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Stock Exchange mergers

Speaking in Brussels on 5 December, Mario Monti, the Commissioner for Competition, addressed the question of applying the rules on competition to the integration of capital market infrastructures. He pointed out that the creation of Euronext through the merger between the Paris, Brussels and Amsterdam stock exchanges, as well as the acquisition of sole control of Clearstream by Deutsche Börse, had not been notified to the Commission under the European merger control law. This was because the Commission assessed mergers only if they had a "Community dimension", that is to say, if the companies involved met certain turnover thresholds.

Turnover and market capitalisation are two very different things, especially when size is concerned. The turnover of a stock exchange is measured in terms of the fees charged for its services; and this explains why mergers in the field of financial infrastructure rarely qualify for the merger review provided by the Commission, either because the turnover thresholds are not met or because they have more than two-thirds of the turnover in one and same country. To ensure that the Commission and the different national competition authorities have their say on merger cases falling outside the scope of the Merger Regulation, the Commission agreed with the Member States in June 2000 that a special cooperation procedure would apply to the sector of stock exchanges and other financial infrastructure providers. The procedure provides for the mutual information of all Member States and the Commission of merger notifications, requests for information, etc., in the same way as is done by the Commission in those cases for which it has exclusive competence. Each Member State and the Commission are then free to comment to the national competition authorities, which are reviewing a transaction.

There has been some talk about whether horizontal mergers (for example, between stock exchanges) are preferable to vertical mergers (that is, between a stock exchange and a clearing house). As a competition authority, the Commission does not have a preference for one model of integration over the other, provided that competition law is respected. The competition issues raised are, however, different in each case. Advocates of the "horizontal model" highlight the separation of roles between different service providers: Stock Exchanges, central counterparties, Central Securities Depositories and Banks. Supporters of vertical consolidation have a different perception of the future of the industry: they see an increasing overlap between trading, clearing and settlement and orient their business model accordingly. Their objective is to build a "transaction engine" that would operate large systems and "load" them with volume. The declared aim of such integration is to "deepen the value-added chain", both upstream and downstream, that is, to cover all the steps in a securities transaction, from the placement of an order, to delivery of the securities against payment, to subsequent safe custody. ■

PROCEDURE (ALL INDUSTRIES): COUNCIL REGULATION

Subject: Procedure

Industry: All industries

Source: Commission Statement IP/02/1739 and Commission Memorandum MEMO/02/268, dated 26 November 2002

(Note. As soon as the text of the newly adopted Council Regulation is available, it will be published and analysed: it does not, however, come into force until 2004. In the meantime, the Commission has issued the following Statement and Memorandum about the procedural reforms governing the European Community's rules on competition. The Memorandum is in the form of "frequently asked questions" and answers. The reform is the most comprehensive undertaken since Regulation 17 of 1962: it is designed to simplify the way in which the Treaty's antitrust rules are enforced throughout the European Union. It abolishes the practice of notifying business agreements to the Commission, therefore ending bureaucracy and legal costs for companies; and it will strengthen vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and national authorities.)

Commission Statement

The proposed reform concerns the modernisation of the 40-year old procedural rules, embodied in Regulation 17 of 1962, which govern how the EC Treaty's provisions on agreements between undertakings which may restrict competition (Article 81 of the EC Treaty) and abuses of a dominant position (Article 82 of the Treaty) are enforced. The reform, which is the most comprehensive overhaul of the European Community's antitrust procedures in more than 40 years, does not alter the substantive content of Articles 81 and 82 of the EC Treaty. The new rules will come into force on the 1st of May 2004: that is, at the same time as the European Union takes in ten new Member States.

The core features of the reform are:

(a) shifting from a system of authorisation under which all agreements have to be notified to the Commission in order to obtain antitrust approval toward a directly applicable exception system. This puts more responsibility in the hands of the companies who will need to ensure themselves that their agreements do not restrict competition or, in case they do, that these restrictions qualify under Article 81(3). On the other hand it ends unnecessary bureaucracy and legal costs for companies;

(b) making the provisions of Article 81(3) directly applicable, thus allowing joint enforcement of the rules governing restrictive practices by the Commission, the

national competition authorities and the national courts. All competition authorities involved will closely co-operate in applying the antitrust rules.

The reform of Regulation 17 must be distinguished from the upcoming reform of the rules governing merger control. Mergers having a Community dimension, as defined in the applicable Merger Regulation, must still be notified to the Commission before their implementation.

Rationale for the Reform

The existing system was appropriate in 1962 when there were only six Member States and there was little experience in the application of antitrust law governing agreements between undertakings. During the last forty years, however, a great number of individual decisions have been made applying the exemption criteria of Article 81(3) of the Treaty. National competition authorities and national courts are therefore well aware of the conditions under which the benefit of Article 81(3) can be granted. Individual exemptions taken by the Commission are thus no longer indispensable to ensure a uniform application of Article 81(3) of the Treaty. A system of notifications is no longer workable as the EU prepares to take in ten new member states.

How decentralised enforcement will work in practice

The Commission and the competition authorities of the Member States will put into place a network of competition authorities, called the European Competition Network (ECN), which will be a key plank of the new enforcement system. It will allow for greater co-operation between the Commission and the national competition authorities and it will provide for an allocation of cases according to the principle of the best-placed authority. As a guardian of the Treaty the Commission will have a special responsibility in the network. The Commission will also adopt during the course of the next year a number of Notices explaining or clarifying how certain concepts must be understood with a view to provide general guidance and legal certainty for businesses.

Commission Memorandum

What are the main lines of antitrust reform?

The reform adopted by the Council significantly strengthens the enforcement of antitrust rules. First of all, the reform enhances enforcement by simplifying procedures. Companies will no longer have to notify their individual agreements in order to obtain clearance or exemption under the antitrust rules. Notification has created a lot of bureaucracy and cost for undertakings in the past. The new Regulation cuts back this bureaucracy and allows the Commission to focus its attention on those cartel and price fixing agreements that are truly harmful to competition.

Does the reform affect the role of national competition authorities?

A central pillar of this reform is the increased role of national competition authorities. They will become, next to the Commission, the enforcers of EC competition rules. The reform will introduce a mechanism for sharing enforcement tasks between the Commission and national authorities. This is a novelty in the way the Union enforces its competition rules. This reform shows that the Commission does not hesitate to involve a wide network of national enforcement agencies in the implementation of a core Community competence when this clearly contributes to stronger enforcement of EU law. National competition authorities are also encouraged to focus vigorously on the important fight against cartels or price-fixing agreements.

Does this reform prepare the EU for enlargement?

The reform of antitrust proceedings is an important step towards preparing the European Union for enlargement. A system of notification and authorisation of a multitude of individual agreements is simply not workable in the context of a European Union comprising 25 Member States. The new streamlined and simplified system will therefore enter into force on the 1st May 2004, to coincide with the enlargement of the Union through the inclusion of 10 new Member States. By this date, the European Competition Network ("ECN") will have also have been established. Implementation of the network in a working group has already begun: it involves not only the competition authorities of the present Member States but also those of the future new Member States. Co-operation within this network will ensure that antitrust rules are enforced in a consistent manner.

How will the ECN function?

To ensure regular consultation between the different enforcement agencies, a network of European Competition authorities (ECN) will be set up. Regular contact and consultation on enforcement policy will provide a valuable safeguard against divergent application of the antitrust exemption in those cases, where the criteria have not yet been clarified by previous antitrust enforcement practice.

The Commission will remain at the centre of the ECN. It will, as the guardian of the Treaty, ensure that decisions taken by national authorities which make up the new "enforcement community" are consistent and that the antitrust rules are applied in a uniform manner. In this respect, the new Regulation sets out several mechanisms of co-operation between national authorities and the Commission. It ensures, for example, that the Commission is consulted before decisions applying Articles 81 or 82 of the Treaty are taken. Also, there are rules on suspending parallel national proceedings, once the Commission or a national competition authority has started investigations in a particular case. Furthermore, the Commission will continue to deal with cases itself, primarily, but not exclusively, with those affecting more than three Member States.

Finally, the Commission will keep, as an ultimate safety valve, the power to initiate proceedings on its own with the effect that national competition authorities may no longer apply Articles 81 or 82.

How will cases involving the application of Articles 81and 82 of the EC Treaty be allocated among the members of the ECN?

Under the new Regulation, the Commission will not act as a "clearing house" and distribute cases to national authorities. Complainants and leniency applicants will bring their case to the authority they consider best placed to handle it. If the authority in question considers that it is not well placed to deal with a case, reallocation may be envisaged. Each authority should deal with cases which it is well placed to deal with: national authorities are well placed to deal with cases the geographical scope of which does not extend too far beyond their territory. It is not because the geographic scope of a case is limited that it is unimportant or that it does not raise important issues from a competition point of view.

Are the authorities of the candidate countries able to apply the antitrust rules?

In most of the candidate countries, competition authorities had been set up in the early 1990s. For many years, they have been applying competition laws identical or very similar to Articles 81 and 82 of the Treaty. The Commission will pay special attention to the new Member States to help them in the application of the EC competition rules.

How will the reform save cost for undertakings?

Under the old Regulation 17, undertakings believing that their agreements merited antitrust exemption had to notify the agreements to the Commission to obtain individual exemption from the antitrust rules. Exemption was necessary for the agreement to be valid and enforceable in law. Initially, the notification requirement was a good thing for the promotion of the antitrust rules. Prior notification allowed the Commission to obtain information on commercial practices in the different sectors of industry. This expertise was not at all prevalent in the 1960s as the Directorate General for Competition had only just started enforcing the new antitrust rules; and information on commercial reality was deemed necessary to ensure a sufficiently uniform application of antitrust rules. Nevertheless, the notification requirement imposed considerable expenses on undertakings wishing to conclude agreements, especially in the drafting of notifications and the collection of the necessary information.

Under the new system, which is directly applicable, undertakings are freed from the obligation to notify; and their agreements are valid in law automatically as long as the criteria for exemption are met. In a mature system of antitrust enforcement all participants - undertakings, their legal advisers, the competent authorities and national courts - are well aware of the criteria which need to be

fulfilled to obtain antitrust exemption. Forty years of Court of Justice and Court of First Instance case-law and Commission decisions have established a homogeneous body of clear rules on the circumstances in which antitrust exemption under Article 81(3) of the Treaty is available.

What is meant by a "directly applicable"?

The antitrust rules governing restrictive agreements and abuses of a dominant position are directly applicable in the national laws of the Member States. This means that these provisions are sufficiently clear to be directly invoked by individuals in national courts. Direct applicability also means that the national courts can apply the prohibitions contained in Article 81(1) and 82 of the Treaty, if these articles are necessary to resolve national litigation. Direct applicability thus allows every court in every Member State to apply the antitrust rules of the Treaty. It is obvious that direct applicability greatly strengthens the enforcement of antitrust rules throughout the European Union.

However, under the old system set forth in Regulation 17, the Commission had the sole power to apply the antitrust exemption contained in Article 81(3) of the Treaty. National courts could only apply the prohibition as contained in Article 81(1) of the Treaty but not grant antitrust exemption under Article 81(3) of the Treaty.

The new Regulation now makes it clear that also the antitrust exemption as contained in Article 81(3) of the Treaty becomes directly applicable and can thus be applied by national courts. The new Regulation therefore makes Article 81 of the Treaty directly applicable as a whole and aligns it with Article 82 of the Treaty, which has always been directly applicable in its entirety. A directly applicable exception system strengthens the application of antirust rules.

Does this mean that economic analysis will increase in the new system?

It does. Forty yeas of interpreting the prohibition on restrictive practices have demonstrated that the effects of a particular agreement can be assessed only by means of economic analysis of all the facts and market circumstances in which the agreement has been concluded. Under the previous system only the prohibition on restrictive practices as contained in Article 81(1) could be applied by national authorities and courts. The antitrust exemption contained in Article 81(3) of the Treaty could only be granted by the Commission. This led to an unfortunate division between paragraphs 1 and 3 of this provision, which did not facilitate an integral analysis of the economic effects of a particular agreement. Ending the present bifurcation of the different paragraphs of Article 81 of the Treaty will also enhance a more economic approach toward applying this Article as a coherent provision.

If the new system is better for undertakings, why has the Commission applied the notification and authorisation system for the last 40 years?

The notification and authorisation system can be explained only in its historical context. When the original Regulation 17 was adopted in 1962, there was no well developed "competition" or "antitrust" culture in the six original Member States. Neither the European Commission nor the national authorities were very familiar with the different sectors of industry and the commercial practices that prevailed at the time. A system of prior notification enabled the Commission to gather to become familiar with the markets and gather expertise in enforcing the antitrust rules governing restrictive agreements. After 40 years of applying the rules on restrictive practices and granting exemptions under the antitrust rules, the Commission felt that the conditions provided for in Article 81(3) had become clear enough to be directly applicable. In other words, the European Union has meanwhile developed a sufficiently robust "antirust culture". Forty years of case-law by the European Court of Justice, the European Court of First Instance and the Commission has made antitrust enforcement a mature system. A mature system is a system that no longer requires individual notification of restrictive agreements because the rules governing such agreements are well developed and sufficiently clear to undertakings and their legal advisers.

Does the Commission need the power to search private homes?

This new power is necessary to maintain the effectiveness of inspections by the Commission. Under the existing rules, Commission inspectors can enter only company premises. Experience from recent cases has shown that managers often keep relevant documents in their homes. Evidence was even found suggesting that incriminatory documents were deliberately stored in private homes. This means that, under the existing rules, companies can effectively undermine inspections by storing incriminating documents in private homes.

Are there sufficient safeguards for the persons concerned?

The new Regulation provides that searches in private homes can be carried out only if there is a reasonable suspicion that business records, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are kept in private homes. This implies that the Commission will search private homes only when it has additional elements suggesting that it is necessary to make such inspections in order to ensure the effectiveness of the main inspection. The new Regulation also ensures that the exercise of this power is subject to authorisation by a judge in every Member State. In carrying out its function, the national judge will ensure that the coercive measures are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. These are important guarantees for the persons concerned. They are similar to those existing in the Member States in such proceedings. ■

PRICING POLICY (PLASTERBOARD): THE LAFARGE/BPB CASE

Subject: Pricing policy
Information agreements
Concerted practices
Fines

Industry: Plasterboard
(Some implications for most industries)

Parties: BPB plc (United Kingdom)
Gebrüder Knauf Westdeutsche Gipswerke KG (Germany)
Société Lafarge SA (France)
Gyproc Benelux SA/NV (Belgium)

Source: Commission Statement IP/02/1744, dated 27 November 2002

(Note. The total amount of fines imposed in this case is the second highest ever imposed by the Commission, after the vitamin cartel case. The fine imposed on Lafarge is the third largest ever imposed on a single company in any one case. The case has a certain interest in that it shows the relationship between pricing policy, information agreements designed to monitor the policy and concerted practices supplementing the more formal arrangements between the parties.)

The Commission has imposed fines totalling €478 million on four companies which operated a long-running cartel on the market for plasterboard, a product which is widely used in the building industry and by DIY practitioners. The plasterboard market, which had a turnover of more than €1.2 billion in 1997 (the last full year of the infringement) is the largest in terms of value to have been covered by a Commission cartel decision over the last ten years or so. The cartel affected 80% of consumers in the European Union, namely in France, the United Kingdom, Germany and the Benelux countries. Two of the companies involved, Lafarge and BPB, were committing their second infringement of EU law on restrictive agreements, having already been fined once in 1994. According to the Commission: "The building industry is the pulse of the economy. The substantial amount of the fine reflects the size of the market, the impact of the illicit agreement on the consumer and the repeated infringement of the competition rules by two of the companies. The Commission is focusing its drive to stamp out cartels on the key sectors of the European economy, where its action can directly improve the well-being of consumers, as is the case here"

Following a detailed investigation during which it carried out surprise inspections in 1998, the Commission concluded that, between 1992 and 1998, BPB, Gebrüder Knauf Westdeutsche Gipswerke and Société Lafarge participated in a plasterboard cartel in the United Kingdom, Germany, France and the Benelux countries. Gyproc Benelux joined the cartel in 1996.

Plasterboard is a manufactured product used as a prefabricated construction material or by DIY practitioners and consisting of a sheet of gypsum plaster sandwiched between two sheets of paper or some other material. The companies covered by the decision produce virtually all the plasterboard manufactured in the countries concerned, in some of which the name of the relevant company's product is commonly used to designate the product itself ("gyproc" in Belgium, "placoplâtre" in France), with the names of the companies being very clearly identified as a brand name by consumers (Rigips/BPB or Knauf in Germany, Lafarge in France).

The cartel started at a meeting held in London in early 1992 at which the representatives of BPB and Knauf decided to end what they called the "price war" which was then taking place and expressed the common desire to reduce competition to a level suiting their interests on the German, French, United Kingdom and Benelux markets. In previous years, the price of plasterboard had fallen sharply as a result of fierce competition, which had directly benefited consumers.

Following the London meeting, a secret information-exchange system was set up to monitor market trends and avoid over-aggressive competition. Lafarge and subsequently Gyproc also joined the system, in mid-1992 and June 1996 respectively. The information assembled by the Commission shows that, on the United Kingdom market, BPB, Knauf and Lafarge repeatedly, through high-level contacts, exchanged information on their sales volumes so as to provide mutual reassurance that the price war had ended. Similarly, they repeatedly gave each other advance warning of price increases.

Top representatives of the companies also met in a hotel at Versailles in 1996, on the fringes of a trade association congress, to prevent a new price war in Germany in the mid-1990s, when the four companies were simultaneously increasing their production capacity in Germany and imports from eastern Europe, particularly Poland, were rising. Other meetings followed in Brussels, in 1997, and in The Hague, in 1998, to share out or at least stabilise market shares in Germany.

These high-level meetings were followed up, at a lower level, by repeated concerted action by BPB, Knauf, Lafarge and Gyproc on the application of price rises on the Germany market between 1996 and 1998. This concerted action took the form of discussions on the fringes of trade association meetings, the sending to competitors of letters announcing price increases to customers and even the sending, to the private addresses of the directors of the German subsidiaries, of the instructions given to sales forces. Such conduct constitutes a very serious infringement of the competition rules laid down in Article 81 of the EC Treaty.

The Commission's investigation began in November 1998 with inspections on the premises of several producers. Following the inspections and information requests sent to the companies in 1999 and 2000, BPB and Gyproc Benelux cooperated in the investigation and provided evidence. In April 2001, the Commission sent a Statement of Objections to the four companies and also to Etex SA, a Belgian financing company which was also included in the investigation, but on which

the Commission closed the proceedings. Etex holds 54% of Gyproc Benelux, the other parent company being BPB with 46%. Nevertheless, the Commission has concluded that there is not enough evidence to prove that Etex participated in the infringement or to hold it responsible for Gyproc's conduct.

The Commission consequently decided to impose the following fines (€ million): Lafarge: 249.6; BPB: 138.6; Knauf: 85.8; Gyproc Benelux: 4.32. The amounts of the fines reflect the size of the plasterboard market, which was worth more than €1.2 billion in 1997, the last full year of the infringement, and the length of the period during which the cartel operated - more than six-and-a-half years. In the case of Lafarge, the Commission has also taken account of its overall size, which is much greater than that of the other companies, so as to ensure that the fine has a real deterrent effect. Lafarge is the largest cement company in the world, and its turnover is five times that of BPB or Knauf. Gyproc is much smaller still. As far as BPB and Lafarge are concerned, the Commission also viewed as an aggravating circumstance the fact that the two companies had previously infringed the competition rules. Lafarge was fined in 1994 in the cement cartel, and BPB, through its subsidiary BPB De Eendracht, was one of the companies fined in the cartonboard decision, also in 1994. This means that, at the time when these decisions were notified to them, the two companies were participating in another restrictive agreement in which they persisted.

There were no mitigating circumstances to justify a reduction in the fine imposed on Knauf and Lafarge, since, unlike BPB and Gyproc, they did not cooperate with the Commission in its investigation. Under the leniency policy introduced in 1996 (see below), the Commission can reduce a fine even where there has been repeated infringement of the competition rules, provided the companies cooperate in uncovering the cartel. In calculating fines in cartel cases, the Commission takes account of the gravity of the infringement, its duration and any aggravating or mitigating circumstances. It also takes account of the market share held by the companies and their overall size, so as to ensure that the fine reflects each company's participation in the infringement and its capacity to harm other operators, particularly consumers, and so as to ensure that the fine acts as a deterrent. The fines are not therefore calculated primarily by reference to a company's turnover, although, under the legislation in force, the fine may never exceed 10% of a company's annual turnover.

Once the amount has been determined, the fines may be reduced to take account of the companies' cooperation in the investigation, in line with the Commission's policy regarding the non-imposition or reduction of fines in cartel cases. The Commission has accordingly granted a reduction of 30% in the fine imposed on BPB and a reduction of 40% in the fine imposed on Gyproc because they provided it with additional information on the cartel before the statement of objections was sent. Knauf and Lafarge did not cooperate in the Commission's investigation and the fine imposed on them has not been reduced. Although a new leniency notice was adopted in February 2002, it is the previous provisions that are applicable in this case (the notice published on 18 July 1996). This is because the cooperation took place before February 2002. ■

PRICE FIXING (CHEMICALS): THE AVENTIS / MERCK CASE

Subject: Price fixing
Market sharing
Fines

Industry: Chemicals; methylglucamine
(Some implications for other industries)

Parties: Aventis Pharma SA
Rhone-Poulenc Biochemie SA
Merck KgaA

Source: Commission Statement IP/02/1746, dated 27 November 2002

(Note. This was a classic cartel; but, in view of its relatively narrow scope, it merited relatively small fines. For an indication of the size of the fines recently imposed by the Commission in cartel cases, see the next page.)

The Commission has adopted a decision finding that Aventis Pharma and Rhone-Poulenc Biochemie, which belong to the Aventis group, and Merck breached European Community competition rules by colluding to fix prices and market shares for methylglucamine between 1990 and 1999. Methylglucamine is a chemical substance used in x-ray analyses. The three companies together control the entire production worldwide. In its decision the Commission treated Aventis Pharma and Rhone-Poulenc Biochemie as one company and fined them €2.85 million. Merck, on the other hand, benefited from full immunity because it submitted crucial information at a time when the Commission had no knowledge of the cartel. When setting the fine the Commission also took into account the small size of the methylglucamine market, which is the smallest product market for which it has ever adopted a cartel decision.

The Commission's decision found that, between November 1990 and December 1999, the three companies formed a cartel in breach of Article 81(1) of the EC treaty by which they fixed market shares for the product, agreed on price targets and price lists as well as on the sharing of the largest customers. The companies concerned are the only producers of pharmaceutical grade methylglucamine in the world. The market can, therefore, be characterised as a duopoly. The value of the market for methylglucamine in the European Economic Area in 1999 was around €3,1 million.

The investigation started in September 2000 when the Commission was approached by representatives of Merck who revealed the cartel and applied for immunity from fines as foreseen in the Commission's Leniency Notice of 1996. In January 2001, the Commission carried out an inspection at the premises of Aventis Pharma and Rhone-Poulenc Biochemie. The investigation culminated

with the adoption of a Statement of Objections against the three companies in June 2002.

The Commission took the view that the cartel agreement was a serious infringement, but considered that Merck fulfilled the conditions for total immunity from fines since it provided crucial information before the Commission was even aware of the illegal behaviour, which had, in any case, already ended. It also took into account the small size of the methylglucamine market. But it imposed a fine of €2.85 million on the Aventis subsidiaries after granting a 40% reduction to reward them for their co-operation throughout the investigation. ■

List of the 10 largest cartel decisions, in terms of total fines

Year	Case	Total amount per case (€ million)
2001	Vitamins	855.23
2002	Plasterboard	478.32
2001	Carbonless Paper	313.69
1998	TACA	272.94
2001	Graphite Electrodes	218.8
2001	Citric Acid	135.22
2002	Methionine	127
2002	Austrian banks	124.26
1994	Cartonboard*	119.38
2000	Lysine	109.990
*Fines reduced by Court judgments		

The plasterboard decision, described on page 283 of this issue, is the sixth cartel decision since the beginning of the year 2002. The other cases concerned Austrian banks, methionine, industrial gases and Christie's and Sotheby's fine arts auction houses, together with the decision reported on the previous page on methylglucamine. In 2001, the Commission took 10 cartel decisions in which 56 firms were fined a total of €1,836 million.

The Court cases reported in this Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

PROCEDURE (POLYVYNILCHLORIDE): THE LVM CASE

Subject: Procedure
Annulment

Industry: Polyvynilchloride (PVC)
(Implications for all industries)

Parties: Limburgse Vinyl Maatschappij NV (LVM), DSM NV & DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH, Hoechst AG, Imperial Chemical Industries plc (ICI);
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 15 October 2002, in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P (*Limburgse Vinyl Maatschappij et al v Commission*)

(Note. This was the final round in the battle by the members of the PVC cartel to challenge the Commission's Decision and the Judgment of the Court of First Instance, which largely upheld the Commission's views. It was successful only to the extremely limited extent that one of the nine appellants, Montedison, had two of its pleas upheld. The Court's judgment was long and was for the most part dismissive; but it contains some passages from which other potential litigants may benefit. Many issues were raised: among them, res judicata, the principle of non bis in idem, reasonable period, professional secrecy and self-incrimination. The more interesting passages from the judgment are set out below.)

Judgment

Following investigations conducted in the polypropylene sector on 13 and 14 October 1983 pursuant to Article 14 of Council Regulation 17, the Commission of the European Communities commenced an inquiry concerning polyvinylchloride (PVC). It subsequently undertook various investigations at the premises of the undertakings concerned and sent them several requests for information. On 24 March 1988 it instituted on its own initiative a proceeding under Article 3(1) of Regulation 17 against 14 PVC producers. On 5 April 1988 it sent each of those undertakings a statement of objections as provided for in Article 2(1) of Commission Regulation 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Regulation No 17. All the undertakings to which that statement was addressed submitted observations in June 1988. Except for Shell International Chemical Company Ltd, which had not requested a hearing, they were heard in September 1988. On 1 December 1988 the Advisory Committee on Restrictive Practices and Dominant Positions delivered an opinion on the Commission's draft decision. At the end of the proceeding, the Commission

adopted Decision 89/190/EEC of 21 December 1988 (the PVC I decision). By that decision, it penalised the following PVC producers for infringement of Article 85(1) of the Treaty (now Article 81(1)): Atochem SA, BASF AG, DSM NV, Enichem, Hoechst, Hüls, ICI, LVM, Montedison, Norsk Hydro A/S, Société artésienne de vinyle SA, Shell, Solvay & Cie and Wacker-Chemie. All those undertakings except Solvay brought actions to have that decision annulled by the Community judicature.

The Court of First Instance declared Norsk Hydro's application inadmissible by order of 19 June 1990 (Case T-106/89 *Norsk Hydro* v *Commission*). The other cases were joined for the purposes of the oral procedure and the judgment. By judgment of 27 February 1992, the Court of First Instance declared the PVC I decision non-existent. On appeal by the Commission, the Court of Justice, by judgment of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others*, set aside the judgment of the Court of First Instance of 27 February 1992 and annulled the PVC I decision. On 27 July 1994 the Commission adopted the PVC II decision in relation to the producers which had been the subject of the PVC I decision, with the exception of Solvay and Norsk Hydro. That new decision imposed on the undertakings to which it was addressed fines of the same amounts as those imposed by the PVC I decision.

The actions brought before the Court of First Instance

By applications lodged at the Registry of the Court of First Instance between 5 and 14 October 1994, LVM, Elf Atochem, BASF, Shell, DSM NV and DSM Kunststoffen BV, Wacker-Chemie, Hoechst, Société artésienne de vinyle, Montedison, ICI, Hüls and Enichem brought actions before the Court of First Instance. Each of the parties sought annulment of the PVC II decision in whole or in part and, in the alternative, annulment or reduction of the fine imposed on it. Montedison also claimed that the Commission should be ordered to pay damages.

By the contested judgment, the Court of First Instance:

- joined the cases for the purposes of the judgment;
- annulled Article 1 of the PVC II decision in so far as it found that Société artésienne de vinyle had participated in the infringement complained of after the first half of 1981;
- reduced the fines imposed on Elf Atochem, Société artésienne de vinyle and ICI to EUR 2 600 000, EUR 135 000 and EUR 1 550 000 respectively;
- dismissed the remainder of the applications;
- ruled on the costs.

Forms of order sought in the appeals

The Applicants agree, in brief, that the Court should:

- annul in whole or in part the contested judgment and end the procedure or, in the alternative, refer the case back to the Court of First Instance for resumption of the proceedings;
- annul in whole or in part the PVC II decision;

- annul the fines imposed on the appellants or reduce the amounts thereof;
- order the Commission to pay the costs of the proceedings at first instance and on appeal.

The principle of *res judicata*

Before the Court of First Instance, LVM, DSM, Enichem and ICI submitted that the Commission could not adopt the PVC II decision without disregarding the authority of *res judicata* attaching to the Court's judgment of 15 June 1994. They allege that the Court of First Instance, in paragraph 77 et seq. of its judgment, failed to observe the principle of *res judicata* by dismissing the plea which they had raised on the basis thereof. In their view, by ruling on the dispute in accordance with Article 54 of the EC Statute of the Court of Justice, after having annulled the judgment of the Court of First Instance of 27 February 1992, the Court of Justice, in its judgment of 15 June 1994, gave final judgment in respect of all the pleas raised by the undertakings in question.

In that connection, it should be observed that, in paragraph 77 of the contested judgment, the Court of First Instance rightly pointed out that the principle of *res judicata* extends only to matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission*, paragraph 14, and Case C-277/95 *Lenz* v *Commission*, paragraph 50). It stated further, in paragraph 78 of the contested judgment, that, in its judgment of 15 June 1994, the Court of Justice found that the Court of First Instance had erred in law by declaring the PVC I decision non-existent and that, therefore, the judgment of the Court of First Instance of 27 February 1992 had to be set aside. It also pointed out in paragraphs 78 and 81 of the contested judgment that the Court of Justice, when giving its final ruling on the dispute in accordance with Article 54 of the EC Statute of the Court of Justice, annulled the PVC I decision for infringement of essential procedural requirements on the ground that the Commission had infringed the first paragraph of Article 12 of its Rules of Procedure by failing to carry out the authentication of the PVC I decision in accordance with that article. Therefore, it was fully entitled to conclude, in paragraph 82 of the contested judgment, that the Court's judgment of 15 June 1994, which expressly ruled out the need to examine the other pleas in law raised by the applicants, did not settle those pleas. It rightly added in paragraph 84 of the contested judgment that, where the Court of Justice itself gives final judgment on the dispute in accordance with Article 54 of the EC Statute of the Court of Justice by accepting one or more pleas raised by the applicants, it does not automatically settle all the points of fact and law raised by them. Accordingly, the Court's judgment of 15 June 1994 imposed on the Commission only the obligation , pursuant to Article 176 of the EC Treaty (now Article 233), which requires an institution whose act has been declared void to comply with the judgment of the Court, to eliminate the illegality in the measure intended to replace the annulled measure.

The principle of *non bis in idem*

The principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in

competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision. The application of that principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. Thus, the principle of *non bis in idem* merely prohibits a fresh assessment in depth of the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second.

On the other hand, it does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them. Accordingly, since the Court of Justice, in its judgment of 15 June 1994, annulled the PVC I decision, including the penalties imposed thereby, without ruling on any of the substantive pleas raised by the appellants, the Court of First Instance was correct in finding that the Commission, by adopting the PVC II decision after curing the defect formally declared unlawful, had neither penalised the undertakings twice nor initiated a second procedure against them on the basis of the same facts.

The pleas on decisions being adopted within a reasonable time

LVM and DSM complain that the Court of First Instance failed to respond in a reasoned manner to their argument that Article 6 of the ECHR is as such applicable to proceedings in competition matters, and that it restricted itself to referring to paragraph 56 of its judgment in Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*. Thus, they also complain that the Court of First Instance reclassified as a general principle of Community law the fundamental principle that decisions are to be adopted within a reasonable time but then failed to apply Article 6 of the ECHR. In its judgment in Case C-185/95 P, *Baustahlgewebe* v *Commission*, paragraphs 26 to 44, the Court of Justice, without stating the nature of the principle in detail, ruled that Article 6 of the ECHR is directly applicable and that, in that case, the length of the proceedings before the Court of First Instance was not justified. However, it should be stated that, in paragraph 120 of the contested judgment, the Court of First Instance rightly observed that, as it had already ruled in paragraph 53 of the judgment in *SCK and FNK*, cited above:

· in accordance with settled case-law, fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, Opinion 2/94 of the Court of Justice, paragraph 33, and Case C-299/95, *Kremzow*, paragraph 14);

· for that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories;

· the ECHR has special significance in that respect (Case 222/84, *Johnston*, paragraph 18, and *Kremzow*, cited above, paragraph 14);

· furthermore, Article F.2 of the Treaty on European Union (now, after amendment, Article 6(2)) provides that the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

In paragraph 121 of the contested judgment, it then stated that it was necessary to examine whether the Commission had infringed the general principle of Community law that decisions adopted following administrative proceedings in competition matters must be adopted within a reasonable time.
In referring in that connection to paragraph 56 of its judgment in *SCK and FNK*, in which it held that:

· it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to competition policy;

· it is therefore unnecessary to rule on the question whether Article 6(1) of the ECHR is, as such, applicable to administrative proceedings before the Commission relating to competition policy,

the Court of First Instance responded implicitly but necessarily to the plea based on the direct applicability of Article 6 of the ECHR.

As to the substance, the Court of First Instance, referring to the wording of Article F.2 (now 6(2)) of the Treaty on European Union, correctly held that, in the Community legal system, the fundamental rights guaranteed by the ECHR are protected as general principles of Community law. Contrary to the appellants' assertion, it did not disregard the judgment in *Baustahlgewebe*, cited above, in paragraphs 20 and 21 of which the Court of Justice, having referred to the content of Article 6(1) of the ECHR, described as a general principle of Community law the right of all persons to a fair hearing and, in particular, the right to a hearing within a reasonable period of time.

With regard to complaints relating to the penalty for infringement of the principle that decisions are to be adopted within a reasonable time, it should be pointed out that the question of the penalty for infringement of the reasonable period principle, already dealt with in *Baustahlgewebe* with respect to judicial proceedings, is relevant only where such an infringement has been established. In stating the reasons as set out in paragraph 122 of the contested judgment, the Court of First Instance first took a preliminary view on that question before examining whether, in the present case, there had been an infringement of the reasonable period principle. Since it came to the conclusion that that principle had not been infringed, the findings in question do not form the necessary basis for the operative part of the judgment. It is therefore necessary to assess the

arguments submitted by the appellants in the context of the present complaints only if, contrary to the contested judgment, it must be held that there was actually an infringement of the reasonable period principle.

Complaints about the Commission's administrative procedure

LVM, DSM and Degussa complain that the Court of First Instance divided the administrative procedure into two stages: one beginning with the investigations carried out in the PVC sector in November 1983 and based on Article 14 of Regulation No 17, the other beginning on the date of receipt by the undertakings concerned of the statement of objections and leading to the adoption of the PVC II decision, excluding the period covered by the examination by the Community judicature of the legality of the PVC I decision and of the validity of the Court of First Instance's judgment of 27 February 1992 delivered as a result of actions brought against the PVC I decision.

In that connection, it should be observed that, contrary to what the appellants maintain, an administrative procedure may involve an examination in two successive stages. The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by Articles 11 and 14 of Regulation No 17 in the context of a preliminary investigation, takes measures involving a complaint that an infringement has been committed and having a significant impact on the situation of the suspected undertakings. This stage must enable the Commission, after investigation, to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the alleged infringement.

It should be borne in mind that the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities. However, that list of criteria is not exhaustive and the assessment of the reasonableness of the period in question does not require a systematic examination of the circumstances of the case in the light of each of them where the duration of the proceedings appears justified in the light of one of them.

It should be observed that the reasonableness of a period cannot be assessed by reference to a precise maximum limit determined in an abstract manner but, rather, must be appraised in the light of the specific circumstances of each case. In the present case, the Court of First Instance held that the first stage of the administrative procedure lasted four years and four months and the second 10 months. In the light of all the findings and assessments set out in the contested judgment, it is apparent that the Court of First Instance was right to deem the duration of the conduct by the Commission of each of the two stages of the administrative procedure preceding adoption of the PVC II decision to be reasonable before correctly concluding that, throughout the whole of that

administrative procedure, the Commission complied with the principle that it must act within a reasonable time.

The Court of First Instance rejected the argument that the duration of the judicial proceedings leading to the annulment of the Commission's first decision could be attributed to that institution simply because the illegality leading to the annulment was itself attributable to it. In that respect, it merely drew the appropriate conclusions from the fact that, before it, the appellants:

- did not allege that the duration of the judicial proceedings leading to the annulment of the PVC I decision had been excessive;
- neither attempted to show nor even pleaded any specific delay in those proceedings which was attributable either to the Community judicature or to the Commission itself on account of its conduct during those proceedings.

The general principle of Community law that action is to be taken within a reasonable time is applicable in the context of judicial proceedings brought against a decision of the Commission imposing fines for infringement of competition law (*Baustahlgewebe*, paragraph 21). The Court of Justice must therefore examine, at the appeal stage, Degussa's complaint directed specifically against the duration of the proceedings before the Court of First Instance which culminated in the contested judgment. Those proceedings began with the lodging between 5 and 14 October 1994 of the applications for annulment of the PVC II decision and ended on 20 April 1999, the date on which the contested judgment was delivered. Thus, they lasted approximately four and half years. Such a duration appears *prima facie* considerable. However, the reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (*Baustahlgewebe*, paragraph 29). In the present case, it should be borne in mind that the actions before the Court of First Instance were brought by 13 undertakings in five different languages.

On 6 April 1995 the Court of First Instance held a meeting with the parties pursuant to Article 64 of its Rules of Procedure. In view of the complexity of the procedural situation, linked, in particular, to the prior stages already completed and to the number and the importance of the pleas raised, it was decided, with the parties' agreement, that the written procedure should be suspended and that the oral procedure should be limited to examination of procedural submissions.
By order of 25 April 1995, the cases were joined for the purposes of that oral procedure. The oral procedure took place on 13 and 14 June 1995, but did not ultimately enable the hoped-for procedural solution to be implemented. By order of 14 July 1995, it was therefore ordered that the written procedure should be resumed and that the cases be disjoined. The written procedure followed the normal course, ending on 20 February 1996. It was then made subject to the rules governing languages provided for in Article 35 of the Rules of Procedure of the Court of First Instance.

On 7 May 1997, in view of the pleas for annulment based on the undertakings' having been given insufficient access to the Commission's file on which the PVC

II decision was founded, the Court of First Instance granted the appellants, in the context of measures of organisation of procedure, access to that file, save for internal Commission documents and documents containing business secrets or other confidential information. Having consulted the file in June and July 1997, all the appellants except for Wacker-Chemie and Hoechst lodged observations at the Registry of the Court of First Instance in July and September 1997. The Commission lodged its observations in reply in December 1997. By order of 22 January 1998, after the parties had been heard, the cases were rejoined for the purposes of the oral procedure, which took place between 9 and 12 February 1998. The contested judgment was delivered on 20 April 1999, ruling on all of the numerous procedural and substantive pleas after a statement of grounds comprising 1269 paragraphs.

It follows from the findings set out above that the duration of the judicial proceedings leading to the contested judgment was justified in the light of the particular complexity of the case.

The principle of the inviolability of the home

Before the Court of First Instance, DSM pleaded the illegality of all the investigations carried out in this case on the basis of written authorisations under Article 14(2) of Regulation No 17 or decisions under Article 14(3). It alleged, in that respect, that there had been a failure to observe the principle of the inviolability of the home within the meaning of Article 8 of the ECHR concerning the right to respect for private and family life, home and correspondence, as interpreted by the European Court of Human Rights (judgment of 16 December 1992 in *Niemietz*, paragraph 31).

In that respect, it should be observed that:

- the case-law of the European Court of Human Rights relating to the interferences by the public authorities referred to in Article 8(2) of the ECHR, on which the appellant relied, concerns measures taken by those authorities against the will of a suspect by way of coercion;
- the judgments in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*, which DSM considers to have been superseded by that case-law, examined generally the nature and scope of the powers of investigation conferred by Article 14 of Regulation No 17 before ruling on the validity of decisions to investigate under Article 14(3), which, in the circumstances described in Article 14(6), permit recourse to coercive measures in the event of opposition from an undertaking to an investigation ordered by a decision.

However, it is clear from the wording of the appeal that it is directed solely against the examination by the Court of First Instance of the investigation carried out on the premises of DSM on 6 December 1983 pursuant to an authorisation dated 29 November 1983. It therefore relates only to the application of Article 14(2) of Regulation No 17, which does not permit recourse to coercive action in the event of a refusal by an undertaking to submit to such an investigation, as the Court of First Instance rightly observed in paragraph 421 of the contested judgment. Accordingly, the complaint made by DSM against paragraph 420 of

the contested judgment must be rejected as irrelevant without its being necessary to rule on the merits of the statement in that paragraph that the development of the case-law of the European Court of Human Rights relating to Article 8 of the ECHR has no direct impact on the merits of the solutions adopted in *Hoechst*, *Dow Benelux* and *Dow Chemical Ibérica*. The ground of judgment challenged relates only to the examination by the Court of First Instance, in paragraph 419 of the contested judgment, of the decisions to investigate sent by the Commission pursuant to Article 14(3) of Regulation No 17, which are not mentioned in the appeal.

Infringement of the privilege against self-incrimination

Before the Court of First Instance, LVM and DSM disputed the legality, in particular under Article 6 of the ECHR, of all the information obtained from the undertakings by the Commission pursuant to Article 11(2) or (5) of Regulation No 17 irrespective of the addressees of the requests for information or decisions requiring information. They submitted that Article 6 of the ECHR, as interpreted by the European Court of Human Rights (judgment of 25 February 1993 in *Funke*, paragraph 44; see also the opinion of the European Commission of Human Rights of 10 May 1994 in *Saunders* v *United Kingdom*), lays down a right to remain silent and in no way to contribute to one's own incrimination, without any distinction being made according to the type of information requested. That right precludes the situation in which an undertaking is itself required to provide evidence of infringements which it has committed in any form, including documentary form. None of the undertakings' responses was provided voluntarily. All of them were given under threat of the penalties provided for in Article 15(1)(b) of Regulation No 17.

LVM and DSM therefore submitted that none of the undertakings' responses could be adduced as evidence. All of the responses should have been excluded from consideration. They requested that the PVC II decision be annulled inasmuch as it was based on evidence obtained in breach of the privilege against self-incrimination. LVM and DSM submit that, contrary to the finding of the Court of First Instance, their plea related not only to those questions posed by the Commission in the decisions requiring information referred to in paragraphs 451 to 453 of the contested judgment, which remained unanswered, but also to the answers of certain undertakings which the Commission used as evidence. In that respect, they rely on six answers, namely two given by ICI and four given by BASF, Elf Atochem, Solvay and Shell respectively, to which they specifically referred in the replies lodged by them in the proceedings before the Court of First Instance. They maintain that application of the legal criteria resulting from the case-law of the European Court of Human Rights should have led to those six answers being excluded from use as evidence.

It should be pointed out that, in paragraphs 441 and 442 of the contested judgment, to which the appellants raised no reasoned objection, the Court of First Instance declared the plea inadmissible, in so far as it sought to have the decisions requiring information which were addressed to each of them declared illegal, on the ground that the undertakings in question did not bring actions for annulment

of those decisions within two months of their notification. Accordingly, in paragraphs 443 to 459 of the contested judgment, the merits of the plea were considered only to the extent that it alleged infringement of the privilege against self-incrimination by virtue of:

- either the requests for information made under Article 11(2) of Regulation No 17, irrespective of the addressees, inasmuch as such measures could not be challenged by way of a direct action for annulment;
- or those decisions requiring information which were addressed, under Article 11(5) of Regulation No 17, to undertakings other than the appellants and against which the appellants were unable to bring an action for annulment.

The complaint made against the requests for information and against the decisions requiring information addressed to other undertakings implicitly consists of two aspects, namely the criticism (a) that the Commission obtained information incriminating those undertakings in their responses and (b) that it obtained information incriminating LVM and DSM in those same responses.

The *Orkem* judgment acknowledged as one of the general principles of Community law, of which fundamental rights are an integral part and in the light of which all Community laws must be interpreted, the right of undertakings not to be compelled by the Commission, under Article 11 of Regulation No 17, to admit their participation in an infringement (see *Orkem*, paragraphs 28, 38 *in fine* and 39). The protection of that right means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence.

The parties agree that, since *Orkem*, there have been further developments in the case-law of the European Court of Human Rights which the Community judicature must take into account when interpreting the fundamental rights, as introduced by the judgment in *Funke*, cited above, on which the appellants rely, and the judgments of 17 December 1996 in *Saunders* v *United Kingdom* and of 3 May 2001 in *J.B.* v *Switzerland*. However, both the *Orkem* judgment and the recent case-law of the European Court of Human Rights require, first, the exercise of coercion against the suspect in order to obtain information from him and, second, establishment of the existence of an actual interference with the right which they define.

Examined in the light of that finding and the specific circumstances of the present case, the ground of appeal alleging infringement of the privilege against self-incrimination does not permit annulment of the contested judgment on the basis of the developments in the case-law of the European Court of Human Rights. First, regarding the requests for information under Article 11(2) of Regulation No 17, the appellants have raised no express arguments against the grounds set out in therein, on the basis of which the Court of First Instance rejected the complaint made by them. Second, regarding the decisions requiring information adopted under Article 11(5) of Regulation No 17, the Court of First Instance stated that it was undisputed that the questions contained in the decisions and challenged by

the appellants were the same as those annulled by the Court of Justice in *Orkem* and that they were therefore vitiated by the same illegality.

In thus ruling on the decisions adopted under Article 11(5) of Regulation No 17, it implicitly rejected, as a matter of law, the appellants' complaint concerning those questions posed in that legal context which did not involve answers of the undertakings which led them to admit the existence of the infringement with which the investigation was concerned. According to the Court of First Instance, those questions were therefore not illegal in terms of the *Orkem* judgment.

With respect to the questions in those decisions which it held to be illegal, the Court of First Instance found essentially, without referring exclusively to those which remained unanswered, that they did not lead to answers constituting admissions or incriminations of third parties since they were countered either by refusals to answer or by denials. It then proceeded to carry out an appraisal of the facts which does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice.

In their appeals, in support of their assertion that the answers of some undertakings contributed to the gathering of evidence, LVM and DSM merely refer, without providing any specific explanations, to the six answers given by other undertakings on which they relied in the replies lodged by them in the proceedings before the Court of First Instance. The appellants thus make it impossible for the Court of Justice to determine whether the Court of First Instance distorted the facts in its assessment of the answers given to the questions contained in the decisions which it ruled to be illegal. Nor do they show that the answers given to the other questions contained in the decisions which it did not consider to be illegal were used for the purposes of incrimination. It follows that the complaint against the decisions requiring information must likewise be rejected without its being necessary to rule on the question whether the Court of First Instance erred in law in holding, in paragraphs 446 to 449 of the contested judgment and by reference to the *Orkem* judgment, that such decisions are illegal only in so far as a question obliges an undertaking to supply answers leading it to admit that there has been an infringement.

Professional secrecy and the rights of the defence

In that connection, it should be observed that, under Articles 20(1) and 14(2) and (3) of Regulation No 17, information obtained during investigations must not be used for purposes other than those indicated in the order or decision pursuant to which the investigation is carried out (*Dow Benelux*, paragraph 17). That requirement is intended to protect, in addition to the professional secrecy expressly referred to in Article 20(1) of Regulation No 17, the undertakings' defence rights (see *Dow Benelux*, paragraph 18), which not only form part of the fundamental principles of Community law but are also enshrined in Article 6 of the ECHR.

On the other hand, it cannot be concluded that the Commission is precluded from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty (*Dow Benelux*, paragraph 19).

Undertakings are in no way deprived of the protection afforded by Article 20 of Regulation No 17 if the Commission makes a new request for a document. From the point of view of the defence of their rights, they are in the same position as where the Commission no longer has the document, since it is forbidden to make direct use as evidence in a second proceeding of a document obtained in a previous proceeding.

The fact that the Commission has obtained documents in a given matter for the first time does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence. The Court of First Instance did not err in law by concluding that there was no infringement of Article 20 of Regulation No 17 or of the fundamental principle of observance of the rights of the defence.

...

17. The pleas raised by Montedison, Elf Atochem, Degussa, Wacker-Chemie and Hoechst alleging failure to respond to certain pleas as well as contradictory and insufficient grounds of the contested judgment

(a) The plea raised by Montedison alleging failure to deal with its plea alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision

Montedison complains that the Court of First Instance did not examine the first plea raised by it, alleging infringement of Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17, read in conjunction with Article 87(2)(d) of the EC Treaty (now, after amendment, Article 83(2)(d) EC). It observes that Article 172 of the Treaty and Article 17 of Regulation No 17 confer on the Community judicature unlimited review jurisdiction, that is to say an unlimited power to assess the facts. Since Article 17 of Regulation No 17 confers on the Community judicature, in particular, the power to cancel, reduce or increase the fine, the Commission loses that power once its decision has been contested. The power of assessment is in fact definitively transferred to the Community judicature.
The Commission submits that, in the appeal, no passage or part of the contested judgment is cited as being specifically challenged by the complaint. It therefore questions whether the complaint is admissible.

In that respect, it should be observed that Montedison did raise before the Court of First Instance a plea alleging a definitive transfer to the Community judicature of the power to impose fines as a result of the action brought against the PVC I decision. That plea was expressly based on infringement of Articles 172 of the

Treaty and 17 of Regulation No 17, in conjunction with Article 87(2)(d) of the Treaty. Where an appellant submits that the Court of First Instance did not respond to a plea, its submission cannot be challenged, in terms of the admissibility of the ground of appeal, on the basis that it does not cite any passage or part of the contested judgment as the specific object of its complaint since, by definition, it is a failure to respond that is being alleged. For the same reason, the submission cannot be challenged on the ground that it simply repeats or reproduces the plea raised at first instance.

In the present case, the Commission maintains that the Court of First Instance dealt with the plea in question in paragraphs 65 to 85 and 86 to 99 of the contested judgment. However, the plea raised by Montedison in its application does not correspond to the two pleas considered in those parts of the contested judgment, which allege infringement of the principles of, respectively, *res judicata* and *non bis in idem*. Montedison's plea was founded on a different legal basis, which is clearly explained. The Commission cannot argue that Montedison did not sufficiently explain its plea and that, consequently, it cannot raise any challenge to the contested judgment. Montedison's application contained a long line of argument leading to the conclusion that the effect of the provisions relied upon was to bring about a definitive transfer to the Community judicature of the power to impose penalties. It is therefore apparent that Montedison is justified in alleging a failure to respond to a plea. Accordingly, the contested judgment must be partially annulled as regards that failure to respond ...

Court's ruling

The Court:

1. Joins Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P for the purposes of the judgment.
2. Partially annuls the judgment of the Court of First Instance of 20 April 1999 in Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 Limburgse Vinyl Maatschappij and Others v Commission to the extent that it:

· dismissed the new plea raised by Montedison SpA alleging infringement of its right of access to the Commission's file;

· failed to respond to the plea raised by Montedison SpA alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision.

3. Dismisses the remainder of the appeals.
4. Dismisses the action brought by Montedison SpA to the extent that it is based on, first, the plea alleging infringement of its right of access to the Commission's file and, second, the plea alleging a definitive transfer to the Community judicature of the power to impose penalties following the Commission's decision.
5. Orders the appellants to pay the costs of the present proceedings. The costs of the proceedings before the Court of First Instance leading to the judgment in Limburgse Vinyl Maatschappij v Commission, cited above, are to be borne in accordance with point 5 of the operative part of that judgment. ■