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. ■