JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

17 December 2009 *

In Case T-58/01,

Solvay SA, established in Brussels (Belgium), represented by L. Simont, P.-A. Foriers, G. Block, F. Louis and A. Vallery, lawyers,

applicant,

v

European Commission, represented by P. Oliver and J. Currall, acting as Agents, and N. Coutrelis, lawyer,

defendant,

APPLICATION for, principally, annulment of Commission Decision 2003/5/EC of 13 December 2000 relating to a proceeding under Article 81 [EC] (COMP/33.133-B:

* Language of the case: French.

Soda ash — Solvay, CFK) (OJ 2003 L 10, p. 1) and, in the alternative, annulment or reduction of the fine imposed on the applicant,

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas (Rapporteur) and A. Dittrich, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 26 and 27 June 2008,

gives the following

Judgment

Facts

1 The applicant, Solvay SA, is a company governed by Belgian law, operating in the pharmaceutical, chemical, plastic and processing sectors. It produces, inter alia, soda ash.

2 Soda ash is either naturally present in the form of trona ore (natural soda) or obtained by a chemical process (synthetic soda). Natural soda is obtained by crushing, purifying and roasting trona ore. Synthetic soda is the result of the reaction of ordinary salt and calcium in the 'ammonia-soda' process developed by the Solvay brothers in 1863.

3 At the time of the facts forming the subject-matter of the present dispute, the applicant was present in the soda ash sector, through the intermediary of marketing units established in nine European countries, namely Germany, Austria, Belgium, Spain, France, Italy, the Netherlands, Portugal and Switzerland. It also had production facilities in Germany, Austria, Belgium, Spain, France, Italy and Portugal. In 1988, the applicant had, in particular, 52,5% of the German market.

4 In addition to the applicant, the Community producers were, in the period 1987 to 1989, Imperial Chemical Industries ('ICI'), Rhône-Poulenc, Akzo, Matthes & Weber and Chemische Fabrik Kalk ('CFK'), a subsidiary of Kali & Salz, part of the BASF group. Their annual production capacities were as follows: Rhône-Poulenc 580 000 tonnes, Akzo 435 000 tonnes, Matthes & Weber 320 000 tonnes and CFK around 260 000 tonnes.

5 In April 1989, the Commission of the European Communities carried out investigations at the premises of the various producers of soda ash in the Community, in application of Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), in the version applicable at the material time. The Commission seized various documents at the premises of the undertakings concerned.

6 On 19 February 1990, the Commission opened a proceeding on its own initiative against the applicant, ICI and CFK pursuant to Article 3(1) of Regulation No 17.

7 On 13 March 1990, the Commission sent a statement of objections to the applicant, ICI and CFK. Each of those undertakings received only the part or parts of the statement of objections relating to the infringements concerning it, to which the relevant inculpatory evidence was annexed.

8 The Commission constituted a single file for all the infringements referred to in the statement of objections.

9 As regards the present case, the Commission concluded under Section III of the statement of objections, entitled 'The Solvay/CFK agreement', that the applicant had participated with CFK in an agreement and/or a concerted practice contrary to Article 81 EC.

10 On 28 May 1990, the applicant submitted its written observations in response to the objections raised by the Commission.

11 On 19 December 1990, the Commission adopted Decision 91/298/EEC relating to a proceeding under Article [81 EC] (IV/33/133-B: Soda ash — Solvay, CFK) (OJ 1991 L 152, p. 16). In that decision, which was notified by letter of 1 March 1991, the Commission found that '[the applicant] and CFK [had] infringed Article [81 EC] by participating from about 1987 until the present time in a market-sharing agreement by which [the applicant] guaranteed to CFK a minimum annual sales tonnage of soda ash in Germany calculated by reference to CFK's achieved sales in 1986, and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum'. The applicant and CFK were ordered to pay fines of ECU 3 million and ECU 1 million respectively.

12 On the same date, the Commission also adopted Decision 91/297/EEC relating to a proceeding pursuant to Article [81 EC] (IV/33.133-A: Soda ash — Solvay, ICI) (OJ 1991 L 152, p. 1), in which it found that '[the applicant] and ICI [had] infringed Article [81 EC] by participating since 1 January 1973 until at least the institution of the present proceedings in a concerted practice by which they confined their soda ash sales in the Community to their respective home markets, namely continental western Europe for [the applicant] and the United Kingdom and Ireland for ICI'. The applicant and ICI were each ordered to pay a fine of ECU 7 million.

13 On the same date, moreover, the Commission adopted Decision 91/299/EEC relating to a proceeding under Article [82 EC] (IV/33.133-C: Soda ash — Solvay) (OJ 1991 L 152, p. 21), in which it found that '[the applicant had] infringed Article [82 EC] from about 1983 to the present time by a course of conduct aimed at excluding or severely limiting competition and consisting of the conclusion of agreements with customers which require them to purchase the whole or a very large proportion of their requirements of soda ash from [the applicant] for an indefinite or excessively long period[,] the granting of substantial rebates and other financial inducements referable to marginal tonnage over and above the customer's basic contracted tonnage in order to ensure that [customers] buy all or most of their requirements from [the applicant] [and] making the granting of rebates dependent upon the customer agreeing to buy the whole of its requirements from [the applicant]'. A fine of ECU 20 million was imposed on the applicant in respect of that infringement.

14 In addition, on the same date, the Commission adopted Decision 91/300/EEC relating to a proceeding under Article [82 EC] (IV/33.133-D: Soda ash — ICI) (OJ 1991 L 152, p. 40), in which it found that 'ICI [had] infringed Article [82 EC] from about 1983 until at least the end of 1989 by a course of conduct aimed at excluding or severely limiting competition and consisting of … granting substantial rebates and other financial inducements referable to marginal tonnage in order to ensure that customers buy all or most of their requirements from ICI[,] securing the agreement of customers to buy the whole or substantially the whole of their requirements from ICI and/or to restrict their purchases of competitive material to a specific tonnage [and] in one case at least making the granting of rebates and other financial benefits

dependent upon the [customer] agreeing to buy the whole of its requirements from ICI'. ICI was ordered to pay a fine of ECU 10 million.

15 On 2 May 1991, the applicant brought an action before this Court for annulment of Decision 91/298. On the same date, the applicant also sought annulment of Decisions 91/297 and 91/299. On 14 May 1991, ICI sought annulment of Decisions 91/297 and 91/300. CFK did not bring an action and paid the fine of ECU 1 million imposed on it by Decision 91/298.

16 By judgment of 29 June 1995 in Case T-31/91 *Solvay* v *Commission* (not published in the ECR) ('*Solvay II*'), the Court annulled Decision 91/298, in so far as it concerned the applicant, on the ground that the authentication of that decision had taken place after it had been notified, which constituted an infringement of an essential procedural requirement within the meaning of Article 230 EC.

17 On the same date, the Court also annulled Decision 91/299 (Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825; '*Solvay III*') and Decision 91/300 (Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901; '*ICI II*') on the ground of the improper authentication of the contested decisions. In addition, the Court annulled Decision 91/297 (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775; '*Solvay I*', and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847; '*ICI I*'), in so far as it concerned the applicants in those cases, on the ground that there had been a breach of the right of access to the file.

18 By applications lodged at the Registry of the Court of Justice on 30 August 1995, the Commission appealed against the judgments in *Solvay II*, paragraph 16 above, *Solvay III* and *ICI II*, paragraph 17 above.

19 By judgments of 6 April 2000 in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341 and Joined Cases C-287/95 P and C-288/95 P *Commission* v *Solvay* [2000] ECR I-2391, the Court of Justice dismissed the appeals against the judgments in *ICI II*, paragraph 17 above, *Solvay II*, paragraph 16 above, and *Solvay III*, paragraph 17 above.

20 On Tuesday 12 December 2000, a press agency issued a press release worded as follows:

'The European Commission will fine the chemical industry companies Solvay SA and Imperial Chemical Industries plc … on Wednesday for infringement of European Union competition law, a spokesperson announced on Tuesday.

The fines for alleged abuse of a dominant position on the soda ash market had initially been imposed 10 years ago, but were annulled by [the European Court of Justice] on procedural grounds.

The Commission will adopt the same decision again on Wednesday, but in the proper form, the spokesperson stated.

The substance of the decision has never been challenged by the companies. We shall adopt the same decision again, said [the spokesperson].'

21 On 13 December 2000, the Commission adopted Decision 2003/5/EC relating to a proceeding under Article 81 [EC] (COMP/33.133-B: Soda ash — Solvay, CFK) (OJ 2003 L 10, p. 1; 'the contested decision').

22 On the same date, the Commission also adopted Decisions 2003/6/EC relating to a proceeding pursuant to Article 82 [EC] (COMP/33.133-C: Soda ash — Solvay) (OJ 2003 L 10, p. 10) and 2003/7/EC relating to a proceeding under Article 82 [EC] (COMP/33.133-D: Soda ash — ICI) (OJ 2003 L 10, p. 33).

23 The operative part of the contested decision reads as follows:

'*Article 1*

Solvay … infringed Article [81 EC] by participating from about 1987 until at least the end of 1990 in a market-sharing agreement by which Solvay guaranteed to CFK a minimum annual sales tonnage of soda ash in Germany calculated by reference to CFK's achieved sales in 1986, and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

Article 2

A fine of EUR 3 million is imposed on Solvay in respect of the infringement specified in Article 1.

…'

24 The contested decision is drafted in virtually the same terms as Decision 91/298. The Commission merely made a few editorial amendments and added a new section entitled 'Proceedings before the [General Court] and the Court of Justice'.

25 In that new section of the contested decision, the Commission, referring to the judgment 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* [1999] ECR II-931 ('the judgment of this Court in *PVC II*'), considered that it was 'entitled to adopt again a decision that [had] been annulled on account of purely procedural defects', that 'a new decision [might] in such cases be adopted without initiating fresh administrative proceedings' and that it was 'not required to organise a further hearing if the text of the new decision [did] not contain objections other than those set out in the first decision' (recital 70).

26 The Commission also stated in the contested decision that the limitation period must be extended by the time during which the action for annulment of Decision 91/298 had been pending before this Court and the Court of Justice, in application of Article 3 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) (recitals 75 and 76). Thus, taking account of the circumstances of the case, the Commission considered that it had until September 2004 to adopt a new decision (recital 78). It also stated that the rights of the defence were not infringed if the new decision was taken within a reasonable time (recital 70).

27 As regards the actual infringement, the Commission stated in the contested decision that an agreement or arrangement had been made between the applicant and CFK by which the applicant had guaranteed CFK an annual minimum sales tonnage on

the German market. If CFK's sales in Germany fell below the guaranteed minimum, the applicant was to 'buy the shortfall' from CFK (recital 42). According to the Commission, CFK's guarantee had initially been set at 179 000 tonnes, a figure apparently based on CFK's achieved sales in Germany during 1986 and had then been increased to 190 000 tonnes in 1989 with a retrospective compensation mechanism for 1988 (recitals 43, 45 and 46).

28 The Commission also referred in the contested decision to a meeting held on 14 March 1989 and attended by senior representatives of CFK and its parent company Kali & Salz, on the one side, and Deutsche Solvay Werke (DSW), a subsidiary of the applicant, on the other. The Commission considered it highly significant that no official record or minute had been made. It added, however, that a brief handwritten note had been found at DSW (recital 47).

29 The Commission stated in the contested decision that the purpose of that agreement was clearly to achieve conditions of artificial market stability and that, in exchange for returning to pricing behaviour which was not considered by the applicant to be disruptive, CFK was guaranteed a minimum share of the German market. The Commission also added that, by removing from the market that tonnage which CFK was unable to sell, the applicant ensured that price levels were not brought down by competition. The Commission concluded that the cartel-type arrangements in question, which had been implemented and had had the intended effect, by their very nature restricted competition within the meaning of Article 81(1) EC (recitals 55 to 58).

30 As regards the effect on trade between Member States, the Commission considered in the contested decision that the fact that the minimum guaranteed tonnage related solely to sales on the German market did not in any way exclude the application of Article 81 EC. The Commission considered that it was clear from the involvement of the applicant in Brussels that the arrangement was part of its overall policy for controlling the soda ash market in the Community and that the arrangement between the applicant and CFK was intended not only to reduce competition in a major part of the Community but also to maintain the rigidity of the existing market structure and

its separation along national lines. The Commission also considered that the tonnage taken by the applicant under the guarantee would otherwise have been placed by CFK on other Community markets (recital 59).

31 The Commission concluded in the contested decision that the applicant and CFK had infringed Article 81 EC by participating in that agreement 'from about 1986 until the end of 1990' (recital 60).

32 As regards the fines imposed on the applicant and CFK, the Commission stated in the contested decision that the infringement was 'serious' on the ground that market-sharing agreements are by their very nature considerable restrictions on competition. As regards the duration of the infringement, the Commission calculated the amount of the fines on the basis that the agreement had been concluded at some time in 1987 (recitals 62 and 63).

33 It is also apparent from the contested decision that, in determining the amount of the fine, the Commission took into consideration the applicant's dominant market position as the leading producer in Germany and in the Community (recital 64). The Commission also found that the infringement had been deliberate and that both parties must have been well aware of the incompatibility of their arrangements with Community law (recital 65).

34 Last, the Commission observed in the contested decision that the applicant had been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemical industry.

35 On 13 December 2000, the Commission also issued a press release stating that it would adopt decisions imposing fines on the applicant and ICI identical to those initially imposed in the 'Soda ash' cases.

Procedure

36 By application lodged at the Court Registry on 12 March 2001, the applicant brought the present action.

37 On 8 May 2001, the case was assigned to the Fourth Chamber of the Court and a Judge-Rapporteur was appointed.

38 After being authorised to do so by the Court, the applicant and the Commission submitted their observations, on 6 and 23 December 2002 respectively, on the consequences to be drawn in the present case from the judgment of the Court of Justice of 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 to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375 ('the judgment of the Court of Justice in *PVC II*').

39 Following a change in the composition of the Chambers of the Court with effect from 1 October 2003, the Judge-Rapporteur was assigned to the First Chamber, and this case was therefore assigned to that Chamber on 8 October 2003.

40 On 19 December 2003, the Court invited the Commission to produce the statement of objections, the annexes thereto and a detailed enumerative list of all the documents in the file. That list was to contain a brief indication that would enable the

author, the nature and the content of each item to be identified. The Court also asked the Commission to inform it as to which of those items had been accessible to the applicant during the administrative procedure.

41 On 13 February 2004, the Commission produced the statement of objections and the annexes thereto, and also the enumerative list requested by the Court. It requested further time to respond to the Court's last request.

42 By letter of 10 March 2004, the Commission stated that during the administrative procedure the applicant had had access to the documents which supported the statement of objections and which were annexed to that statement of objections. The Commission also referred to 65 'sub-files' making up the file, of which 22 'sub-files' originated in the applicant's headquarters or the headquarters of one of its subsidiaries (namely 'sub-files' Nos 2 to 14, 24 to 27, 50 to 52 and 62 to 65 and part of sub-file No 61). The Commission claimed that the procedure followed in 1990 complied with the existing case-law on the right of access to the file and added that, following a re-reading of the investigation file, there was nothing to suggest at that stage that there had been any breach of the rights of the defence during the administrative procedure, even when that investigation file was examined in the light of subsequent case-law on the right of access to the file.

43 By letter of 21 June 2004, the Commission sent the Court Registry a revised enumerative list of the documents in the administrative file which was more complete than the list provided on 13 February 2004. Like the previous list, this revised enumerative list referred to 65 'sub-files'. The Commission also listed some documents originating for the most part in Oberland Glas.

44 By letter of 21 July 2004, the Court invited the applicant to indicate which documents in the revised enumerative list had not been communicated to it during the administrative procedure and, in its view, might contain material which could have been of use for its defence.

45 By letter of 29 September 2004, the applicant asserted that the revised enumerative list was incomplete and inaccurate. The applicant also indicated those documents in that revised enumerative list which appeared to be of use for its defence and which it wished to consult. According to the applicant, those documents might have enabled it to develop its arguments in relation to the effect of the agreement in question on trade between Member States.

46 The composition of the Chambers of the Court changed with effect from 13 September 2004 and the Judge-Rapporteur was assigned to the newly composed Fourth Chamber, to which the present case was therefore assigned on 7 October 2004.

47 On 17 December 2004, the Court invited the Commission to lodge at the Registry the documents in the file to which the applicant had referred in its letter of 29 September 2004, in confidential and non-confidential versions.

48 By letter of 28 January 2005, the Commission lodged at the Court Registry the confidential version of the documents in the file which had been requested. It requested further time to produce any non-confidential version that might be necessary, as the undertakings concerned had to be consulted concerning their interest in maintaining confidentiality. The Commission also stated:

'[A]lthough the list contains all the documents now in [the Commission's] possession, it does not include all the files which had been mentioned to the [General Court] in the first *Soda ash* case. The few missing files have proved impossible to find, in spite of a lengthy search.'

49 By letter of 15 March 2005, the Commission, after stating that the undertakings concerned did not seek confidential treatment, submitted the following observations:

'As regards the files which could not be found, the Commission regrets that it is unable to give a wholly reliable answer to the Court's questions.

'The administrative file ([that is to say] the file covering the procedure from the initiation of the investigation to the issue of the statement of objections) now in the Commission's possession consists of 65 numbered binders covering the period to September 1989 [and also] the file bearing number 71 and containing the statement of objections and the annexes thereto and [also] an unnumbered binder bearing the title 'Oberland Glas" . It is therefore likely that five binders are missing.

As regards the contents of the missing binders, the Commission regrets that it is impossible to draw up a complete list of the documents which have disappeared, as the indexes to those binders cannot be found either. That said, there is every reason to believe that at least some of [those binders] contained the correspondence relating to Article 11 of Regulation No 17, which corresponds to the explanation given to the Court by the Commission concerning the administrative file in 1990. For example, it is probable that … ICI's response to the Commission's request for information of 19 June 1989 is part of the missing files: that request to ICI is in the administrative file which the Commission still has, but the response is missing.'

50 On 14 April 2005, the applicant consulted at the Court Registry the documents in the file mentioned in its letter of 29 September 2004.

51 On 15 July 2005, the applicant submitted its observations on the usefulness for its defence of the documents consulted. On 17 November 2005, the Commission responded to the applicant's observations.

52 The Judge-Rapporteur initially designated left office and the President of the Court, by decision of 22 June 2006, appointed a new Judge-Rapporteur.

53 Following a change in the composition of the Chambers of the Court with effect from 25 September 2007, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was therefore assigned on 5 October 2007.

54 On 12 February 2008, as Judge Tchipev was prevented from attending, the President of the Court designated Judge Dittrich to complete the Chamber, pursuant to Article 32(3) of the Rules of Procedure.

55 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a number of written questions to the applicant and the Commission on 5 May 2008. The parties replied within the prescribed period.

56 The parties presented oral argument and their answers to the Court's oral questions at the hearing on 26 June 2008.

Forms of order sought by the parties

57 The applicant claims that the Court should:

— principally, declare that the proceedings are time-barred and, in any event, annul the contested decision;

— in the alternative, declare that the Commission's power to impose fines was time-barred and, in any event, annul Article 2 of the contested decision in so far as it imposes a fine of EUR 3 million on the applicant;

— further in the alternative, declare that it is inappropriate to impose a fine on the applicant or, at the very least, substantially reduce the fine;

— by way of measure of inquiry, order the Commission to produce all the internal documents relating to the adoption of the contested decision and, in particular, the minutes of any meeting of the College of Commissioners at which the contested decision was discussed;

— order the Commission to produce all the documents in its file in Case COM/33.133;

— order the Commission to pay the costs.

58 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

59 The applicant claims, principally, that the contested decision should be annulled and, in the alternative, that the fine imposed on it by that decision should be annulled or reduced.

1. *The claim seeking annulment of the contested decision*

60 The applicant raises, in substance, four pleas in law in support of its claim that the contested decision should be annulled. Those pleas allege, first, failure to take into account the time that had elapsed; second, breach of essential procedural requirements; third, no effect on trade between Member States; and, fourth, breach of the right of access to the file.

First plea: failure to take into account the time that had elapsed

61 The first plea consists of two parts, alleging, respectively, incorrect application of the limitation rules laid down in Regulation No 2988/74 and breach of the 'reasonable time' principle.

First part: incorrect application of the limitation rules

— Arguments of the parties

62 The applicant claims that the reasoning followed by the Commission with respect to compliance with the limitation rules is contrary to the letter and the spirit of Regulation No 2988/74.

63 In the applicant's submission, the subject-matter of the appeal brought by the Commission on 30 August 1995, which, pursuant to Article 60 of the Statute of the Court of Justice, did not have suspensory effect, was not Decision 91/298, which had retroactively ceased to exist, but the judgment in *Solvay II*, paragraph 16 above. Under Article 58 of the Statute of the Court of Justice, an appeal is to be limited to points of law and the Court of Justice reviews the legality of the judgment under appeal by reference to the definitive findings of fact made by this Court.

64 While the expression 'proceedings pending before the Court' in Article 3 of Regulation No 2988/74 must now be read as including this Court, the establishment of a second court cannot allow the period during which the limitation period is suspended to be extended to cover proceedings whose subject-matter is not the contested decision. Furthermore, to maintain that Article 3 of Regulation No 2988/74 entailed suspension

of the limitation period during proceedings on appeal would amount to giving effect to a decision which has been annulled *ab initio*, which would be unprecedented in the common practice of the Member States.

65 The applicant refers to paragraph 1098 of the judgment of this Court in *PVC II*, paragraph 25 above, and observes that the specific purpose of Article 3 of Regulation No 2988/74 is to enable the limitation period to be suspended where the Commission is prevented from acting for an objective reason not attributable to it and connected precisely with the fact that an action is pending. The applicant takes the view that in the present case the Commission could claim to be prevented from acting while the action was pending before this Court. On the other hand, from the time when the judgment of this Court was delivered, the Commission, provided that it observed the 'reasonable time' principle, was free to adopt a new decision. By bringing an appeal, the Commission thus took the risk that its action would be time-barred, when it was aware of the judgment of the Court of Justice of 15 June 1994 in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, where the Court adjudicated on the failure to authenticate acts adopted by the College of Commissioners. The Commission's failure to act while its appeal was pending before the Court of Justice cannot therefore be justified by any objective reason.

66 Consequently, only the duration of the proceedings before this Court ought to have been taken into account as prolonging the limitation period. The limitation period therefore ended on 15 January 2000, well before the contested decision was adopted.

67 The applicant also observes that that interpretation was not contradicted in the judgment of this Court in *PVC II*, paragraph 25 above. In that case, the Commission's new decision was adopted within a period of less than five years increased only by the 'suspension period' relating to the proceedings before this Court. Thus the question whether an appeal has suspensory effect within the meaning of Article 3 of Regulation No 2988/74 was not examined in the judgment of this Court in *PVC II*.

68 In the reply, the applicant further submits that the Commission's argument would amount to depriving the judgment in *Solvay II*, paragraph 16 above, of any effect until such time as it was upheld by the Court of Justice, which would be to ignore the binding force of that judgment. Furthermore, to give Article 3 of Regulation No 2988/74 a broad interpretation, covering situations in which the Commission is not prevented from acting, would be contrary to the principle of legal certainty.

69 Last, in the observations which it submitted following the judgment of the Court of Justice in *PVC II*, paragraph 38 above, the applicant maintains that neither this Court nor the Court of Justice can have intended, in that case, to resolve the question whether an appeal brought by the Commission against a judgment of the General Court annulling a decision has the effect of suspending the limitation period during the appeal proceedings.

70 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

71 It should be emphasised, as a preliminary point, that Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 324, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 223).

72 Thus, in accordance with Article 1(1)(b) and (2) of Regulation No 2988/74, and also with Article 2(3) of that regulation, the limitation period in proceedings expires if the Commission has not imposed a fine or a penalty within five years from the date on which it began to run where, during that time, no interruptive action is taken or,

at the latest, within 10 years from the date on which it began to run where interruptive action has been taken. Nevertheless, pursuant to Article 2(3) of that regulation, the limitation period thus defined is extended by the time for which limitation is suspended pursuant to Article 3 (judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 140).

73 Under Article 3 of Regulation No 2988/74, the limitation period in proceedings is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

74 In the present case, it is apparent from the contested decision that, in the case in question, the Commission applied the limitation rules as follows.

75 First of all, the Commission considered that, as the infringements in question were continuous or continued infringements, the limitation period had begun to run at the end of 1990. The Commission added that, even on the assumption that the infringement had ceased on 19 December 1990 and that adoption and notification of Decision 91/298 had not interrupted the running of the limitation period, it had at least until the end of 1995 to adopt its decision (recital 74).

76 Next, the Commission considered that the limitation period must be extended by the time during which the action for annulment of the decision was pending before this Court (recital 75). In this case, since the action had been brought before this Court on 2 May 1991, judgment had been delivered by this Court on 29 June 1995, the appeal had been lodged before the Court of Justice on 30 August 1995 and judgment had been delivered by the Court of Justice on 6 April 2000, the limitation period had been suspended for at least eight years, nine months and four days (recital 77). Consequently, the Commission considered that it had until September 2004 to adopt a new decision (recital 78).

77 It follows that, according to the Commission, the contested decision, of 13 December 2000, had been adopted before the expiry of the limitation period.

78 In that regard, it should be observed, first of all, that the limitation period began to run when the infringement ended, that is to say, in 1989, as stated at paragraphs 293 to 304 below, and not in 1990, as the Commission stated.

79 Next, as the parties correctly observe, the reference in Article 3 of Regulation No 2988/74 to 'proceedings pending before the Court of Justice of the European Communities' must be understood, since the establishment of what is now the General Court, as envisaging in the first place proceedings pending before this Court, since actions imposing fines or penalties in the field of competition law fall within its jurisdiction. The limitation period was therefore suspended throughout the duration of the proceedings before this Court.

80 Last, it follows from paragraph 157 of the judgment of the Court of Justice in *PVC II*, paragraph 38 above, that, within the meaning of Article 3 of Regulation No 2988/74, the limitation period is suspended for as long as the decision at issue is the subject of proceedings pending 'before the [General Court] and the Court of Justice'. Consequently, the limitation period was also suspended throughout the duration of the proceedings before the Court of Justice, without there being any need to rule on the period between delivery of the judgment of this Court and the lodging of the appeal with the Court of Justice.

81 It follows from the foregoing that the proceedings were not time-barred in the present case, since the limitation period began to run in 1989 and the Commission imposed a fine on 13 December 2000, or within five years following the starting point of the limitation period extended by the period during which limitation was suspended. In that regard, the Commission's error in the contested decision as to the date on which the infringement ended has no consequence for the fact that the contested decision was adopted in compliance with the limitation rules laid down in Regulation No 2988/74.

82 None of the arguments put forward by the applicant is capable of calling that consideration into question.

83 First, it must be pointed out that Article 60 of the Statute of the Court of Justice and Article 3 of Regulation No 2988/74 are different in scope. The fact that an appeal does not have suspensory effect does not deprive Article 3 of Regulation No 2988/74, which concerns situations in which the Commission must await the decision of the Community judicature, of all effect. The applicant's argument that the Commission ought not to have taken account of the period during which an appeal was pending before the Court of Justice cannot therefore be upheld, since the result would be to deprive the judgment of the Court of Justice on appeal of its *raison d'être* and its effects.

84 Second, as regards the applicant's argument that the establishment of a second court does not permit the period of suspension of the limitation period to be extended, it must be borne in mind that Article 3 of Regulation No 2988/74 protects the Commission against the effect of the limitation period in situations in which it must await the decision of the Community judicature in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality (see, to that effect, the judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 144).

85 Third, as regards the argument that the judgment of this Court in *PVC II*, paragraph 25 above, is not relevant for the outcome of the present dispute, it is clear, on the contrary, from the wording of that judgment that, generally, the limitation period must be increased by the period during which the limitation period was suspended, that is to say, not only the period during which the proceedings were pending before this Court but also the period during which the proceedings were pending before the Court of Justice.

86 Fourth, as regards the argument that suspension of the limitation period throughout the duration of proceedings on appeal would amount to giving effects to a decision that was annulled at first instance, it is sufficient to observe that suspension of the limitation period allows the Commission to adopt a new decision only where the appeal

against a judgment of the General Court annulling a decision of the Commission is dismissed. That suspension of the limitation period has no effect on the decision annulled by the judgment of the General Court.

87 Fifth, in the event of an appeal, the Commission is indeed not formally prevented from acting and adopting a new decision following the annulment of the initial decision by this Court. However, an action brought against the final decision imposing penalties suspends the limitation period in proceedings pending delivery by the Community judicature of a final ruling on that action (judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 147). According to the case-law of the Court of Justice, Article 3 of Regulation No 2988/74 protects the Commission against the effect of the limitation period in situations in which it must await the decision of the Community judicature in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality. Article 3 therefore deals with cases in which the inaction of the institution is not the result of a lack of diligence (judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 144). The Commission cannot therefore be criticised for having lodged an appeal, in the exercise of its rights of defence, and awaited the judgment of the Court of Justice in *Commission* v *Solvay*, paragraph 19 above, before adopting a new decision.

88 Sixth, it should be added that the interpretation of Article 3 of Regulation No 2988/74 proposed by the applicant leads to serious practical difficulties. If the Commission must adopt a new decision following annulment of a decision of the General Court, without awaiting the judgment of the Court of Justice, there is a risk that two decisions having the same object would coexist if the Court of Justice should set aside the judgment of the General Court.

89 Furthermore, it seems to be contrary to the requirements of the economy of the administrative procedure to require the Commission, with the sole aim of ensuring that the limitation period does not expire, to adopt a new decision before it knows whether the initial decision is or is not vitiated by illegality.

90 It follows from all the foregoing that the first part of the first plea must be rejected.

Second part: breach of the 'easonable time' principle

— Arguments of the parties

91 The applicant submits that it was aware of the 'charge against it' on 13 March 1990, the date on which the statement of objections was addressed to it, that is to say, 11 years before the date on which the present action was brought. In addition, the importance of the present case was especially high for the applicant, since in Decision 91/298 and then in the contested decision the Commission found that it had committed 'serious' infringements and imposed a fine of EUR 3 million. However, at the time when the applicant brought the present action no final decision had been adopted with respect to the charges laid against the applicant in the statement of objections.

92 The applicant refers to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950, and observes that, taken as a whole, the proceedings initiated in February 1990 manifestly exceeded a reasonable time. In that regard, the Community case-law does not envisage that the duration of the proceedings is to be assessed stage by stage. Accordingly, there can be no justification for the Commission's waiting for five and a half years in order to adopt a new decision, particularly as the appeal to the Court of Justice does not have suspensory effect.

93 Following the judgment in *Solvay II*, paragraph 16 above, the Commission chose not only to bring an appeal which it could expect to be dismissed in the light of the judgment in *Commission* v *BASF and Others*, paragraph 65 above, but also to await the outcome of that appeal before adopting the contested decision. In addition, according to the applicant, the Commission waited a further eight months after the judgment

in *Commission* v *Solvay*, paragraph 19 above, whereas, in the case giving rise to the judgment of this Court in *PVC II*, paragraph 25 above, the new decision had been adopted within one and a half months.

94 Furthermore, the Commission confuses a 'reasonable time' and the limitation period by wrongly considering that it was entitled to wait until 2004 in order to adopt a new decision. Thus, in the contested decision, the Commission does not identify the evidence on which it concludes that the 'reasonable time' principle was complied with in this case. In the applicant's submission, whatever the justification for the length of each stage of the proceedings, 'a period of 14 to 16 years, or even more, for the entire proceedings between the statement of objections and the final decision of the [General Court] or the Court of Justice' cannot be described as reasonable.

95 Accordingly, the Court must find that the reasonable time was exceeded and annul the contested decision on the ground that it is no longer possible, at this stage, to adjudicate within a reasonable time on the charges laid against the applicant. Any other solution, consisting, for example, in taking account of the fact that the reasonable time was exceeded when setting the amount of the fine, would not make good the infringement of Article 6 of the ECHR. The applicant further maintains that, in application of the principles laid down by the European Court of Human Rights, it is not required to prove that the fact that a reasonable time was exceeded harmed its rights of defence, which would constitute a separate ground of annulment. The test for harm to the rights of the defence is distinct from the right to be tried within a reasonable time in a criminal matter.

96 In any event, the applicant claims that the fact that a reasonable time was exceeded and the resulting deterioration of the evidence prevent it from defending its interests, by depriving it, in particular, of the possibility of substantiating the arguments put forward in the application. In addition, the applicant contends that it is no longer able to call upon former employees who were employed in the sector and the subsidiary concerned. Thus, the applicant claims that it has suffered 'specific harm to its defence'.

97 The applicant maintains that the Commission's negligent failure to act during the five and a half years following the judgment in *Solvay II*, paragraph 16 above, is particularly reprehensible. In that regard, the applicant submits that it had legitimate grounds to believe that the Commission had decided not to reopen the file, so that it did not seek to preserve a systematic record of the facts and documents that might be of use in its defence. In addition, its policy on preserving records required, other than in exceptional circumstances, the systematic destruction of the records after 10 years, or even after five years.

98 Last, to take the view that the burden of proving unreasonableness is borne by the applicant would be contrary to the case-law of the European Court of Human Rights, which has held that it is for the national authorities, where there have been long periods of inactivity, to explain the reasons for those periods of inactivity, which can be justified only in exceptional circumstances. The applicant also contends that, unlike the Commission, it cannot be accused of engaging in a manoeuvre designed to delay the proceedings since 1989. The applicant observes that the Commission has shown itself to be incapable of complying with its internal rules on authentication and with the principle of legal certainty, which delayed the substantive examination of the initial decision by several years.

99 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

100 As a preliminary point, it must be borne in mind that, in competition matters, the principle that action must be taken within a reasonable period must be observed in administrative proceedings conducted pursuant to Regulation No 17 which may lead to the penalties provided for therein and in the judicial proceedings before the Community judicature (judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 179).

101 In the first place, in support of the complaint alleging that the duration of the administrative procedure was unreasonable, the applicant relies, in particular, on the fact that, although the appeal does not have suspensory effect, the Commission, without any reason, waited five and a half years before adopting a new decision following the annulment of Decision 91/298 by the judgment in *Solvay II*, paragraph 16 above.

102 However, as the Court found when it examined the first part of the first plea, the limitation period was suspended in accordance with Article 3 of Regulation No 2988/74 throughout the duration of the entire proceedings before the Court of Justice when the Commission appealed against the judgment in *Solvay II*, paragraph 16 above. The Commission cannot therefore be criticised for having breached the 'reasonable time' principle solely because it waited until the Court of Justice had made a determination in the context of such an appeal before adopting the contested decision.

103 In the second place, the applicant claims, more generally, that the duration of the administrative procedure, taken as a whole, that is to say, from the issue of the statement of objections until the adoption of the contested decision, exceeded a reasonable time.

104 That argument must be rejected.

105 In the context of the examination of a complaint alleging breach of the 'reasonable time' principle, a distinction must be drawn between the administrative procedure and the judicial proceedings. Thus, the period during which the Community judicature examined the legality of Decision 91/298 and the validity of the judgment in *Solvay II*, paragraph 16 above, cannot be taken into account in determining the duration of the procedure before the Commission (see, to that effect, the judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraphs 202 to 204).

106 In the third place, the applicant takes issue with the duration of the administrative procedure between delivery of the judgment in *Commission* v *Solvay*, paragraph 19 above, and the adoption of the contested decision.

107 In that regard, it must be borne in mind that that period began on 6 April 2000, the date of delivery of the judgment in *Commission* v *Solvay*, paragraph 19 above, and ended on 13 December 2000 when the contested decision was adopted. That stage of the administrative procedure therefore lasted eight months and seven days.

108 During that period, the Commission merely made a number of formal amendments to Decision 91/298, in particular by inserting a new passage on 'Proceedings before the [General Court] and the Court of Justice', concerning the assessment of compliance with the limitation periods. Nor was the adoption of the contested decision preceded by any additional measure of investigation, as the Commission relied on the results of the investigation carried out 10 years earlier. It must be acknowledged, however, that, even in those circumstances, certain checks and consultations within the administration may prove essential for the purposes of arriving at such a result.

109 From that perspective, the period of eight months and seven days between the delivery of the judgment in *Commission* v *Solvay*, paragraph 19 above, and the adoption of the contested decision cannot be considered unreasonable.

110 In the fourth place, as regards the duration of the administrative procedure between the issue of the statement of objections and the adoption of Decision 91/298, it should be observed that the applicant has not claimed that that period was open to criticism as such. The applicant merely asserted that the reasonableness of the period must be evaluated as from 13 March 1990, namely the date on which the statement of objections was notified to it, without criticising the period of eleven and a half months between notification of the statement of objections and the adoption of Decision 91/298 on 1 March 1991.

111 It follows from all the foregoing that the applicant has adduced no evidence on which it might be considered that the duration of the administrative procedure as a whole was excessive in this case.

112 Even though the phase of the administrative procedure preceding notification of the statement of objections must be taken into account (see, to that effect, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 51), the duration of the entire administrative procedure cannot be considered excessive, in the light of, in particular, the investigations carried out from April 1989, the requests for information subsequently issued and the opening of the proceeding on the Commission's own initiative on 19 February 1990. In those circumstances, neither the period of approximately 11 months between the investigations which the Commission carried out from April 1989 and the date of the statement of objections, nor the duration of the entire administrative procedure can be considered unreasonable.

113 It is appropriate to add that, in any event, a breach of the 'reasonable time' principle would warrant annulment of a decision adopted following an administrative procedure in a competition matter only where it also entailed a breach of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves effectively, failure to observe the 'reasonable time' principle cannot affect the validity of the administrative procedure (see, to that effect, the judgment of this Court in *PVC II*, paragraph 25 above, paragraph 122).

114 In that regard, the applicant claims that it is difficult for it to defend itself against charges relating to facts alleged to have taken place at that time, since it is no longer able to call upon its employees who were active in the sector and the subsidiary concerned at the material time.

115 However, the Commission did not carry out any measure of investigation between delivery of the judgment in *Commission* v *Solvay*, paragraph 19 above, and the contested decision.

116 Furthermore, it is clear from the contested decision that that decision is based on the same grounds as those forming the basis of Decision 91/298, that the content of the two decisions is virtually identical and that the Commission did not take into account any new factor requiring the exercise of a right of defence.

117 In those circumstances, there has been no breach of the applicant's rights of defence.

118 In the fifth place, as regards the judicial proceedings, it must be observed that, in the application, the applicant does not directly challenge the duration of the proceedings before this Court and then before the Court of Justice so far as Decision 91/298 is concerned.

119 In any event, it must be borne in mind that the general principle of Community law that everyone is entitled to a fair hearing, which is inspired by Article 6(1) of the ECHR, and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law. 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. The list of criteria is not exhaustive and the assessment of the reasonableness of a period 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. Thus, the complexity of the case may be deemed to justify a duration which is prima facie too long (see Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraphs 115 to 117 and the case-law cited).

120 Furthermore, in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 the Court of Justice, after stating that this Court had ignored the requirements concerning completion within a reasonable time, held, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, that the plea alleging excessive duration of the proceedings

was well founded for the purposes of setting aside the judgment under appeal in so far as it set the amount of the fine imposed on the applicant at ECU 3 million. In the absence of any indication that the length of the proceedings affected their outcome in any way, the Court held that that plea could not result in the judgment under appeal being set aside in its entirety, but that a sum of ECU 50 000 constituted reasonable satisfaction for the excessive duration of the proceedings, and therefore reduced the amount of the fine imposed on the undertaking concerned.

121 Consequently, in the absence of any indication that the length of the proceedings affected their outcome in any way, any exceeding of a reasonable time by the Community judicature in the present case, even on the assumption that it were established, would not in any way affect the legality of the contested decision.

122 It should further be noted that, in the application, the applicant expressly renounced the possibility of a reduction in the fine by way of compensation for the alleged breach of its right to be tried within a reasonable time. Nor did it claim damages.

123 Accordingly, the second part of the first plea must be rejected and, in consequence, the first plea must be rejected in its entirety.

Second plea: breach of essential procedural requirements

124 The second plea consists, essentially, of seven parts, alleging, first, breach of the principle of collegiality; second, breach of the principle of legal certainty; third, breach of the applicant's right to be heard again; fourth, failure to consult the Advisory Committee on Restrictive Practices and Dominant Positions again; fifth, the irregular composition of the Advisory Committee; sixth, breach of the right of access to the file; and, seventh, breach of the principles of impartiality, sound administration and proportionality.

125 The Court considers it appropriate to examine the sixth part of the second plea in the context of the fourth plea, alleging breach of the right of access to the file, after it has examined the plea relating to the substance of the case.

First part: breach of the principle of collegiality

— Arguments of the parties

126 The applicant observes that, according to the covering letter of 10 January 2001, signed by the Member of the Commission responsible for competition, the contested decision was adopted by the College of Commissioners on 13 December 2000.

127 However, it is apparent from the statements of the Commission's spokesperson, reproduced in a press release issued by a press agency on 12 December 2000, that the decision to adopt Decision 91/298 again had already been taken at the latest on the day before the day on which the College of Commissioners met in order to deliberate.

128 In the applicant's submission, in the absence of any indication that the College of Commissioners deliberated on a date before 12 December 2000, it must be inferred that the contested decision was adopted in breach of the principle of collegiality.

129 Furthermore, even on the assumption that the contested decision was in fact adopted by the College of Commissioners, it follows from the press release issued by a press agency on 12 December 2000 that the Commission had apparently decided to adopt a new decision with a content identical to that of Decision 91/298, on the ground that the applicant had never contested the substance of the latter decision. The applicant

contends that it had challenged the legal and factual assessment made by the Commission and also the principle and the amount of the fine. Consequently, the College of Commissioners was not correctly informed of the applicant's position at the time when it decided to adopt the contested decision.

130 The applicant also requests the Court to order the Commission to produce all the internal documents relating to the adoption of the contested decision, and in particular the minutes of any meeting of the College of Commissioners during which the draft decision was discussed, and also the documents submitted to the College of Commissioners.

131 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

132 In accordance with settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the College of Commissioners should bear collective responsibility at the political level for all decisions adopted (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 39, and Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 79).

133 Compliance with the principle of collegiality, and especially the need for decisions to be deliberated upon by the Commissioners together, must be of concern to the individuals affected by the legal consequences of such decisions, in the sense that they must be sure that those decisions were actually taken by the College of Commissioners and correspond exactly to its intention. This is particularly so, as here, in the case of acts, expressly described as decisions, which the Commission finds it necessary to

adopt with regard to undertakings or associations of undertakings for the purpose of ensuring observance of the competition rules and by which it finds an infringement of those rules, issues directions to those undertakings and imposes pecuniary sanctions upon them (*Commission* v *BASF and Others*, paragraph 65 above, paragraphs 64 and 65).

134 In the present case, the applicant relies on the fact that, according to a press release issued by a press agency on 12 December 2000, the Commission's spokesperson announced that the Commission would adopt the same decision again on 13 December 2000.

135 However, even on the assumption that the Commission's spokesperson did use the words to which the applicant refers, the mere fact that a press release issued by a private company mentions a statement which is not in any way official does not suffice to support the conclusion that the Commission breached the principle of collegiality. The College of Commissioners was not in any way bound by that statement and, at its meeting of 13 December 2000, it could equally have decided, following collective deliberation, not to adopt the contested decision.

136 It should further be noted that the Commission's official press statement was issued on 13 December 2000.

137 Furthermore, even on the assumption that the Commission's spokesperson did state that the applicant had never contested the substance of Decision 91/298, such an argument is ineffective. It follows from recital 70 to the contested decision that the Commission adopted a new decision the content of which was virtually identical to the content of Decision 91/298 on the ground that that decision had been annulled on account of purely procedural defects. Accordingly, the fact that the applicant challenged the substance of Decision 91/298 is irrelevant.

138 It follows from the foregoing that there is no need to order the Commission, in the context of the measures of organisation of procedure, to produce all the internal documents relating to the adoption of the contested decision.

139 The first part of the second plea must therefore be rejected.

Second part: breach of the principle of legal certainty

— Arguments of the parties

140 The applicant suggests that the formalities of authentication fixed by the Rules of Procedure of the Commission (OJ 1999 L 252, p. 41), which were applicable at the time of adoption of the contested decision, are not consistent with the requirements of *Commission* v *BASF and Others*, paragraph 65 above, paragraphs 73 to 76, and *Commission* v *Solvay*, paragraph 19 above, paragraphs 44 to 49.

141 It maintains that the first paragraph of Article 16 of the Rules of Procedure of the Commission, in force at the material time, prescribes no formality for authentication of the contested decision, which is not signed although it mentions the name of the Member of the Commission responsible for competition. In particular, there is no provision for the instruments adopted to be attached to the summary note at the time when it is drafted, so that 'the authentication of one or other of those notes has no direct link with the instrument adopted'. In that regard, the first paragraph of Article 16 of the Rules of Procedure of the Commission differs from Article 15 of the Council decision of 5 June 2000 adopting the Council's Rules of Procedure (OJ 2000 L 149, p. 21).

142 Accordingly, the Commission's Rules of Procedure ignore the fundamental nature of the formalities of authentication and contravene the principle of legal certainty. The contested decision was therefore not validly authenticated.

143 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

144 The Court takes the view, as a preliminary point, that the applicant's argument must be understood as constituting a plea that a provision of the Rules of Procedure of the Commission in force at the time of the adoption of the contested decision was illegal.

145 Such a plea of illegality must be held admissible.

146 According to the case-law, Article 241 EC must also extend to internal rules of an institution which, although they do not constitute the legal basis of the contested decision and do not produce effects similar to those of a regulation within the meaning of that article, determine the essential procedural requirements for adopting that decision and thus ensure legal certainty for those to whom it is addressed. Any addressee of a decision must be able indirectly to challenge the legality of the measure determining the formal validity of that decision, notwithstanding that the measure in question does not constitute the legal basis of the latter if it was not in a position to apply for the annulment of that measure before receiving notification of the contested decision. Consequently, those of the Commission's Rules of Procedure which are designed to ensure the protection of individuals may be the subject-matter of a plea of illegality (judgment of this Court in *PVC II*, paragraph 25 above, paragraphs 286 and 287).

147 It must be borne in mind, moreover, that the plea of illegality must be limited to what is essential to the outcome of the dispute.

148 Article 241 EC is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever. The general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see the judgment of this Court in *PVC II*, paragraph 25 above, paragraphs 288 and 289 and the case-law cited).

149 In that regard, it must be borne in mind that the contested decision was authenticated under the provisions of the first paragraph of Article 16 of the Rules of Procedure of the Commission. There is thus a direct legal connection between that decision and that article of the Rules of Procedure which the applicant claims to be unlawful. It follows that the first paragraph of Article 16 of the Rules of Procedure applicable at the time of adoption of the contested decision may be the subject-matter of a plea of illegality.

150 It is therefore appropriate to ascertain whether or not the formalities of authentication fixed by the Rules of Procedure of the Commission are consistent with the requirements of the principle of legal certainty.

151 In the present case, the reference text is the first paragraph of Article 16 of the Rules of Procedure of the Commission, in the version applicable at the time of adoption of the contested decision, which provides as follows:

'Instruments adopted by the Commission in the course of a meeting shall be attached, in the authentic language or languages, in such a way that they cannot be separated, to a summary note prepared at the end of the meeting at which they were adopted. They

shall be authenticated by the signatures of the President and the Secretary-General on the last page of the summary note.'

152 In the judgment of this Court in *PVC II*, paragraph 25 above, the Court examined the legality of the first paragraph of Article 16 of the Rules of Procedure of the Commission of 17 February 1993 (OJ 1993 L 230, p. 15), which was drafted as follows:

'Instruments adopted by the Commission in the course of a meeting … shall be annexed, in the authentic language or languages, to the minutes of the meeting at which they were adopted or at which note was taken of their adoption. They shall be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.'

153 In that judgment, the Court considered that the rules laid down in that provision constituted in themselves a sufficient guarantee for determining, in case of dispute, whether texts notified or published corresponded perfectly with the text adopted by the College and thus with the intention of their author. Since that text was annexed to the minutes, and the first page of the minutes was signed by the President and the Secretary-General, there was a link between those minutes and the documents which they covered which allowed certainty as to the exact content and form of the College's decision. In that regard, in the absence of a finding by the Community judicature that an authority had not complied with its usual practice, an authority must be presumed to have acted in accordance with the applicable legislation. Therefore, the authentication provided for in accordance with the rules in the first paragraph of Article 16 of the Rules of Procedure must be regarded as lawful (judgment of this Court in *PVC II*, paragraph 25 above, paragraphs 302 to 304).

154 It must be held that the first paragraph of Article 16 of the Rules of Procedure of the Commission, in the version applicable at the time of adoption of the contested decision, prescribes a more formalistic procedure for authentication than that examined in the judgment of this Court in *PVC II*, paragraph 25 above.

155 Following amendments, the two texts now differ as follows: instruments adopted in a meeting are no longer merely 'annexed' to the minutes, but are 'attached … in such a way that they cannot be separated'; the word 'minutes' is replaced by 'summary note'; the summary note is prepared 'at the end of the meeting'; and, last, the signatures are no longer placed on 'the first page of the minutes' but on 'the last page of the summary note'.

156 Taken together, those amendments reinforce the guarantees offered by the authentication procedure with a view to ensuring, in particular, compliance with the principle of legal certainty.

157 Accordingly, the first paragraph of Article 16 of the Rules of Procedure of the Commission as applicable on the date of adoption of the contested decision is not vitiated by illegality.

158 In those circumstances, the second part of the second plea must be rejected.

Third part: breach of the applicant's right to be heard again

— Arguments of the parties

159 The applicant acknowledges that at paragraphs 246 to 252 of the judgment of this Court in *PVC II*, paragraph 25 above, the Court considered that where a Commission decision is annulled on account of a procedural defect, a new hearing of the undertakings concerned is required before a new decision is adopted only to the extent to which the new decision contains new objections.

160 However, that solution cannot be transposed to the facts of the present case. First, the administrative procedure is vitiated by numerous defects owing to the breach of the right of access to the file. Second, the contested decision adopts the analysis undertaken in Decision 91/297, which was annulled for other than purely formal reasons, and which was not adopted again.

161 Thus, the annulment of Decision 91/297 affected the validity of the measures preparatory to the contested decision. In *Solvay I*, paragraph 17 above, this Court held that the Commission's complete refusal to disclose documents constituted a breach of the applicant's right of access to the file. Furthermore, that procedural defect affects both the administrative procedure leading to the adoption of Decision 91/298 and that leading to the adoption of Decision 91/297. The Commission therefore ought to have reopened the procedure by granting the applicant full access to its file and then allowing it to submit all its written and oral observations on that matter.

162 Furthermore, because it limits the right to be heard to the sole possibility for the undertaking concerned to submit its observations on the objections raised against it, the interpretation adopted in the judgment of this Court in *PVC II*, paragraph 25 above, is incorrect in law. Any undertaking concerned is also entitled to be heard and to submit its observations on the principle, the appropriateness and the amount of the fines. The applicant refers to the case-law and asserts that the undertakings which are the potential addressees of a decision finding an infringement on their part and imposing a fine for such infringement must be given the opportunity to submit all their observations with respect to the fine at the stage of the administrative procedure. Owing to the time that has elapsed in the present case, the applicant contends that it would have had new observations to submit with respect to the limitation in time of the Commission's power to impose fines on it and to the fact that a reasonable time had been exceeded, as well as to the amount of the fine.

163 The applicant maintains that, following the annulment of Decision 91/297, it ought, in particular, to have been heard on the internal coherence of the analysis made by the Commission, which in the contested decision presented the alleged infringement as reinforcing the effects of an alleged general anti-competitive policy, and on the validity of certain assertions in the contested decision concerning the existence of a cartel with ICI, which were taken directly from Decision 91/297.

164 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

165 Where, following the annulment of a decision imposing sanctions on undertakings which have infringed Article 81(1) EC on account of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission adopts a new decision, having substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned (see, to that effect, the judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraphs 83 to 111).

166 As for the questions of law which may arise in the context of the application of Article 233 EC, such as those relating to the passage of time, the possibility of resuming proceedings, the access to the file required on resumption of the proceedings, the intervention of the hearing officer and the Advisory Committee and the possible implications of Article 20 of Regulation No 17, they do not render a new hearing necessary either, since they do not alter the substance of the objections, being at most amenable to subsequent judicial review (see, to that effect, the judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 93).

167 In the present case, the Commission repeated virtually the entire content of Decision 91/298. It supplemented the contested decision solely by a passage concerning the proceedings before the General Court and the Court of Justice.

168 Admittedly, in the part of the contested decision devoted to the facts, the Commission also added a number of considerations originating in Decision 91/297, which was subsequently annulled by the judgment in *Solvay I*, paragraph 17 above.

169 However, Decision 91/298, in which the contested decision originated, made express reference to Decision 91/297 with respect to information on the product and the market for soda ash (see Part IB of the recitals to Decision 91/298). In the reply, the applicant acknowledges, moreover, that the passages from Decision 91/297 set out in the contested decision were an 'integral part' of Decision 91/298.

170 Furthermore, that information, which is purely factual, is not relevant to the infringement which the applicant was found to have committed in the present case. In this case, the conduct at issue relates to an agreement between the applicant and CFK and not to the anti-competitive practices between the applicant and ICI.

171 It must therefore be held that the contested decision and Decision 91/298 have substantially the same content and are based on the same grounds.

172 Consequently, in accordance with the case-law cited at paragraphs 165 and 166 above, in the present case the Commission was not required to hear the applicant again before adopting the contested decision.

173 Furthermore, as regards the argument alleging breach of the right of access to the file, it forms the subject-matter of an autonomous complaint and will therefore be examined elsewhere.

174 It follows from the foregoing that the third part of the second plea must be rejected.

Fourth part: failure to consult the Advisory Committee on Restrictive Practices and Monopolies again

— Arguments of the parties

175 The applicant disputes the assessment made at paragraphs 254 to 257 of the judgment of this Court in *PVC II*, paragraph 25 above, according to which a fresh consultation of the Advisory Committee was not necessary in that case. In the applicant's submission, contrary to the Court's finding in that judgment, the obligation to consult the Advisory Committee does not follow from Article 1 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), which merely regulates the chronological order to be taken by the procedure to be followed, but from Article 10 of Regulation No 17 in the version applicable at the material time. Furthermore, although consultation of the Advisory Committee is an important procedural guarantee, it pursues a different aim from the mere hearing of the undertaking concerned by the draft decision, as shown by the fact that where the undertaking concerned waives the right to a hearing the Commission is not relieved of its obligation to consult the Advisory Committee.

176 Consequently, in the present case, the Advisory Committee ought to have been consulted on the Commission's preliminary draft of the contested decision which was drawn up following the judgment in *Commission* v *Solvay*, paragraph 19 above, and in particular on the question of compliance with the 'reasonable time' principle.

177 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

178 In the words of Article 10 of Regulation No 17, in the version applicable at the material time:

'3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article [81](3) [EC].

…

5. The consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than 14 days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.'

179 Furthermore, Article 1 of Regulation No 99/63 provides:

'Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17.'

180 According to consistent case-law, it follows from Article 1 of Regulation No 99/63 that the hearing of the undertakings concerned and the consultation of the Advisory Committee are necessary in the same situations (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 54, and judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 115).

181 Regulation No 99/63 was replaced by Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81 EC] and [82 EC] (OJ 1998 L 354, p. 18), which was in force at the time of adoption of the contested decision and Article 2(1) of which is drafted in terms similar to those of Article 1 of Regulation No 99/63.

182 In the present case, the Court notes that, according to the terms of the contested decision, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted prior to the adoption of Decision 91/298. The applicant does not dispute the existence or the regularity of that consultation.

183 Accordingly, in so far as the contested decision does not contain substantial amendments by comparison with Decision 91/298, the Commission, which was not required to hear the applicant again before adopting the contested decision, was not required to consult the Advisory Committee again either (see, to that effect, the judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 118).

184 Consequently, the fourth part of the second plea must be rejected.

Fifth part: irregular composition of the Advisory Committee on Restrictive Practices and Dominant Positions

— Arguments of the parties

185 The applicant submits that, after the Advisory Committee on Restrictive Practices and Dominant Positions had been consulted prior to the adoption of Decision 91/298 and of the contested decision, three States acceded to the Community on 1 January 1995. Since that Advisory Committee is composed of a representative of each Member State, it was not properly composed when the Commission prepared the draft which led to the adoption of the contested decision. The Commission ought therefore to have undertaken a fresh consultation of the properly composed Advisory Committee.

186 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

187 In the words of Article 10(4) of Regulation No 17, in the version applicable at the material time:

'The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.'

188 According to the case-law, a change in the composition of an institution does not affect the continuity of the institution itself, and its final or preparatory acts in principle retain their full effect (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 36).

189 Nor is there any general principle of Community law requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine (judgment of this Court in *PVC II*, paragraph 25 above, paragraphs 322 and 323).

190 It follows that the Commission was not required to consult the Advisory Committee again following the accession of three further States to the Community.

191 Accordingly, the fifth part of the second plea must be rejected.

Seventh part: breach of the principles of impartiality, sound administration and proportionality

— Arguments of the parties

192 The applicant claims that the contested decision reproduces practically word for word a decision adopted 10 years previously and that it takes no account whatsoever of the passage of time or of the consequences of the annulment of Decision 91/297. The applicant further maintains that the Commission ought to have granted it full access to the file.

193 In addition, the contested decision is disproportionate in so far as it has the effect of reopening a proceeding long after the facts took place, so much so that in any event it serves no useful purpose.

194 Furthermore, the applicant asserts that the Commission did not state the reasons why it considered it appropriate to impose a 'draconian decision' on the applicant again, when it had, moreover, declined to adopt a new decision following the annulment of Decision 91/297. The Commission none the less treated as constituting a whole the infringements leading to the adoption of Decisions 91/297, 91/298 and 91/299, which had been drafted from that aspect. The Court is therefore unable to assess the reasons for the Commission's decision to adopt a new decision the content of which is virtually identical to that of Decision 91/298.

195 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

196 The applicant, while purporting to allege a breach of the principles of impartiality, sound administration and proportionality, reiterates the same arguments as those already put forward, relating, in particular, to the passage of time and access to the file, which the Court examines elsewhere.

197 The only new element concerns the failure to state reasons for the fact that the Commission adopted a new decision the content of which is virtually identical to that of Decision 91/298. In that regard, it must be held that the Commission stated its reasons for choosing to adopt Decision 91/298 again at recitals 67 to 78 to the contested decision, which are added to Decision 91/298. The applicant's complaint is therefore factually incorrect.

198 Consequently, the seventh part of the second plea must be rejected.

199 It follows from all the foregoing that the second plea must be rejected in its entirety, subject to examination of the sixth part, alleging breach of the right of access to the file, which will be carried out in the context of the fourth plea.

Third plea: no effect on trade between Member States

Arguments of the parties

200 The applicant claims that the contested decision is 'badly reasoned' in so far as, when attempting to demonstrate the effect on trade between Member States, the Commission merely referred to an alleged general policy on the applicant's part of controlling the soda ash market in the Community and asserted that the alleged agreement between the applicant and CFK formed part of that general policy.

201 In the applicant's submission, that reference to an alleged general policy refers to the approach taken by the Commission, which, in the *Soda ash* cases, has always considered that the alleged infringements of Articles 81 EC and 82 EC reinforced each other in order to form an overall strategy aimed at partitioning markets and restricting competition.

202 In the first place, the Commission has never succeeded in establishing the existence of an alleged 'European cartel' between all producers of soda ash.

203 In the second place, even on the assumption that the conduct with which the Commission takes issue was abusive, it consisted of isolated events having no significant impact on competition.

204 In the third place, the alleged agreement in question concerned minimal tonnages, as the Commission mentions the figure of 11 000 tonnes over two years in a market of more than 1 million tonnes, or approximately 1% of annual consumption on the German market and around 4% of CFK's total production capacity. Furthermore, the alleged agreement concerns, *ex hypothesi*, quantities of soda ash that CFK would not have been in a position to place on the market. Consequently, the alleged agreement was not capable of constituting a significant restriction on trade between Member States.

205 In the reply, the applicant observes that, while it did not raise a specific plea with respect to the existence of the alleged agreement which the Commission accuses it of having concluded with CFK, that does not mean that it acknowledges the existence of such an agreement.

206 The applicant also observes that the prices charged in Germany were higher than in the rest of the Community. Therefore, if CFK had wished to place those tonnages in other Member States, it would have had to bear a drop in revenue and it would not have been in CFK's interest to increase that drop in revenue by further reducing prices on those markets. In the absence of the alleged agreement, it is on the German market that CFK had an interest in placing the tonnages that DSW would not have absorbed.

207 The Commission disputes the arguments put forward by the applicant.

Findings of the Court

208 Article 81(1) EC applies only to agreements which may affect trade between Member States. It has consistently been held that, for an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or of fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between States (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 22, and Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 63). Thus, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not decisive (Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54, and Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 27).

209 It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 172).

210 Furthermore, the capability of a cartel to affect trade between Member States, that is to say, its potential effect, is sufficient for it to fall within the scope of Article 81 EC and it is not necessary to demonstrate an actual effect on trade (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 48, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 166). It is none the less necessary for the potential effect of the cartel on inter-State trade to be appreciable, or, in other words, that it be not insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17, and *CMA CGM and Others* v *Commission*, paragraph 71 above, paragraph 207).

211 A cartel extending over the whole of the territory of a Member State, moreover, has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29, and Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 37).

212 In the present case, at recital 59 to the contested decision, the Commission identified three elements which led it to conclude that the agreement in question affected trade between Member States: first, that agreement 'was part of [an] overall policy for controlling the soda ash market in the Community'; second, the agreement 'was intended not only to reduce competition in a major part of the Community but also to maintain the rigidity of the existing market structure and its separation along national lines'; and, third, '[i]t was … quite possible that the tonnage taken by Solvay under the guarantee would [in the absence of the agreement] have been placed by CFK [o]n other Community markets'.

213 First of all, it must be stated that, in its pleadings, the applicant does not dispute the first two elements identified by the Commission.

214 It must be observed, next, that the applicant does not put forward any plea aimed at disputing the existence of an agreement between it and CFK, under which, in the words of Article 1 of the contested decision, '[the applicant] guaranteed to CFK a minimum annual sales tonnage of soda ash in Germany … and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum'.

215 Such an agreement providing a guarantee with respect to a minimum annual sales tonnage on a national market, such as that at issue in the present case, is by definition likely to divert trade patterns from the course which they would otherwise have followed, as it has the effect of removing from the market a part of the production of soda ash that might have been exported to other Member States.

216 Consequently, even on the assumption that the applicant's argument that there was no general policy for controlling the soda ash market were well founded, it must be held that that argument has no effect on the legality of the contested decision, in so far as the Commission's conclusion relating to the finding of an effect on trade between Member States is sufficiently demonstrated by the fact that the agreement at issue was likely to divert trade patterns from the course which they would otherwise have followed.

217 The applicant also claims that, in view of the small size of the tonnages in question, the agreement was not capable of having an appreciable effect on trade between Member States.

218 According to recital 43 to the contested decision, however, while the German market represented around 1 080 000 tonnes in 1986 and 1987, CFK's guarantee was originally set at 179 000 tonnes, and subsequently increased. In that regard, it is necessary to refer not to the amount which the applicant actually purchased from CFK each year, but to the amount which the applicant might have had to purchase from CFK under the agreement, namely 179 000 tonnes originally.

219 As the Commission correctly submits in the defence, that amount of 179 000 tonnes, which represented 16,57% of the German market in 1987, cannot be considered insignificant.

220 It follows from all the foregoing that, in the contested decision, the Commission was correct to consider that the cartel in question was capable of affecting trade between Member States.

221 The third plea must therefore be rejected.

Fourth plea: breach of the right of access to the file

222 The fourth plea consists, in substance, of two parts, whereby the applicant alleges, respectively, that documents of use for the defence were among the documents in the file consulted in the context of the measures of organisation of procedure and that it was unable to consult the complete file.

223 As a preliminary point, it must be borne in mind that respect for the rights of the defence constitutes a fundamental principle of Community law which must be respected in all circumstances, in particular in any procedure which may give rise to penalties, even if it is an administrative procedure. It requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, paragraph 11, and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 49).

224 The right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission provides the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 68, and *Hoechst* v *Commission*, paragraph 71 above, paragraph 145).

225 As regards the inculpatory evidence, the undertaking concerned must demonstrate that the result which the Commission reached in its decision would have been different if a document that was not disclosed on which the Commission relied to make a finding of infringement against that undertaking ought to have been excluded as inculpatory evidence. As regards the exculpatory evidence, the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine. The possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had — from the aspect of that evidence — a significance which ought not to have been overlooked (*Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraphs 73 to 76, and *Hoechst* v *Commission*, paragraph 71 above, paragraph 146).

226 Last, a breach of the right of access to a file can entail annulment of a Commission decision in whole or in part only where the lack of proper access to the investigation file during the administrative procedure had prevented the undertaking or undertakings concerned from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence. That would be the case if disclosure of a document would have had even a slight chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraphs 73 to 76).

227 It is in the light of those considerations that the Court must assess whether the Commission respected the applicant's rights of defence in the present case.

First part, relating to the existence of documents of use for the defence among the documents in the file consulted in the context of the measures of organisation of procedure

228 It follows from the case-law cited in the preceding paragraphs that, as regards the exculpatory evidence, the undertaking concerned must establish that its non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision.

229 In the present case, the applicant submitted its observations on 15 July 2005, after it had consulted certain documents in the file.

— Arguments of the parties

230 The applicant claims that access to those documents during the administrative procedure would have enabled it to put forward arguments of use for its defence with respect to the absence of any effect on trade between Member States.

231 First, the applicant asserts that the documents in the investigation file to which it was not given access during the administrative procedure would have enabled it to show that it had not established a commercial strategy for controlling the market and that, during the same period, CFK had supplied soda ash to other competitors. In particular, it is apparent from an internal CFK memo that in 1988 CFK supplied 2 544 tonnes of soda ash to the applicant following production problems which the applicant had encountered in its factories in southern Europe. In addition, other documents in the investigation file to which the applicant was not given access during the administrative procedure show that all producers of soda ash regularly obtained supplies from each other.

232 Second, the applicant maintains that the documents in the file to which it was not given access show that in the years in which CFK made the supplies at issue, the typology and volume of its exports to other States of the Community remained similar. Consequently, the supplies made to the applicant had no effect on the patterns of trade in the Community.

233 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

234 It must be borne in mind, first of all, that the element identified by the Commission, namely that the agreement in question was part of a general policy for controlling the soda ash market in the Community does not affect the legality of the contested decision (see paragraph 216 above). Consequently, even if the documents on which the applicant relies after consulting the file tend to show that the applicant had no commercial strategy designed to control the market, they cannot entail the annulment of the contested decision.

235 In any event, the applicant, which was the main producer of soda ash in the Community at the material time, necessarily had at its disposal the information which would have enabled it to claim and substantiate in 1990 that soda ash producers regularly obtained supplies from each other. In particular, the applicant relies on a number of documents showing that sales of soda ash were made between it and its competitors, a fact of which it clearly could not be unaware.

236 Furthermore, the argument that supplies to the applicant had no effect on the patterns of trade in the Community cannot call in question the Commission's finding that there was an effect on trade between Member States. As the Commission stated,

at recital 58 to the contested decision, the purpose of the agreement was to achieve conditions of artificial market stability, which the applicant does not dispute. Since the agreement was intended to maintain the existing structure of the soda ash market, it logically follows that CFK's exports in the Community must remain stable. Consequently, far from calling in question the Commission's considerations as to the effect on trade between Member States, the applicant's argument tends rather to support them.

237 Consequently, the applicant has not shown that disclosure of those documents would have had even a slight chance of altering the outcome of the administrative procedure if it had been able to rely on them during that procedure as required by the case-law (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraphs 73 to 76).

238 Consequently, it follows from the examination of the documents on which the applicant relied after having access to the file in the context of the measures of organisation of procedure that the Commission did not breach the applicant's rights of defence. The first part of the applicant's fourth plea must therefore be rejected.

Second part, relating to the absence of consultation of the complete file by the applicant

— Arguments of the parties

239 In the application, the applicant claims that it was never able to obtain a complete enumerative list of the Commission's file. Furthermore, during the administrative procedure leading to the adoption of Decision 91/298, the Commission merely granted the applicant access to the inculpatory documents annexed to the statement of

objections. Consequently, according to the description of the file which emerges from the judgment in *Solvay I*, paragraph 17 above, the applicant was refused access to a set of 'sub-files' relating to its competitors (Rhône-Poulenc, CFK, Matthes & Weber, Akzo and ICI), and also to around 10 files containing the responses to the requests for information pursuant to Article 11 of Regulation No 17, in the version applicable at the material time, in particular those which the Commission sent to certain of the applicant's customers. The applicant contends that it was thus prevented from examining whether those files contained material of use for its defence, in particular as regards the competitive situation on the German market, the context of the alleged agreement and its effects on competition and trade between Member States. The fact that the evidence deteriorated owing to the passage of time since the facts complained of took place made access to that file even more important.

240 In its observations of 15 July 2005, submitted after it had consulted the file at the Court Registry, the applicant maintains that it cannot state to what extent the documents missing from the file would have been of use for its defence. In that regard, the applicant observes that, first, the Commission expressly acknowledged that it had lost five binders and, second, the Commission cannot guarantee that the binders still in its possession are complete, in the absence of continuous numbering of the documents and an enumerative list. The applicant concludes that the contested decision must be annulled in its entirety, as the Court is not in a position to review its legality.

241 The Commission disputes the arguments put forward by the applicant.

— Findings of the Court

242 It should be observed, as a preliminary point, that, during the administrative procedure preceding the adoption of Decision 91/298, the Commission did not draw up an enumerative list of the documents making up the file and communicated to the applicant only the inculpatory documents, which were annexed to the statement of objections.

243 In that regard, the Commission claimed at the hearing that, in certain cases, its practice consisted in sending the undertakings concerned a statement of objections together with only certain documents, owing to the voluminous nature of the file; those undertakings were then invited to come and consult all the documents to which they were entitled to have access at the Commission's premises, with the assistance of an enumerative list. However, in the case leading to the adoption of Decision 91/298, the rapporteur, according to the Commission, decided to 'simplify the procedure' and considered that, as all the documents relied on had been communicated with the statement of objections, there was no need to consult the file and, consequently, that an enumerative list was unnecessary.

244 However, it must be borne in mind that, at pages 40 and 41 of its *Twelfth Report on Competition Policy*, the Commission laid down, with respect to access to the file, the following rules:

'The Commission permits the undertakings involved in a procedure to inspect the file on the case. Undertakings are informed of the contents of the Commission's file by means of an annex to the [s]tatement of [o]bjections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access. They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned: (i) documents or parts thereof containing other undertakings' business secrets; (ii) internal Commission documents, such as notes, drafts or other working papers; (iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.'

245 It follows from those rules that, during the administrative procedure preceding the adoption of Decision 91/298, the Commission was under a duty to make available to the applicant all the documents, whether in its favour or otherwise, which the Commission had obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or

other confidential information were involved (see, to that effect, Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraphs 51 to 54, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraphs 39 to 41).

246 Accordingly, it must be held that, in the context of the case leading to the adoption of Decision 91/298, the Commission departed from the rules which it had imposed on itself in 1982 by not drawing up an enumerative list of the documents in the file and not giving the applicant access to all the documents in the file.

247 Next, it should be observed that, as Decision 91/298 was annulled by this Court because it had not been authenticated, the Commission considered that it was entitled to adopt the contested decision without reopening the administrative procedure.

248 Consequently, it must be held that, before adopting the contested decision, the Commission did not communicate to the applicant all the documents in the file which were accessible to the applicant and did not invite the applicant to come and inspect those documents at its premises, so that the administrative procedure was irregular in that regard.

249 However, it follows from consistent case-law that the rights of the defence are breached by reason of a procedural irregularity only in so far as the irregularity actually has an effect on the ability of the undertakings involved to defend themselves (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 55, and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 632).

250 Accordingly, the Court, in the context of the judicial proceedings brought against the contested decision, ordered measures of organisation of procedure designed to ensure full access to the file, in order to determine whether the Commission's refusal to disclose or communicate a document might have been detrimental to the applicant's defence (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraph 102).

251 In that regard, it must be borne in mind that, as such an examination is limited to a judicial review of the pleas in law, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Belated disclosure of documents in the file does not put the undertaking which has brought the action against the Commission decision back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission (see *Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraph 103 and the case-law cited). Furthermore, where access to the file is granted at the stage of the judicial proceedings, the undertaking concerned does not have to show that, if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 128, and judgment of the Court of Justice in *PVC II*, paragraph 38 above, paragraph 318).

252 In the present case, at the Court's request, the Commission produced the statement of objections and the documents annexed thereto. It also drew up an enumerative list of the documents in the file, as currently composed.

253 In that regard, first, it must be noted that there is uncertainty as to the precise content of the file as originally composed. The Commission did indeed state that the file, in its present form, was a copy of the original file, which was made up of 'sub-files' numbered 1 to 71. At the same time, however, the Commission informed the Court of the existence of an unnumbered 'sub-file', entitled 'Oberland Glas'.

254 Second, it should be observed that the Commission expressly acknowledged having lost the five 'sub-files' numbered 66 to 70. It is apparent from its letter of 15 March 2005 that it arrived at that conclusion when it realised that it had 'sub-files' Nos 1 to 65 and that 'sub-file' No 71 contained the statement of objections.

255 In its observations of 18 November 2005, the Commission stated that it was 'very unlikely that the files that could not be found contain[ed] exculpatory documents'. When invited at the hearing to explain that phrase, the Commission stated that it was 'plausible' that the 'sub-files' in question did not contain any exculpatory document and that, from a 'statistical' point of view, they could not be of use for the applicant's defence.

256 It follows from those replies that the Commission is not in a position to identify with certainty the author, the nature and the content of each of the documents in 'sub-files' Nos 66 to 70.

257 It is therefore appropriate to ascertain whether the applicant had the opportunity to examine all the documents in the investigation file that are capable of being relevant for its defence and, if that is not so, whether the breach of the right of access to the file was of such significance that it had the effect of depriving that procedural guarantee of its substance. According to the case-law, access to the file is one of the procedural safeguards intended to protect the rights of the defence (*Solvay I*, paragraph 17 above, paragraph 59), and a breach of the right of access to the Commission's file during the procedure preceding the adoption of a decision can, in principle, cause the decision to be annulled if there has been a breach of the rights of defence of the undertaking concerned (*Corus UK* v *Commission*, paragraph 251 above, paragraph 127).

258 In that regard, the Court must examine whether there was a breach of the applicant's rights of defence as regards the objections raised against the applicant in the statement of objections and in the contested decision.

259 According to the case-law, a breach of the rights of the defence must 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 (*Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraph 127). It is therefore necessary to examine the substantive objections raised by the Commission in the statement of objections and in the contested decision (*Solvay I*, paragraph 17 above, paragraph 60).

260 It is also necessary to examine the existence of a breach of the rights of the defence by reference to the arguments which the undertaking concerned has specifically raised against the contested decision (see, to that effect, *ICI II*, paragraph 17 above, paragraph 59).

261 In the present case, in the context of the present proceedings, the Court has examined the arguments put forward by the applicant and the substantive objections in the contested decision and concluded that the applicant's pleas must all be rejected.

262 As the applicant has put forward in the application no argument challenging the existence of the agreement referred to by the Commission in the contested decision, there is no reason to presume that it might have discovered in the missing 'sub-files' documents casting doubt on the Commission's findings. Furthermore, if the applicant had not entered into the agreement referred to in the contested decision, it would have been able to assert that it had not done so in the application, even without full access to the file. Last, as regards the applicant's argument that it did not have a general policy for controlling the soda ash market, it must be borne in mind that, as stated at paragraph 215 above, an agreement incorporating a guarantee, such as the agreement in question, is by definition likely to divert trade patterns from the course which they would otherwise have followed

263 It must therefore be concluded that it has not been established that the applicant did not have the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Although the applicant did not have access to all the

documents in the investigation file, in the present case that did not prevent it from defending itself against the substantive objections which the Commission raised in the statement of objections and in the contested decision.

264 In consequence, in the circumstances of the present case, the contested decision must not be annulled on the ground that five 'sub-files' to which the applicant never had access disappeared from the file. Accordingly, the second part of the fourth plea must be rejected and the fourth plea must therefore be rejected in its entirety.

2. *The claims seeking annulment or reduction of the fine*

265 The claims whereby the applicant seeks annulment or reduction of the fine consist, in substance, of five pleas, alleging, first, incorrect assessment of the gravity of the infringement; second, incorrect assessment of the duration of the infringement; third, incorrect taking into account of aggravating circumstances by the Commission; fourth, the existence of attenuating circumstances; and, fifth, the disproportionate nature of the fine, notably in the light of the time which had elapsed.

First plea: incorrect assessment of the gravity of the infringement

Arguments of the parties

266 The applicant maintains that the Commission is required to comply with the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17

and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the Guidelines'). However, as the facts of the present case took place before those Guidelines were adopted, the Commission is not required, in principle, to take them into consideration, on two conditions: first, it must follow the Guidelines where they apply the principles established in the Commission's practice; and, second, it must do so where they render the Commission's policy on the setting of fines less severe.

267 As regards the gravity of the infringement, the Commission fails to explain the extent to which the alleged agreement consists in a market-sharing agreement, a characterisation which appears for the first and only time at recital 62 to the contested decision. Nor did the Commission take account of the insignificant quantities concerned by the alleged agreement. Last, the Commission did not state the reasons for finding that the agreement in question was implemented in conditions of very strict secrecy or demonstrate that that was so.

268 The Commission disputes the arguments put forward by the applicant.

Findings of the Court

269 As a preliminary point, it must be borne in mind that, while the Commission has a discretion in setting the amount of each fine, and is not required to apply a precise mathematical formula, the Court has, under Article 17 of Regulation No 17, unlimited jurisdiction within the meaning of Article 229 EC in relation to actions brought against decisions whereby the Commission has fixed a fine and it may, consequently, cancel, reduce or increase the fine imposed (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 165, and *FNCBV and Others* v *Commission*, paragraph 208 above, paragraph 358).

270 In the first place, as regards the application of the Guidelines, it must be borne in mind that, as Decision 91/298 was annulled on the ground of a procedural defect, the Commission was entitled to adopt a new decision without a new administrative procedure being initiated.

271 Since the content of the contested decision is virtually identical to that of Decision 91/298, and since both decisions are based on the same grounds, the contested decision is subject, in the context of the fixing of the fine, to the rules in force at the time when Decision 91/298 was adopted.

272 The Commission resumed the procedure at the stage at which the procedural error was committed and, without reappraising the case in the light of rules which did not exist when Decision 91/298 was adopted, it adopted a new decision. The adoption of a new decision precludes *ex hypothesi* the application of guidelines which became applicable after the adoption of the first decision.

273 Consequently, the Guidelines are not applicable in the present case.

274 In the second place, it must be observed that the Commission considered that the infringement which the applicant was found to have committed, namely the agreement entered into with CFK, had been 'serious' (recital 62 to the contested decision).

275 In that regard, it must be borne in mind that, according to the case-law, the amount of fines must be graduated according to the circumstances and the gravity of the infringement and that, for the purposes of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature

of the restrictions on competition (see Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 143 and the case-law cited).

276 In the present case, it must be held that the practice in which the applicant was found to have engaged justified at least the characterisation as 'serious' applied by the Commission.

277 The agreement was intended to restrict competition on the German market by guaranteeing to purchase a certain quantity of soda ash from CFK in order to maintain price levels.

278 At recital 58 to the contested decision, the content of which is not disputed by the applicant, the aim of the agreement in question is presented as follows:

'The purpose was clearly to achieve conditions of artificial market stability. In exchange for returning to pricing behaviour which was not considered by Solvay [to be] disruptive, CFK was guaranteed a minimum share of the German market. By removing from the market the tonnage which CFK could not sell, Solvay ensured that price levels were not brought down by competition. It is clear from the documentary evidence that the arrangements were put into practice and had the intended effect. Such classic cartel-type arrangements by their very nature restrict competition within the meaning of Article 81(1) [EC].'

279 Thus, contrary to the applicant's assertion, the agreement in question was a market-sharing agreement, in the sense that the undertakings concerned agreed to regulate, on the German market, the placing of CFK's production on the market.

280 Agreements of this type are among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC. They are categorised in the case-law as obvious restrictions of competition (see, to that effect, Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136, and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 173).

281 In the third place, as regards the argument that the quantities concerned by the agreement were insignificant, it is sufficient to observe that that argument has already been examined and that it was rejected (see paragraphs 218 and 219 above).

282 In the fourth place, as regards the argument alleging the absence of secrecy in the implementation of the agreement, it should be observed that recital 47 to the contested decision states that:

'A meeting was held on 14 March 1989, attended by senior representatives of CFK and its parent company Kali & Salz on the one side and DSW on the other. It is highly significant that no official record or minute was made of this meeting and indeed no trace of it whatever exists at either CFK or Kali & Salz. However a brief handwritten note of this meeting was found at DSW.'

283 In the application, the applicant claims, in substance, that the Commission 'neither stated its reasons for finding' that the agreement in question was implemented in conditions of very strict secrecy 'nor showed' that that was so. As for the Commission, it relies on the absence of any official record, even though a handwritten note was found at DSW.

284 However, the mere fact that there is no official record does not permit the view that the agreement was implemented in conditions of very strict secrecy, especially when, as the Commission acknowledged, an internal note relating to that meeting had been drawn up by the applicant's German subsidiary.

285 Consequently, the Commission could not take the secret nature of the agreement in question into account when assessing the gravity of the infringement.

286 None the less, in the light of the fact that the agreement in question constitutes an obvious restriction of competition, the Commission was in any event entitled to characterise the infringement committed by the applicant as serious.

287 Accordingly, the first plea must be rejected.

Second plea: incorrect assessment of the duration of the infringement

Arguments of the parties

288 The applicant maintains that the Commission has wholly failed to show that any volume guarantee whatsoever was given for 1990. Therefore, even on the assumption that the infringement were established, its duration would at least have to be reduced by one quarter.

289 The Commission contends that the statement of objections, which was sent to the applicant and to CFK on 14 March 1990, stated that the infringement had continued 'to this day'. The Commission maintains that it gave the undertakings concerned the opportunity to put forward their point of view on the duration of the infringement. However, in their responses to the statement of objections, the applicant and CFK merely denied outright the existence of the agreement, without taking a position on the question of its duration, and did not provide the Commission with any reason to think that the infringement had ceased.

290 The Commission claims that, given the improbability of the arguments put forward by the applicant and CFK in their responses to the objections, it was entitled to conclude that the agreement had continued during 1990. In that regard, the Commission refers to the Opinion of Advocate General Sir Gordon Slynn in Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, at 1914, where he stated that, from the time when the existence of a cartel is established, that cartel is presumed to continue until there is proof to the contrary. In the present case, the Commission submits that it relied on particular circumstances, which relate not to the very nature of the agreement, but to the explanations given by the undertakings concerned about the existence of the agreement.

291 Last, the Commission maintains that the applicant merely asserts that the Commission has not demonstrated the fact that a volume guarantee was granted in 1990, without stating when the agreement ceased. The Commission observes that such guarantee had been given in 1989 and that the volume had increased in the context of a structural policy and not of ad hoc deliveries.

Findings of the Court

292 As a preliminary point, it should be observed that the applicant disputes the date on which the infringement ceased, but does not question the starting date of the infringement, which the operative part of the contested decision fixes at 'about 1987'.

293 According to the case-law of this Court, in order to calculate the duration of an infringement whose object is to restrict competition, it is necessary merely to determine the period during which the agreement existed, that is to say, the time between the date on which it was entered into and the date on which it was terminated (*CMA CGM and Others* v *Commission*, paragraph 71 above, paragraph 280).

294 The duration of the infringement is an intrinsic element of an infringement under Article 81(1) EC, the burden of proof of which is borne principally by the Commission. In this respect, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79, and Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 51).

295 That apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (*Peróxidos Orgánicos* v *Commission*, paragraph 294 above, paragraph 53; see also, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 224 above, paragraph 79).

296 In the present case, in Article 1 of the contested decision, the Commission stated that the applicant had infringed Article 81 EC 'by participating from about 1987 until at least the end of 1990 in a market-sharing agreement'. At recital 60 to the contested decision, moreover, the Commission refers to the period 'from about 1986 until the end of 1990'.

297 At recital 2 to the contested decision, on the other hand, the Commission observed that '[f]rom a date unknown in about 1987 to at least 1989 Solvay and CFK participated

in an agreement and/or concerted practice contrary to Article 81 [EC] by which, for each of the years 1987, 1988 and 1989, Solvay guaranteed CFK a minimum sales tonnage'.

298 It must therefore be held that the contested decision contains contradictory elements as regards the end of the infringement.

299 Furthermore, the part of the contested decision dealing with the 'guarantee' agreement (recitals 42 to 48) mentions only figures up to 1989 and 1990 is not mentioned in the part dealing with the duration of the infringement (recitals 63 to 66).

300 The Commission, referring to the Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion française and Others* v *Commission*, paragraph 290 above, maintains that, since it established the existence of the infringement, there is a presumption that it continued and that, in the present case, it was for the applicant to demonstrate that the agreement was no longer applied in 1990.

301 It must be emphasised, however, as observed above, that the Commission's view that the agreement in question had existed until the end of 1990 is to be found only in the operative part of, and at recital 60 to, the contested decision, which sets out the Commission's conclusion as to the existence of an infringement of Article 81 EC, but has not the slightest basis either in the grounds devoted to the characterisation of the agreement (recitals 53 to 59 to the contested decision) or in those dealing with the duration of the agreement (recitals 63 to 66 to the contested decision). In those circumstances, and in the light of the contradiction in the grounds of the contested decision as to the end of the infringement, the presumption on which the Commission relies cannot be applied in the present case, even though the applicant has adduced no evidence that the cartel ceased at the end of 1989.

302 Even on the assumption that particular circumstances may be present in which the burden of proof as to the duration of an infringement may be reversed (see, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 2801 to 2804), it does not follow that, in a decision establishing an infringement of Article 81 EC, the Commission can decline to state, with supporting evidence, when the infringement ended and to provide any information which it may have on the duration of the infringement.

303 It follows from all the foregoing that the Commission, which bore the main burden of proof, has not demonstrated that the infringement in question had continued until the end of 1990.

304 It must therefore be held that the infringement in question lasted from 1987 to 1989 and not from 1987 to 1990. Consequently, Article 1 of the contested decision must be annulled in so far as it declares that the applicant infringed Article 81 EC by participating, from about 1987 until at least the end of 1990, in a market-sharing agreement.

305 In those circumstances, it is appropriate to vary the contested decision by reducing the amount of the fine imposed on the applicant by 25%.

306 Consequently, the amount of the fine must be reduced by EUR 750 000.

Third plea: incorrect taking into account of aggravating circumstances by the Commission

Arguments of the parties

307 The applicant submits that the Commission did not state reasons or provide justification for characterising its position on the relevant market as a dominant position and that that characterisation must therefore be disregarded.

308 Nor does the contested decision show that the alleged infringement was committed intentionally.

309 The Commission claims that, at recitals 18 and 22, the contested decision mentions that the applicant held a dominant position, being the leading producer in Germany and in the Community, with a market share of 52% and 60% respectively. In the Commission's submission, that reasoning must be assessed in the light of Decision 91/299 of the same date.

310 Furthermore, the intentional nature of the infringement is mentioned in the contested decision. It follows from recital 58 that the parties were fully aware that they were participating in an agreement that restricted competition on the market.

Findings of the Court

311 It should be observed at the outset that, according to recital 64 to the contested decision:

'In determining the amount of the fine to be imposed on each producer, the Commission has borne in mind Solvay's dominant position as the leading producer in Germany and in the Community. Solvay considered that as such it had a particular responsibility for ensuring the "stability" of the market. CFK was a relatively small producer of soda ash but it was a willing partner in the collusive venture.'

312 Furthermore, at recital 65 to the contested decision, it is stated that:

'The infringement was deliberate and both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.'

313 As regards the applicant's argument that the Commission did not state its reasons for characterising the applicant's position on the market as a dominant position, the Court makes the following observations.

314 According to the case-law, the concept of a dominant position relates to a position of economic strength which enables the entity holding that position to prevent effective competition on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of

consumers. Whether it is an individual entity or a collective entity, an entity which holds more than 50% of the market is capable of enjoying such independence (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraphs 931 and 932).

315 In the contested decision, the Commission stated that '[the applicant] was the market leader with almost 60% of the total Community market' (recital 18) and that its market share was '52% in Germany' (recital 22).

316 Accordingly, the objection that the contested decision fails to state reasons for finding that the applicant held a dominant position must be rejected.

317 Next, even on the assumption that the applicant did raise a substantive plea concerning the absence of a dominant position, that plea would be inadmissible. The applicant merely states that:

'[The applicant] refers the Court to the reasoning developed in the context of the action against the decision in the case brought under Article 82 EC lodged today by [the applicant] concerning the fact that it did not have a dominant position on the market(s) for soda ash under consideration. The applicant attaches the relevant pages of that action as an annex to the present application.'

318 According to the case-law of this Court, however, in order to ensure legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the basic matters of fact and law relied on appear coherently and intelligibly in the text of the application itself, even if only stated briefly. Whilst specific points in this text can be supported and supplemented by references to specific passages in the documents attached, a general reference to other documents, even those annexed

to the application, cannot compensate for the lack of essential elements in the application. It is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function That interpretation of Article 44(1)(c) of the Rules of Procedure also refers to the conditions of admissibility of the reply, which, according to Article 47(1) of the Rules of Procedure, is intended to supplement the application (judgment of this Court in *PVC II*, paragraph 25 above, paragraphs 39 and 40).

319 As regards the applicant's argument that the contested decision does not show that the alleged infringement was committed deliberately and fails to state reasons on that point, the following observations must be made.

320 According to settled case-law, for an infringement of the competition rules in the EC Treaty to be regarded as having been committed intentionally, it is not necessary that the undertaking was aware that it was restricting competition; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition, and it is unimportant whether the undertaking was aware that it was infringing Article 81 EC (see *Brasserie nationale and Others* v *Commission*, paragraph 280 above, paragraph 155 and the case-law cited).

321 In the light of that case-law, and given a market-sharing agreement, the applicant could not be unaware that the object of the agreement in issue was to restrict competition and the infringement was therefore committed intentionally.

322 It should further be observed that the contested decision contains sufficient reasoning in that regard. At recitals 57 and 58 to the contested decision, the Commission found that the agreement had the object of restricting competition and that '[its] purpose was clearly to achieve conditions of artificial market stability'. At recital 65 to the contested decision, moreover, the Commission stated that both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.

323 The Commission therefore stated to the requisite legal standard the reasons on which the contested decision was based.

324 It should be added that it is precluded that the applicant might have been able to find any evidence of use for its defence on those points in the missing sub-files.

325 First, the existence of a dominant position on the applicant's part was established essentially on the basis of its market share, and there is nothing to indicate that the applicant might have found in the missing sub-files any documents that would undermine the finding that it held a dominant position on the market for soda ash (see, to that effect, *ICI II*, paragraph 17 above, paragraph 61).

326 In addition, with respect to the fact that the infringement was committed intentionally, it is precluded that the applicant might have been able to find documents of use for its defence in the sub-files which had disappeared, since it is not necessary for the undertaking to be aware that it was infringing Article 81 EC.

327 The third plea must therefore be rejected.

Fourth plea: the existence of attenuating circumstances

328 The fourth plea consists of two parts, relating, respectively, to the applicant's cooperation with the Commission and to the absence of an effect on competition.

First part, relating to the applicant's cooperation with the Commission

329 The applicant asserts that it cooperated in the investigation, both during the Commission's visits to its premises and when it responded to the Commission's requests for information.

330 According to Article 11 of Regulation No 17, entitled 'Requests for information':

'4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.'

331 It is settled case-law that cooperation in the investigation which does not go beyond that which the undertakings are already obliged to provide under Article 11(4) and (5) of Regulation No 17 does not warrant a reduction in the fine (Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342, and Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 218). On the other hand, such a reduction is warranted where the undertaking has provided information well in excess of that which the Commission may require under Article 11 of Regulation No 17 (Case T-230/00 *Daesang and Sewon Europe* v *Commission* [2003] ECR II-2733, paragraph 137).

332 In the present case, the applicant merely contends that it responded to the requests for information which it was sent. As that conduct is covered by the obligations borne by the applicant, it cannot constitute an attenuating circumstance.

333 As for the applicant's alleged cooperation with the Commission during the visits to its premises, it must be observed that that conduct is also covered by the obligations borne by the applicant and that it cannot constitute an attenuating circumstance.

334 The first part of the fourth plea must therefore be rejected.

Second part, relating to the absence of an effect on competition

335 The applicant claims that the Commission ought to have taken account of the fact that the alleged agreement had no effect on competition, owing to the insignificant tonnages involved.

336 In that regard, it is sufficient to observe that the agreement between the applicant and CFK, which represented 16,57% of the German market in 1987, cannot be considered to relate to insignificant tonnages (see paragraphs 218 and 219 above).

337 The applicant's argument, which is factually incorrect, must therefore be rejected.

338 Accordingly, the second part of the fourth plea must be rejected and the fourth plea must therefore be rejected.

Fifth plea: the disproportionate nature of the fine, notably in the light of the time which had elapsed

339 The applicant submits that the Commission ought to have taken into account the fact that more than 11 years had elapsed since the end of the alleged infringement. The applicant questions the 'topicality' of the punitive and deterrent effect of the fine, when it adapted its commercial policy in accordance with the Commission's requirements. Nor does it see what justification there might be for the deterrent effect of the fine vis-à-vis third undertakings.

340 In that regard, it must be borne in mind that the Commission correctly considered that the infringement which the applicant was found to have committed was 'serious'. At recital 62 to the contested decision, the Commission stated, in particular, that market-sharing agreements are by their very nature considerable restrictions on competition and that in the present case the parties had restricted competition between them by means of a device intended to create artificial conditions of market stability.

341 The Commission was therefore entitled to impose a fine on the applicant.

342 Purely as a matter of interest, it may be observed that, although the Guidelines are not applicable in the present case, they provide that, for 'serious' infringements, the likely starting amounts for the calculation of the fine are between EUR 1 million and EUR 20 million.

343 As regards the time which had elapsed, it follows from the examination of the first plea that in the present case the Commission complied with the provisions of Regulation No 2988/74 and also with the 'reasonable time' principle. The Commission cannot therefore be criticised for having delayed in adopting the contested decision.

344 Next, it follows from the case-law that, in determining the amount of fines for infringements of competition law, the Commission must take into account not only the gravity of the infringement and the particular circumstances of the case but also the context in which the infringement was committed and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique Diffusion française and Others* v *Commission*, paragraph 290 above, paragraph 106, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 272).

345 Consequently, even if a fine is adopted again after a certain time has elapsed, it cannot lose its punitive and deterrent effect, provided that it is established that the undertaking concerned infringed competition law, in particular, as in the present case, by committing a serious infringement.

346 Accordingly, the fifth plea must be rejected.

347 In conclusion, the contested decision must be annulled in so far as it incorrectly finds that the infringement took place from about 1987 until the end of 1990.

348 In consequence, the amount of the fine imposed on the applicant must be set at EUR 2,25 million.

Costs

349 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

350 In the present case, the applicant's claims have been declared well founded in part. The Court considers that, on a just assessment of the circumstances of this case, the applicant should bear three quarters of its own costs and pay three quarters of those incurred by the Commission and that the Commission should bear one quarter of its own costs and pay one quarter of the applicant's costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 2003/5/EC of 13 December 2000 relating to a proceeding under Article 81 [EC] (COMP/33.133-B: Soda ash — Solvay, CFK) in so far as it declares that Solvay SA infringed Article 81 EC in 1990;**

2. **Sets the amount of the fine imposed on Solvay at EUR 2,25 million;**

3. **Dismisses the action as to the remainder;**

4. **Orders the applicant to bear three quarters of its own costs and to pay three quarters of the costs of the European Commission;**

5. **Orders the Commission to bear one quarter of its own costs and to pay one quarter of the applicant's costs.**

Meij Vadapalas Dittrich

Delivered in open court in Luxembourg on 17 December 2009.

[Signatures]

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