the case here, since the decision had in fact been adopted by the college on 19 December 1990 just as it was, so that the principle of collegiate responsibility had been observed; furthermore, unlike the PVC decision, the texts adopted, notified and published were identical and the decision in the present case was not affected by any of the other defects alleged to vitiate the PVC decision.

33 The Commission added that authentication was merely one means of ensuring legal certainty if there was a dispute as to whether the text notified corresponded with the text adopted. In the present case, there was no such dispute. Consequently, the fact that the President and the Secretary-General of the Commission had not added their signatures before notification had not substantially affected the applicant's position. The fact that authentication of the decision had taken place after its notification, and even after the bringing of the present action, was not of fundamental importance for the applicant, since it could not in itself cast doubt on the authenticity of the text in question. Therefore, the presumption of the validity of administrative measures should fully apply.

34 The Commission stated that, in such circumstances, to deny that the signing *ex post facto* by the President and Secretary-General of the Commission of the text of the decision constituted valid authentication would amount to pure, meaningless formalism, especially since it was commonly accepted that such a formality is necessarily a kind of fiction in view of the fact that voluminous texts could not be checked in full. Where an administrative or judicial authority signed a document it could not be expected that all persons signing it had read its entire text.

Findings of the Court

— Admissibility

35 In order to assess the admissibility of the new plea in law alleging irregular authentication, which was raised in the supplementary application after the closure of the written procedure, it should be noted that under Article 48(2) of the Rules of Procedure of the Court the submission of new pleas in law during the course of the proceedings is not allowed unless those pleas are based on matters of fact or of law which came to light in the course of the procedure: consideration of the admissibility of the plea is then reserved for the final judgment.

36 The plea in question is in two parts: the first part alleges irregular authentication of the act adopted by the Commission, and the second part alleges that the text of the decision was amended after the action was brought, namely by the insertion of point 63.

37 As to the first part of the plea, the Court considers, first of all, that the statements made by representatives of the Commission regarding the systematic failure, over a period of several years, to authenticate acts adopted by the college of Commissioners is a matter of fact which can be relied on by the applicant in support of its application. While it is true that those statements were made solely in the context of the PVC case, they cover all the proceedings under Articles 85 and 86 of the Treaty which have taken place up to the end of 1991, including the proceeding with which the present dispute is concerned.

38 Although the lack of authentication of the contested decision was a fact which already existed before the present action was brought, the applicant could not have been expected to rely on it as soon as it lodged its application on 2 May 1991. The text of the decision, notified in the form of a copy certified as a true copy by the

signature of the Secretary-General of the Commission, would not, even on a careful reading, reveal that the original of the decision had not been authenticated at the relevant time. It is true that point 63 was missing from the text of the decision. However, the applicant, as addressee of that decision, could not infer from that circumstance that authentication had not taken place.

39 Nor could the applicant know prior to lodging its application that, according to the Commission's subsequent statements, the authentication procedure provided for in Article 12 of the Commission's Rules of Procedure had long since 'fallen into desuetude' (see the PVC judgment, paragraph 32), since at that time the fact that that formality had allegedly fallen into desuetude had not yet been brought to the attention of the public concerned. It follows that the lack of prior authentication of the notified decision is a matter of fact which became apparent to the applicant during the present proceedings.

40 As to whether the submission, in the supplementary application lodged on 10 April 1992, after the closure of the written procedure, of the new plea in law based on that factual matter may be regarded as having been made in due time or whether it ought to have been made at an earlier stage in the procedure, it should be pointed out that Article 48(2) of the Rules of Procedure lays down neither a time-limit nor any particular formality for the submission of a new plea in law; in particular, it does not provide that, if it is not to be time-barred, such a submission must be made immediately, or within a particular period, after the matters of fact or of law to which it refers come to light. The Court considers that, since the submission of a plea in law is involved, a time-bar, restricting the ability of the party concerned to put forward all matters necessary for the success of its claims, should not in principle be admitted unless it is the subject of express, unequivocal rules. It follows that the applicant was at liberty to raise the new plea in a supplementary application lodged after the closure of the written procedure and before the opening of the oral procedure.

41 Moreover, even if the abovementioned provision were to be interpreted to the effect that a new plea in law is admissible only if submitted as expeditiously as possible, it should be pointed out that, in this case, the applicant would have satisfied that requirement. Although it is true that the Commission had already indicated at the hearing of 10 December 1991 in the cases giving rise to the PVC judgment that the non-authentication of acts adopted by the college of Commissioners was a consistent practice, neither the applicant nor its lawyers were involved in those cases and the applicant was not therefore supposed to know the content of that oral statement by the Commission before the two abovementioned press articles appeared at the end of February/beginning of March 1992. Consequently, the applicant could not be expected to invoke the plea in question even in its reply lodged on 28 December 1991. Finally, as regards the period which elapsed between the appearance of those articles and the lodging of the supplementary application, the Court considers that the period was reasonable, since it was objectively necessary for a careful re-examination, in the light of the content of those articles, of the text of the decision and the procedure followed for its adoption, in order to detect any procedural defects.

42 It follows that the first part of the plea alleging irregular authentication of the decision must be declared admissible.

43 It should be added that in any event in its order of 25 October 1994 the Court of First Instance ordered the Commission to produce *inter alia* the text of the decision authenticated at that time. As is apparent from the grounds of the order, the Court took into account the judgment in Case C-137/92 P *Commission* v *BASF*, cited above, in which the Court of Justice held, having regard to the Commission's admission that the acts adopted by the college of Commissioners had long since ceased to be authenticated, that non-authentication of a decision such as that concerned in the present proceedings constitutes an infringement of essential procedural requirements (paragraph 76). It also based its judgment on consistent case-law to the effect that the infringement of essential procedural requirements may be examined by the Community judicature of its own motion (judgments of the Court of Justice in Case 1/54 *France* v *High Authority* [1954] ECR p. 1, Case 2/54 *Italy* v *High Authority* [1954] ECR 37, Case 18/57 *Nold* v *High Authority* [1959] ECR 41, Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 14, and Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 18).

44 As regards the second part of the plea, to the effect that the text of the decision was subsequently amended by the insertion of a point 63, the only matter brought to the attention of the applicant before the action was brought was the fact that point 62 was followed immediately by point 64, which could have been taken by the applicant to be a mere error of numbering and was not necessarily indicative of the absence of an entire paragraph. Moreover, the actual text of point 63 was not brought to the applicant's attention until after its application had been lodged.

45 On 11 June 1991 the text of point 63 was sent to the applicant by the Secretary-General of the Commission. The applicant could then have realized that the notified text of the decision was incomplete. However, as has been held above (see paragraph 40), Article 48(2) of the Court's Rules of Procedure did not require the applicant to refer to that new matter already in its reply. Consequently, the second part of the plea must also be declared admissible.

— Substance

46 As regards the second part of the plea, it should be noted that, according to the Commission's replies in response to a written question put by the Court, point 63 was included in the text of the draft decision approved by the college (see Annex 1 to the Commission's replies of 17 May 1993). The Commission also explains that after the college adopted the decision some purely formal amendments were made to the decision with regard to the line spacing and the typographical characters used, which necessitated a new lay-out for the document. It is probable that point 63 disappeared when the document was then laid out. Since the paragraph had been approved by the Commission and was therefore part of the decision adopted, the Secretary-General of the Commission was obliged, as soon as it was discovered that the paragraph was missing from the notified text, to send it, in accordance with the second paragraph of Article 191 of the Treaty, to the undertaking to which the decision was addressed.

47 The Commission's explanation is confirmed by the wording of the authentication subsequently appended to the text of the decision, which stated that 'point 63 set out in the annex hereto was adopted by the Commission at its 1 040th meeting ...'. Even though that authentication has not been affected in accordance with the Commission's Rules of Procedure (see paragraphs 50 to 53 below), the Court considers that it should be admitted as evidence to show that the college actually adopted point 63.

48 Consequently, it must be found that, although point 63 had been adopted by the Commission, it was not notified to the applicant before the action was brought. However, the fact that the notification was vitiated by such a defect cannot of itself lead to the annulment of the decision; its only possible consequence is that the Commission may not rely on the point not notified. The second part of the plea is therefore unfounded.

49 As regards the first part of the plea, reference should be made to the wording of Article 12 of the Commission's Rules of Procedure in the version in force at the material time:

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

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

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

With regard to the various stages of the abovementioned procedure, the Court considers that the very scheme of those rules implies a sequence of events whereby first, pursuant to the first paragraph of the provision, acts are adopted by the college of Commissioners and then authenticated before being notified, as appropriate, to the persons concerned, pursuant to the third paragraph, and possibly published in the Official Journal. Consequently, authentication of an act must necessarily precede its notification.

50 That sequence, which follows from a literal and schematic interpretation, is confirmed by the purpose of the rule on authentication. As the Court of Justice held in its judgment in Case C-137/92 P *Commission* v *BASF*, cited above, that provision is the consequence of the Commission's obligation to take the steps necessary to enable the complete text of acts adopted by the college of Commissioners to be identified with certainty (paragraph 73). In that same judgment the Court added that authentication was therefore intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding in order that, in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted and so with the intention of the author (paragraph 75). The Court therefore concluded that authentication constituted an essential procedural requirement within the meaning of Article 173 of the EEC Treaty (paragraph 76).

51 In the present case, authentication of the contested decision was carried out after notification of the decision. Consequently, there was an infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty.

52 It should be pointed out that it is the mere failure to observe the essential procedural requirement in question which constitutes that infringement. It is therefore unconnected with the question whether there are discrepancies between the texts adopted, notified and published and, if so, whether or not those discrepancies are material, which is why it is irrelevant that the textual discrepancies pointed out by the applicant — namely 'pour la Commission' and 'par la Commission' and the absence of point 63 — are to be regarded as insignificant.

53 Regardless of the considerations set out above, it should be noted that authentication was carried out in this case after the action was brought. Once an originating application has been lodged, it is not possible for an institution to cure a material defect vitiating the contested decision simply by taking the step of retroactive regularization. That is especially true where, as in the present case, a decision is involved which imposes a fine on the undertaking concerned. Regularization carried out after an action has been brought would remove *ex post facto* any basis for a plea of non-authentication prior to notification. The Court of First Instance considers that such an approach would, once again, impair legal certainty and be contrary to the interests of persons affected by a decision imposing a fine. Consequently, it must be held that the defect resulting from the infringement of an essential procedural requirement has not been cured by authentication carried out one year after the action was brought.

54 It follows from the foregoing that the first part of the plea, alleging irregular authentication of the act adopted by the Commission, must be upheld. Consequently, the decision must be annulled in its entirety and it is not necessary to rule on the other pleas in law raised by the applicant in support of its claim for annulment.

Costs

55 Under the first paragraph of 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, it should be ordered to pay the costs, and it is not necessary to take into account the applicant's partial withdrawal with regard to its claim that the decision be declared non-existent.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay);**

2. **Orders the Commission to pay the costs.**

Cruz Vilaça Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 29 June 1995.

H. Jung J. L. Cruz Vilaça

Registrar President