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

29 June 1995 *

In Case T-37/91,

Imperial Chemical Industries plc, a company incorporated under English law, established in London, represented by David Vaughan QC, Gerald Barling QC and David Anderson, Barrister, members of the Bar of England and Wales, instructed by Victor O. White and Richard J. Coles, Solicitors, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and Nicholas Forwood QC, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-D: Soda-ash — ICI, OJ 1991 L 152, p. 40),

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

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

Registrar: H. Jung,

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

gives the following

Judgment

Facts and procedure

Economic background

1 Soda-ash, the product with which these proceedings are concerned, is used in the manufacture of glass (dense soda-ash) and also in the chemical industry and

metallurgy (light soda-ash). Natural (dense) soda-ash, produced mainly in the United States of America, should be distinguished from synthetic (dense and light) soda-ash manufactured in Europe through a process invented by Solvay more than 100 years ago.

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

— Solvay et Cie SA (hereafter 'Solvay'), the largest producer in the world and in the Community, with a Community market share of almost 60% (and even 70% in the Community excluding the United Kingdom and Ireland);

— the applicant, the second largest Community producer, with over 90% of the United Kingdom market;

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

3 Solvay operated plants in Belgium, France, Germany, Italy, Spain, Portugal and Austria and had sales organizations in those countries as well as in Switzerland, the Netherlands and Luxembourg. It was, moreover, the principal producer of salt in the Community and was therefore very favourably placed with respect to the supply of the main raw material for the manufacture of synthetic soda-ash. The applicant owned two plants in the United Kingdom, a third plant having being closed in 1985.

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

Administrative procedure

5 Following investigations carried out without warning in 1989 at the premises of the main soda-ash producers in the Community and supplemented by requests for information, the Commission sent to the applicant, by letter of 13 March 1990, a statement of objections in several parts. That statement of objections concerned *inter alia* an infringement of Article 86 of the EEC Treaty alleged against the applicant, to which the corresponding Appendices V.1 to V.123 were sent, and also an infringement of Article 85 of the EEC Treaty alleged against the applicant and Solvay, to which the corresponding Appendices II.1 to II.42 were sent.

6 After having referred to the importance of maintaining the confidentiality of the documents obtained pursuant to Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereafter 'Regulation No 17'), the Commission revealed to each undertaking in its letter of 13 March 1990 the replies given by the other undertaking under Article 11 of Regulation No 17 and stated that 'information which might be commercially sensitive (had again) been blanked out'.

7 In a telephone call made on 14 May 1990 the applicant's lawyer requested access to the Commission's file in so far as it related to the infringements alleged against the applicant. That request was apparently rejected by Mr J, an official in the Commission's Directorate-General for Competition (DG IV).

8 By letter of 23 May 1990, the applicant's lawyer repeated his request and referred to the reaction of Mr J who, he claimed, had refused to grant him any access to the file, even to documents which were not confidential. According to the lawyer, there had also been a refusal to provide a list of documents in the file. The Commission had stated that it was prepared only to accept requests to see specific documents. That restrictive attitude on the Commission's part was alleged to have adversely affected the preparation of the applicant's defence.

9 By letter of 31 May 1990, signed by Mr R of DG IV, the Commission refused to grant the applicant access to the full file. It stated that the applicant was not entitled to peruse on a speculative basis the internal commercial documents of other producers that were not offered in evidence. The Commission added that it had itself re-examined all those documents in order to check whether they were of such a kind as to exculpate the applicant, but had not found any such document; furthermore, it offered to examine the files again if the applicant established 'good cause' by reference to a specific factual or legal point.

10 On 31 May 1990 the applicant also submitted a 'defence'. In it the applicant protested against the refusal to grant access to the file and annexed several new documents as evidence.

11 On 26 and 27 June 1990 the Commission held a hearing concerning the infringements alleged against the applicant and Solvay. Only the applicant took part in it. At the hearing it submitted additional observations, the 'presentation of its case' ('Article 86 presentation'), to which other documents were annexed.

12 At the hearing, the competent Commission department produced certain documents (documents designated 'X 12 to X 14') which all came from the applicant

and which, according to the Commission, showed — like the documents already produced — the applicant's true behaviour and weakened its defence. According to the department concerned, those new documents were introduced into the procedure not because they contained additional evidence compared with the documents annexed to the statement of objections, but in order to reply to the applicant's argument based on the alleged lack of documentary evidence. The hearing officer stated that the question of access to the file was a difficult problem. No one knew what the word 'file' meant and one day the Community judicature would have to interpret it. The problem should not therefore be discussed at the hearing.

13 After the hearing, at which two questions had been left open, the applicant sent to the Commission a letter of 31 July 1990 containing additional information. The Commission then carried out an additional investigation in order to check certain statements made by the applicant regarding the rebates which a soda-ash producer established in the United States, Allied, had quoted to the United Kingdom glass manufacturer, Rockware.

14 According to the documents before the Court, at the end of the abovementioned procedure the college of Commissioners adopted Decision 91/300/EEC relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-D: Soda-ash — ICI, OJ 1991 L 152, p. 40, hereafter 'the decision') at its 1 040th meeting held on 17 and 19 December 1990. In substance, the decision finds that the applicant held a dominant position on the United Kingdom market for soda-ash and had abused that position, within the meaning of Article 86 of the Treaty, from about 1983, and consequently imposes on it a fine of ECU 10 million.

15 The decision was notified to the applicant by registered letter of 1 March 1991.

16 It is common ground (see paragraph 77 below) that the text of the notified decision had not been previously authenticated by the signatures of the President of the Commission or its Executive Secretary in accordance with the first paragraph of Article 12 of the Commission's Rules of Procedure 63/41/EEC of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9) provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (OJ 1967 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (OJ 1986 L 72, p. 34) which were then in force (hereafter 'the Rules of Procedure').

Procedure before the Court

17 Those are the circumstances in which the applicant brought this action, lodged at the Registry of the Court of First Instance on 14 May 1991.

18 The written procedure before the Court of First Instance followed the normal course. After lodging its reply on 23 December 1991 the applicant lodged a 'supplement to its reply' on 2 April 1992 in which it put forward a new plea in law to the effect that the contested decision should be declared non-existent. Referring to statements made by representatives of the Commission during the oral procedure, which terminated on 10 December 1991, in the cases which gave rise to the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 (hereafter 'the PVC judgment') and to two press articles which had appeared in the *Wall Street Journal* of 28 February 1992 and in the *Financial Times* of 2 March 1992, it claimed *inter alia* that the Commission had publicly stated that for years the practice of the college of Commissioners was not to authenticate acts adopted by it and that no decision in the past 25 years had been authenticated. In accordance with Article 48(2) of the Rules of Procedure, the President of the First Chamber (Extended Composition) extended the time for lodging the rejoinder. In its rejoinder the Commission submitted its written observations on that 'supplement to the applicant's reply'.

19 During March 1993 the Court of First Instance (First Chamber) decided — as measures of organization of procedure — to put to the parties several questions concerning *inter alia* the applicant's access to the Commission's files. The parties replied to those questions in May 1993. After the Court of Justice had ruled on the appeal against the PVC judgment on 15 June 1994 in its judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, the Court of First Instance (First Chamber, Extended Composition) adopted other measures of organization of procedure which included a request that the Commission produce *inter alia* the text of its decision as authenticated at the time in the languages in which it is authentic by the signatures of the President and the Secretary-General and annexed to the minutes.

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

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

22 Following that order, the Commission produced on 11 November 1994 *inter alia* the text of the decision in English, the covering page of which bears an undated form of authentication signed by the President and the Executive Secretary of the Commission. It is agreed that that form of authentication was affixed only after a period of more than six months after the bringing of the present action (see paragraph 77 below).

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

Forms of order sought

24 The applicant claims that the Court should:

— declare the application admissible;

— annul the contested decision;

— annul the order to terminate the infringement in Article 2 of the decision;

— cancel or reduce the fine imposed by Article 3 of the decision;

— in the alternative, order the Commission, by way of preparatory inquiry, to permit the applicant's advisers to examine the files;

— in the further alternative, itself examine the files in order to exonerate the applicant through additional documents;

— order the Commission to pay the costs.

25 In the supplement to its reply the applicant claims that the contested decision should be annulled or, if the Court considers it appropriate, declared non-existent.

26 The Commission contends that the Court should:

— reject the application as unfounded;

— reject the arguments raised in the supplement to the applicant's reply as inadmissible and, in any event, unfounded;

— order the applicant to pay the costs.

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

The claim that the decision should be annulled

28 In support of its claim that the decision should be annulled the applicant puts forward a series of pleas which can be divided into two separate groups. In the first group of pleas, relating to the regularity of the administrative procedure, the applicant refers in its application to the pleas in law raised by it in Case T-36/91 (*ICI* v *Commission*) relating to the application of Article 85 of the Treaty. Those pleas allege infringement of the rights of the defence on the grounds that, first, the Commission refused to allow the applicant to have access to the complete file, which, in its view, probably contains documents of use in its defence. Secondly, the Commission based its decision on information and documents to which the applicant had no access during the administrative procedure and, following the

supplementary investigation carried out after the hearing, used documents which had not been communicated to it. Finally, the Commission was guilty of prejudging the case, a lack of objectivity and a general failure to respect the rights of the defence. In its application, the applicant refers to a plea in law raised by Solvay in Case T-30/91 (*Solvay* v *Commission*) relating to the application of Article 85 of the Treaty and complains that the Commission also infringed the principle of collegiate responsibility, since, contrary to Article 4 of its Rules of Procedure, discussion of the draft decision was not deferred, even though at least one of its members requested such deferment to enable him properly to consider the file which had been sent to him at a late stage.

29 Again with regard to the first group of pleas, in the supplement to its reply the applicant pleads infringements of essential procedural requirements in so far as, contrary to Article 12 of the Commission's Rules of Procedure, the notified decision was not authenticated in due time by the President and the Secretary-General of the Commission and amendments were made to the decision between the time of its adoption and its notification to the applicant.

30 In the second group of pleas the applicant advances several pleas contesting the Commission's appraisal of the facts as well as its legal assessment on the ground that it wrongly found that the applicant held a dominant position and that it had abused that position. Finally, it disputes the legality of the order to terminate the alleged infringement, that order being contrary to the principle of legal certainty, and also claims that the fine imposed was excessive.

31 The Court considers it appropriate to examine first the plea of infringement of the rights of the defence alleging that the applicant's request to consult the complete file of the Commission was unlawfully refused, that the Commission based the contested decision on documents not communicated to the applicant and that it displayed a lack of objectivity by distorting the clear sense of the evidence in its possession.

Infringement of the rights of the defence

Arguments of the parties

32 In paragraph 2.8 of its application the applicant complains that the Commission refused to allow it to have access to the file. It refers first to the arguments raised in Case T-36/91 (*ICI* v *Commission*) concerning Decision 91/297/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A: Soda-ash — Solvay, ICI, OJ 1991 L 152, p. 1), and more particularly to paragraph 2.8 of the application lodged by it in that case. In that context, it claims that a large number of findings made in the contested decision (see points 6, 10, 23 and 39) are unsupported by evidence and cites, by way of examples, findings regarding the commercial practices of the United States soda-ash producer General Chemical (formerly Allied) and findings regarding the level of prices. The applicant concludes from this that the Commission based its assertions on documents to which the applicant had not had access. Finally, the applicant refers to corresponding pleas which it raised in Cases T-98/89 (*ICI* v *Commission*, hereafter 'the PVC case') and T-99/89 (*ICI* v *Commission*, hereafter 'the LDPE case'), which were pending at that time before the Court of First Instance. It states that it relies on the arguments submitted in those cases also in the present proceedings. Finally, it refers to the arguments set out in pages 3 to 5 of its defence to the statement of objections (see paragraph 10 above).

33 As to the alleged lack of objectivity, the applicant claims in point 2.9 of its application that the Commission failed in its duty to approach the circumstances of the present case in an open and objective manner. Its interpretation of certain documents upon which it relied had distorted their sense. Moreover, the Commission had not replied to the arguments submitted to it in the course of the applicant's defence to the statement of objections.

34 In its defence the Commission contends that the plea is inadmissible, since the references to other pleadings do not permit an understanding of the matters of fact and of law upon which it is based.

35 As to the complaint that it refused access to the file, the Commission replies by first dealing with the issue of price levels in general. Referring to its defence lodged in Case T-36/91, it contends that its conclusions regarding the level of prices were inferred from documents coming from the applicant itself, which were annexed to the joint statement of objections relating to the proceeding under Article 85 of the Treaty (the documents in Appendix II). As to the prices and rebates offered by Allied to Rockware, established in the United Kingdom, the Commission states that the applicant raised that issue in its defence to the statement of objections. After the conclusion of the oral hearing, the Commission investigated the prices quoted by Allied. It discovered that the applicant's allegations regarding a special rebate were not well founded (see Annex I to the defence). In those circumstances, it was not obliged to make available to the applicant the evidence which it had gathered after the oral hearing and on which it had not based its objections. Similarly, a supplementary statement of objections was not necessary. It was sufficient for the Commission to explain in its decision why it rejected the applicant's claims regarding Allied, which were, moreover, contradicted by other documents annexed to the statement of objections.

36 The Commission rejects the complaint that it lacked objectivity. In that context it claims that the conclusions which it drew from the facts of the case are justified.

37 In its reply the applicant states, first, that pleading by reference to another pleading lodged in other cases has been held to be compatible with the Rules of Procedure of the Court of Justice and of the Court of First Instance.

38 As to the substance, it refers again to the arguments which it submitted in Case T-36/91. It observes that in its reply lodged in that case it explained that none of its documents was evidence supporting the Commission's conclusions as to the level of prices. The figures or the documents on which the Commission relies were never shown to it (paragraphs 4.1 to 4.3 of the reply in question). As to the prices and rebates alleged to have been offered by Allied to Rockware, the applicant states that the Commission investigated that matter after the oral hearing in order to check

the correctness of its claims. By failing to inform the applicant of the result of its subsequent checks the Commission infringed its rights of defence.

39 The Commission having accepted that it had not provided the applicant with a list of documents in its file, the applicant stated in reply to a written question from the Court that its lack of a list had had an extremely serious consequence for its ability to defend itself and for its right to be heard. In particular, it had prevented the applicant from

— making specific requests for documents from the Commission's files;

— verifying the Commission's statement that its officials' examination of the whole of the file had not revealed any undisclosed documents which could be considered exculpatory of the applicant or which might throw doubt on any document used as evidence by the Commission;

— requiring the Commission, if it refused to produce a document on the grounds of its confidentiality, to produce a non-confidential summary of any such document or to agree to an alternative method of inspecting the document which still protected confidentiality;

— requesting the undertaking from which a document had been obtained to waive confidentiality if the Commission still refused to produce documents on the grounds of confidentiality.

40 In reply to a written question from the Court, concerning the classification of the documents seized from the premises of the applicant and other undertakings, the

Commission stated that those documents were classified according to the place where they were found and not according to whether they were relevant to Article 85 or Article 86 of the Treaty. The following 'files' were involved:

(i) file 1: internal documents, such as drafts of the decision

(ii) files 2-14: Solvay, Brussels,

(iii) files 15-19: Rhône-Poulenc

(iv) files 20-23: CFK

(v) files 24-27: Deutsche Solvay Werke

(vi) files 28-30: Matthes & Weber

(vii) files 31-38: Akzo

(viii) files 39-49: ICI

(ix) files 50-52: Solvay Spain

(x) files 53-58: 'Akzo II' (additional visit)

(xi) file 59: visit to Spanish producers and a further visit to Solvay Brussels

(xii) There were about ten further files containing the correspondence under Article 11 of Regulation No 17.

41 In those same replies the Commission stated *inter alia* that the applicant had immediately seen the documents on which the Commission relied, since the relevant documentary evidence had been sent with the statement of objections. Consequently, the applicant had had 'access to the file'. What the applicant had not had was the chance to examine the whole of the documents collected by the Commission, for the good reasons that they were not all relevant and a large number of them contained commercially sensitive information. Moreover, the only basis on which a document other than the documents sent with the statement of objections could be divulged to the applicant was where it demonstrated that such a document was significant with regard to an issue in the case, so that the Commission had an indication of what it should look for.

Findings of the Court

Admissibility

42 Under the first paragraph of Article 19 of the Statute of the Court of Justice of the EC and Article 38(1)(c) of the Rules of Procedure of the Court of Justice,

applicable when the action was brought, the application must contain a summary of the pleas in law on which the application is based. The purpose of that requirement is to obtain sufficiently clear and precise information to enable the defendant to defend itself properly and the Community judicature to exercise its power of review (see, for example, the order of the Court of First Instance in Case T-515/93 *B* v *Commission* [1994] ECR-SC II-379, paragraph 12, and the judgment of the Court of First Instance in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21).

43 In that regard, the application contains a summary of the complaint that the Commission's refusal to grant the applicant 'access to the file' — a refusal already challenged in Case T-36/91 — also impaired the applicant's defence to the charge that it abused a dominant position (page 11 of the application). The applicant added that the Commission had apparently based its position upon documents to which it had had no access. That summary of the plea in law in the application was sufficient to enable the Commission properly to defend the way in which it proceeded and its decision. Consequently, the plea in law is admissible.

44 The application also makes reference to pages 3 to 5 of the observations on the statement of objections (Annex 3 to the application), which contains a general introduction to those objections. There the applicant criticizes the Commission's general rebuff to it in matters concerning 'access to the file' and its refusal to send a list of documents to it, but does not submit specific arguments in reply to the objection that it had abused a dominant position. Nevertheless, the Court finds that the observations referred to contain a summary of the argument concerning the Commission's refusal to send a list of the documents contained in its file, which is the argument supporting the present plea.

45 However, it must also be examined whether the Court is also required to take into account the content of applications submitted in other cases pending between the applicant and the Commission. In that context, the Court of Justice has held that regard must be had to the specific features of each particular case (see the

judgments in Case 9/55 *Société des Charbonnages de Beeringen* v *High Authority* [1954-1956] ECR 311, Joined Cases 19/63 and 65/63 *Prakash* v *Commission* [1965] ECR 533, Case 111/63 *Lemmerz-Werke GmbH* v *High Authority* [1965] ECR 677, Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 2, and Joined Cases 26/79 and 86/79 *Forges de Thy-Marcinelle and Monceau* v *Commission* [1980] ECR 1083, paragraph 4).

46 As to the general reference to the two applications submitted in the PVC and LDPE cases, it is not for the Community judicature to transpose to the present proceedings, concerning the abuse of a dominant position on the soda-ash market, pleas or arguments raised in the course of two other cases concerning two separate markets and two different infringements. To do so would not be consistent with the responsibility of each party for the content of the pleadings which it lodges, which is affirmed in particular in Article 37(1) of the Rules of Procedure of the Court of Justice. Since the question of an infringement of the rights of the defence must be decided by taking into consideration the specific circumstances of each particular case, the Court of First Instance considers that the content of the pleadings lodged in the PVC and LDPE cases should not be taken into account in the present case.

47 However, with regard to the reference to the pleadings lodged in Case T-36/91, it should be held that, although Cases T-36/91 and T-37/91 have not been joined, it is a fact that the parties, the agents and the lawyers are identical, that the two actions were brought before the Court on the same day, that the two cases have been pending before the same Chamber and have been assigned to the same Judge-Rapporteur and, finally, that the contested decisions concern the same market. Furthermore, the separation of economic data relating to the soda-ash market, which the Commission made in the statement of objections by conducting two separate procedures, infringed the applicant's rights of defence in the procedure initiated under Article 85 of the Treaty, as the Court has held in its judgment given on this same date in Case T-36/91 *ICI* v *Commission* (paragraphs 69 to 118). In that judgment the Court states that the Commission ought to have assessed the data in question as a whole. In that particular situation, distinguished by a close link which

exists between the two cases, the Court considers that the reference made in the application in this case to the application submitted in Case T-36/91 is acceptable.

48 In so far as the applicant complains, finally, that the Commission made certain findings, first, as regards the general level of prices and, secondly, as regards the absence of any special rebate granted by Allied, without communicating the relevant documents to the applicant, the Court considers that the information provided by the applicant in that context is sufficiently clear and precise to satisfy the requirement that it state a summary of the pleas in law on which the application is based, as laid down in the abovementioned provisions of the Statute of the Court of Justice of the EC and the Rules of Procedure. Similarly, the claim alleging lack of objectivity was submitted in a manner which complies with the Rules of Procedure.

Substance

49 The Court observes at the outset that the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence (judgments of the Court of First Instance in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38, and Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 30). Respect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. The proper observance of that general principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (judgment of the Court of Justice in Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11).

50 The Court considers that an infringement of the rights of the defence must therefore be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertaking concerned is alleged to have committed. In order to determine whether the plea in question, considered in its two parts, is well founded, it is therefore necessary to examine the burden of the substantive objections raised by the Commission in the statement of objections and in the contested decision.

(i) The objections raised and the evidence used by the Commission

51 The Court finds, first, that the burden of the statement of objections is that at the material time the applicant held a dominant position in the United Kingdom, its market share exceeding 90% (p. 75 of the statement of objections), and that it had abused that position from about 1983. That abuse is alleged to result from the applicant offering to its clients 'top-slice rebates', that is to say inducing them to buy from it not only their 'core' tonnage but also the marginal tonnage or the 'top-slice' which they could have purchased from a second supplier. It is further alleged that in several cases the applicant exerted pressure on customers to buy the whole or substantially the whole of their requirements from the applicant in order to minimize the competitive effect of other suppliers and to maintain a quasi-monopoly on the United Kingdom market (p. 77 et seq. of the statement of objections).

52 The Commission also asserted in the statement of objections that the objective of that customer loyalty strategy was systematically to exclude imports of soda-ash into the United Kingdom with the exception of those effected by the American company, Allied, whose presence on the market as a secondary supplier the applicant was prepared to tolerate for reasons of 'commercial prudence', subject to strict limits guaranteed by a minimum price which that company had undertaken to observe in the course of an anti-dumping procedure. The applicant took the view

that, if Allied were to withdraw completely from the United Kingdom market, glass manufacturers would almost certainly look for alternative sources of supply in continental Europe (p. 62 et seq. of the statement of objections).

53 The Commission considered that the abovementioned business practices discriminated between the applicant's customers since the rebates did not reflect any difference in costs based on the volume delivered, but were granted in return for a commitment from customers to take the whole or the highest possible percentage of their requirements. The 'top-slice' rebate system therefore differed considerably from one customer to another as to the level of tonnage above which it was granted. There were also differences with regard to the amount per tonne of the rebate itself (pp. 79 and 80 of the statement of objections).

54 As to the effect on trade between Member States, the Commission considered that the measures adopted by the applicant, directed first against imports from the United States (Allied) and Poland, had maintained the status quo based on the separation of the markets. Moreover, in the absence of the measures adopted by the applicant, imports into the United Kingdom from the United States could have been sold to customers in other Member States (pp. 80 and 81 of the statement of objections).

55 In order to substantiate those charges, the Commission annexed to the statement of objections intended for the applicant a series of documents marked 'V', the majority of which come from the applicant itself. One part of the documents comes from the Commission (V.61, 64, 66, 67, 69, 71 and 74) and relates to a file, opened in 1979 and closed in 1982, which concerned an initial inquiry by the Commission concerning the supply contracts used by the applicant on the United Kingdom market. Another part of those documents comes from glass manufacturers established in the United Kingdom, Rockware and CWS, and from a competitor of the applicant on that market, Brenntag, an importer of Polish soda-ash; those

documents form a file concerning the policy allegedly implemented by ICI in order to exclude Brenntag from the relevant market by means of its rebate system (V.92 to 98). Finally, document V.90 relates to a promise by CWS to reduce its purchases of United States soda-ash. It should be pointed out that that evidence relates exclusively to the United Kingdom market.

56 Secondly, as regards the objections formulated in the contested decision, the Court finds that they correspond in substance to those raised in the statement of objections. However, the finding in point 39 of the decision that neither the American producer Allied nor its successor General Chemical had offered special top-slice discounts to Rockware was based on supplementary investigations carried out by the Commission after the applicant's oral hearing, on which the applicant was not given an opportunity to be heard before the decision was adopted. As to the effect on trade between Member States, the Commission considered that it was a consequence of the alleged conduct, and the argument based on possible re-exportation from the United Kingdom was not maintained in points 63 and 64 of the decision.

(ii) The applicant's defence

57 With regard to the applicant's defence, it should be noted that in its observations submitted in response to the statement of objections ('defence' of 31 May 1990), in its written presentation at the hearing ('Article 86 presentation') and at the oral hearing itself on 25 and 26 June 1990 (see paragraphs 10 to 12 above), the applicant disputed that it held a dominant position in the United Kingdom within the meaning of Article 86 of the Treaty and that it had pursued a general strategy of excluding other soda-ash producers from the market. Its 'top-slice rebates', to which the Commission objected, were negotiated with customers individually and not

according to a preconceived plan. They were not contrary to the criteria laid down by the Court of Justice for identifying lawful rebates. As regards the effect on trade between Member States, the applicant claimed that the Commission's theory as to the possibility of re-exportation from the United Kingdom was unrealistic.

58 That defence has been repeated before the Court of First Instance in connection with the pleas in law contesting the Commission's assessment of the facts and its legal assessment. As regards the effect on trade between Member States, the applicant adapted its defence to the new reasoning in the decision by denying that its conduct had led to a partitioning of the market. It also claimed that there was a contradiction with findings made elsewhere by the Commission regarding the existence of a concerted practice within the meaning of Article 85 of the Treaty.

(iii) The scope of the plea alleging infringement of the rights of the defence

59 It follows from the foregoing that the Court must examine whether that defence of the applicant was affected by a possible infringement of its rights of defence committed through refusal to grant it 'access to the file'. In this context, as is apparent from the application, the applicant complains about that refusal in general terms without referring to any specific parts of the 'file' which only the Commission has in its possession. Having regard to the Commission's reply to a question from the Court, it must be held that that 'file' is made up of 59 individual files (see paragraph 40 above). Consequently, the plea must be interpreted as referring to the Commission's refusal to grant the applicant access to those 59 individual files, including those containing documents coming from the applicant itself, since the applicant has not excluded them from its claims.

60 Furthermore, a distinction should be drawn between access to documents which may exculpate the applicant and access to documents establishing the existence of the alleged infringement. Consequently, the plea must be divided into two parts, the first referring to documents which may be exculpatory, the second concerning documents used against the applicant. In the context of that second part, it is necessary to examine the complaint that the Commission made findings of fact about the level of prices and the conduct of Allied without previously granting the applicant access to the relevant inculpatory documents, and that it appraised the evidence in a biased and incorrect manner.

— First part of the plea: non-disclosure to the applicant of documents which may exculpate it

61 It must first be considered whether the Commission's refusal to grant the applicant access to the files relating to the continental producers (Solvay, Rhône-Poulenc, Deutsche Solvay Werke, Akzo and Solvay Spain) could have affected its defence. Since the existence of the applicant's dominant position had been found on the basis of the market share which it held (see points 4, 47 and 48 of the decision and paragraph 60 of the judgment of the Court of Justice in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359), there are no grounds for presuming that the applicant might have discovered, for example in the individual files on Solvay or Akzo, documents casting doubt on the finding that it held a dominant position on the soda-ash market in the United Kingdom. As to the abuse of that dominant position, the Commission found that it had taken place in business relations between the applicant and its customers established in the United Kingdom. On this point, it is also not clear that the applicant might have found amongst the documents emanating from the continental producers documents affecting the legal appraisal of its rebate systems, of its exclusive supply contracts and of the agreements concluded with its customers in the United Kingdom which, according to the Commission, were intended to restrict purchases from its competitors.

62 As regards the effect on trade between Member States, it must be examined whether the lack of access to the documents of continental producers could have prevented

the applicant from rebutting, during the administrative procedure, the objection which the Commission set out in points 63 and 64 of the decision. In that context, it is important to note at the outset that in its Article 86 defence the applicant did not use Appendices II to the statement of objections, which were sent to it and of which it was therefore aware (see paragraph 5 above). However, the applicant attempted to attribute the partitioning of the markets to the actual conditions prevailing on the soda-ash market. It argued that continental producers frequently made quotations to customers established in the United Kingdom. The reasons why those offers were not converted into sales had been explained in Case T-36/91 (page 99 of the application in the present case, which apparently refers to the arguments set out in paragraph 4.1.1 et seq. of the application in Case T-36/91). Consequently, it must be examined whether that defence could have been strengthened by documents originating from the continental producers.

63 Under Article 86 of the Treaty the Commission had to examine whether any abuse by the applicant 'may' affect trade between Member States. According to the case-law of the Court of Justice and the Court of First Instance, it was not therefore necessary for it to be found that inter-State trade was actually being affected (see the judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 103, and in Case T-65/89 *BPB Industries and British Gypsum* v *Commission*, cited above, paragraphs 134 and 135). Consequently, the Commission's findings in points 63 and 64 of the decision seem ambiguous. The Commission there finds that the measures taken by the applicant affect inter-State trade instead of finding that they may affect it; yet point 40 of the decision sets out the exact wording of Article 86 of the Treaty ('may affect ...'). However, even if the Commission found in the decision that there was an actual effect on inter-State trade, the applicant had to show in its defence that the measures adopted by it were not capable of affecting it. If it is assumed that documents from Akzo or Solvay may show that other factors contributed to prevent soda-ash from being imported from the continent to the United Kingdom, there is no evidence to suggest that those documents may rebut the finding that the measures taken by the applicant also in themselves contributed to that partitioning of the markets and were thus capable of affecting trade between Member States. It follows that the request for a list of the documents included in the files relating to the continental producers was also not justified in the present case.

64 As to the refusal to grant access to the 11 files containing documents emanating from the applicant itself, the Court cannot exclude the possibility that those documents may contain evidence relevant to its defence. It should however be noted that under Article 14(1)(b) of Regulation No 17 the Commission's investigators were able to take those documents only in the form of photocopies. The applicant was therefore in a position to identify those documents, which all came from its own domain. Nothing could prevent it from relying on evidence relevant for its defence which they might contain. That also applies to any other document in the applicant's possession which escaped the Commission's attention and was not taken in photocopy form. The general principle of equality of arms, which presupposes that the undertaking concerned has the same knowledge of the case evidence as the Commission, does not therefore require the Commission to provide the undertaking with a list of the undertaking's own documents.

65 It should be added that the Commission's explanation for not providing a list in the circumstances of the present case was that such a list was superfluous since it was clear that the applicant had a set of its own documents to deal with any eventuality, and the applicant has not contradicted it on this point. Furthermore, the course of the hearing of the applicant during the administrative procedure (see paragraphs 11 and 12 above) confirms that the applicant was not hindered in its defence by the fact that the Commission had not provided it with a list of its own documents. At that hearing, the Commission submitted, for the first time, three inculpatory documents emanating from the applicant (documents 'X12 to X14'), which had not been annexed to the statement of objections. According to the transcript of the hearing, Counsel for the applicant stated during the hearing concerning the case investigated under Article 85 of the Treaty: 'As Mr J correctly says, ICI can look at its own original documents ...' (p. 47 of the transcript).

66 It follows that the applicant has not been hindered in exercising its rights of defence by not having a list of the documents emanating from itself. Consequently, the first part of the plea cannot be upheld. It follows that the applicant's alternative claims

for an order providing for measures of inquiry regarding the examination of the files by its lawyers or by the Court itself must be rejected, since in the circumstances of the present case the Commission rightly refused to grant the applicant access to those files and to provide it with a list of the documents contained in them.

— Second part of the plea: failure to disclose certain inculpatory documents to the applicant

67 As regards, first of all, the findings made in the decision on the matter of the general level of prices, it should be observed that the Commission stated that it reached its conclusions solely on the basis of documents emanating from the applicant. In so far as the applicant claims that those documents do not justify such conclusions, the Court considers that this involves a question as to the interpretation and appraisal of the evidence on which the Commission relies. Whether or not the inculpatory documents used by the Commission to prove the alleged infringement are sufficient depends on whether or not the factual assessments made by the Commission in the recitals to the decision are well founded. Since that question relates to examination of the substance of the case, it is extraneous to the matter of an alleged infringement of the rights of the defence.

68 Next, as regards the Commission's findings in point 39 of the decision concerning the special rebate which Allied was said to have offered in the United Kingdom, it should be noted that those findings are the result of additional investigations carried out after the hearing of the applicant. However, the applicant was not given an opportunity to state its views on those findings before the decision was adopted. The Court considers that such a procedure is hardly reconcilable with the rights of the defence.

69 The fact remains, however, that the applicant does not dispute the correctness of the result reached by those investigations — that is to say that no particularly

advantageous rebate was offered — and that it even states that those investigations are 'irrelevant'. The applicant states in fact that it had simply 'believed' at the time that Allied had quoted a particularly advantageous rebate and that, consequently, in order to remain competitive it had to make a similar offer (paragraphs 2.2.3 and 2.2.5 of the reply).

70 In those particular circumstances and even assuming that the use of non-disclosed documents constitutes a procedural defect, the Court considers that, as is clear from the applicant's own statements, that defect did not affect the exercise of its rights of defence. The Commission's additional investigation concerned the actual level of prices charged by Allied, whereas the applicant's arguments have never concerned this point but merely put forward its own subjective view.

71 It should be added that, even if the additional investigations in question had provided the Commission with inculpatory documents on which it based new objections in the decision, such a procedural defect could only have the result of excluding those documents as evidence. Far from entailing the annulment of the entire decision, the exclusion of those documents would be significant only if the objection made by the Commission in that respect could be proved only by reference to those documents (judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30). So, that question, too, relates to the correctness of the Commission's findings of fact and must therefore be dealt with in the examination of the substance of the case.

72 Similarly, the lack of objectivity allegedly shown by the Commission, which, according to the applicant, interpreted certain documents in a way which distorts their meaning, must be examined in connection with the review of the correctness of the Commission's assessment of the evidence. It does not constitute an infringement of the rights of the defence capable of leading to annulment of the decision and possibly to the re-opening of the administrative procedure.

73 Consequently, the second part of the plea must be rejected. It follows that the plea alleging infringement of the rights of the defence must be dismissed in its entirety.

Irregular authentication of the act adopted by the Commission

Arguments of the parties

74 In the supplement to its reply the applicant complains that Article 12 of the Commission's Rules of Procedure was infringed in the present case, since the decision did not bear the required form of prior authentication. In this regard, it refers *inter alia* to statements made by the Commission's representatives during the oral procedure held in the PVC case before the Court of First Instance which ended on 10 December 1991 (see paragraph 18 above).

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

76 The Commission contends primarily that the plea should be rejected as being out of time and thus inadmissible. In reply to a written question put by the Court, the Commission stated that in this case there was no matter of fact or of law which had come to light during the course of the procedure within the meaning of Article 48(2) of the Court's Rules of Procedure. The PVC judgment could not in itself be regarded as a new fact (see the order of the Court of First Instance in Case T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591, paragraph 12). It was also doubtful whether the statements of the Commission's representatives made in the context of other proceedings could, as such, be classified as a 'new fact' in the context of the present proceedings. Finally, part of the procedure for adopting the decision in the PVC case had been subject to specific time constraints. Since that was not so in the present case, there was no justification for assuming that the procedure followed in the PVC case had been identical in every detail to the procedure followed in other cases challenging the application of Articles 85 and 86 of the Treaty, and that the presumption of validity enjoyed by the present decision did not apply.

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

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

present case was not affected by any of the other defects alleged to vitiate the PVC decision.

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

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

Findings of the Court

Admissibility

81 In order to assess the admissibility of the new plea in law alleging irregular authentication, which was raised in the supplement to the applicant's reply after the

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

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

83 Although the lack of authentication of the contested decision was a fact which already existed before the present action was brought, the applicant could not have been expected to rely on it at the time it lodged its application on 14 May 1991. The text of the decision, notified in the form of a copy certified as a true copy by the signature of the Secretary-General of the Commission, would not, even on a careful reading, have revealed that the original of the decision had not been authenticated at the relevant time.

84 As to whether the new plea in law based on that factual matter which was submitted in the supplement to the applicant's reply lodged on 2 April 1992 may be regarded as having been raised in due time or whether it ought to have been raised at an earlier stage in the procedure, it should be pointed out that Article 48(2) of the Rules of Procedure lays down neither a time-limit nor any particular formality for the submission of a new plea in law; in particular, it does not provide that, if it is not to be time-barred, such a submission must be made immediately, or within a particular period, after the matters of fact or of law to which it refers come to light. The Court considers that, since the submission of a plea in law is involved, a time-

-bar, restricting the ability of the party concerned to put forward all matters necessary for the success of its claims, should not in principle be admitted unless it is governed by express, unequivocal rules. It follows that the applicant was at liberty to raise the new plea in the supplement to its reply, before the opening of the oral procedure.

85 Moreover, even if the abovementioned provision were to be interpreted to the effect that a new plea in law is admissible only if submitted as expeditiously as possible, it should be pointed out that, in this case, the applicant would have satisfied that requirement. Although it is true that the Commission had already indicated at the hearing of 10 December 1991 in the cases giving rise to the PVC judgment that the non-authentication of acts adopted by the college of Commissioners was a consistent practice, and also that the applicant participated in that hearing, it could not reasonably be required that the applicant raise the new plea in question already in its reply lodged on 23 December 1991. Since the legal question involved was highly controversial — it having received three different answers in the PVC judgment, the judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF*, cited above, and in the Opinion of the Advocate General delivered in the latter case — the applicant was at least able to await the delivery of the PVC judgment by the Court of First Instance on 27 February 1992. Finally, as to the period which elapsed between the delivery of that judgment and the lodging of the supplement to its reply, the Court considers that the period was reasonable since it was objectively necessary for a careful examination of the judgment and a detailed re-examination of the text of the decision and the procedure followed for its adoption, in order to detect any procedural defects.

86 It follows that the plea alleging irregular authentication of the decision must be declared admissible.

87 It should be added that in any event in its order of 25 October 1994 the Court of First Instance ordered the Commission to produce *inter alia* the text of the decision authenticated at that time. As is apparent from the grounds of the order, the Court

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

— Substance

88 Reference should be made to the wording of Article 12 of the Commission's Rules of Procedure in the version in force at the material time:

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

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

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

With regard to the various stages of the abovementioned procedure, the Court considers that the very scheme of those rules implies a sequence of events whereby

first, pursuant to the first paragraph of the provision, acts are adopted by the college of Commissioners and then authenticated before being notified, as appropriate, to the persons concerned, pursuant to the third paragraph, and possibly published in the Official Journal. Consequently, authentication of an act must necessarily precede its notification.

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

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

91 It should be pointed out that it is the mere failure to observe the essential procedural requirement in question which constitutes that infringement. It is therefore unconnected with the question whether there are discrepancies between the texts adopted, notified and published and, if so, whether or not those discrepancies are material.

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

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

Costs

94 Under the first paragraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it should be ordered to pay the costs, and it is not necessary to take into account the applicant's partial withdrawal with regard to its claim that the decision be declared non-existent.

On those grounds,

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

hereby:

1. **Annuls Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-D: Soda-ash — ICI);**

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

Cruz Vilaça Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 29 June 1995.

H. Jung J. L. Cruz Vilaça

Registrar President