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

In Case T-30/91,

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

applicant,

v

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

defendant,

APPLICATION for the annulment of Commission Decision 91/297/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A: Soda-ash — Solvay, ICI, OJ 1991 L 152, p. 1),

* Language of the case: French.

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

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

Registrar: H. Jung,

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

gives the following

## Judgment

### Facts and procedure

*Economic background*

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

than 100 years ago, the production costs of natural soda-ash being much lower than those of the synthetic product.

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

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

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

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

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

4 With regard to demand, the main customers in the Community were glass manufacturers. Approximately 70% of the production of western European undertakings was used in the manufacture of flat and hollow glass. Most glass producers operated continuous process plants and required an assured supply of soda-ash; in

most cases, they had a relatively long-term contract with one major supplier for the main part of their requirements and, as a precaution, used another supplier as a 'secondary source'.

5 At the material time the Community market was characterized by separation along national lines, producers generally tending to concentrate their sales in the Member States where they had production facilities. In particular, there was no competition between the applicant and ICI, each limiting its sales in the Community to its own traditional 'sphere of influence' (continental western Europe for the applicant and the United Kingdom and Ireland for ICI). That sharing of the market goes back to 1870 when the applicant first granted patent licences to Brunner, Mond & Co, one of ICI's original constituent companies. Moreover, the applicant was one of the main shareholders in Brunner, Mond & Co, and subsequently in ICI, until it sold its shares in the 1960s. According to the applicant and ICI, the successive market-sharing agreements, the most recent dating from 1945/1949, had become outdated in 1962 and were formally cancelled in 1972.

*Administrative procedure*

6 At the beginning of 1989 the Commission carried out investigations without warning at the premises of the Community's main soda-ash producers. At the end of those investigations the applicant, by letter of 27 April 1989, drew the Commission's attention to the fact that the documents taken as copies from its premises were confidential in nature. By letter of 22 May 1989 the Commission confirmed that Article 20 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereafter 'Regulation No 17') applied to the documents gathered during the course of the investigations in question. Those investigations were supplemented by requests for information. That information was supplied by the

applicant in a letter of 18 September 1989, in which it pointed out the confidential nature of the documents sent. At the time of those same investigations and requests for information ICI also stressed, by letters of 13 April and 14 September, the confidential nature of its own documents.

7 By letter of 13 March 1990 the Commission then sent to the applicant a statement of objections made up of several parts:

— the first part refers to the factual background to the proceedings;

— the second part concerns the alleged infringement of Article 85 of the EEC Treaty by Solvay and ICI (to which the corresponding Appendices II.1 to II.42 were addressed);

— the third part concerns an alleged infringement of Article 85 by Solvay (to which the corresponding Appendices III.1 to III.12 were addressed) and by CFK;

— the fourth part concerns an alleged infringement of Article 86 of the EEC Treaty by the applicant (to which the corresponding Appendices IV.1 to IV.180 were addressed);

— the fifth part (accompanied by Appendices marked 'V'), which refers to an alleged infringement of Article 86 by ICI, does not form part of the statement of objections addressed to the applicant; in that respect, the letter of 13 March 1990 states only that 'the fifth part does not concern Solvay';

— the sixth part deals with the question of possible fines.

8 After having referred to the importance of maintaining the confidentiality of the documents obtained pursuant to Regulation No 17, the Commission stated in its letter of 13 March 1990 that the evidence contained in Appendices II.1 to II.42 had been sent to each of the undertakings concerned and 'passages which may possibly relate to secret or confidential matters and which do not relate directly to the suspected infringement have been deleted from the documents'. Finally, the Commission revealed to each undertaking the replies given by the other undertaking under Article 11 of Regulation No 17 and stated that 'information which might be commercially sensitive has [again] been blanked out'.

9 On 28 May 1990 the applicant submitted its written observations on the statement of objections. By letter of 29 May 1990 the Commission invited the applicant to take part in the hearing concerning the infringements alleged against the applicant and ICI which was planned for 25 to 27 June 1990. By letter of 14 June 1990 the applicant declined that invitation to take part in that hearing, which took place on 26 and 27 June 1990. Only ICI took part in it.

10 By letter of 20 September 1990 addressed to the Commission, the applicant protested against the Commission's use during the hearing of certain documents or parts of documents which were not included amongst the documents sent to it and the Commission's disregard of other documents or parts of documents which might have been relied on by the applicant; in that context, the applicant requested the Commission to ensure that the rights of the defence were fully observed.

11 By letter of 1 October 1990 the Commission replied that it had introduced into the hearing about 10 documents taken from ICI, marked 'X 1 to X 11', solely in order to respond to an argument made by ICI during the hearing. At ICI's express request, those documents had not been annexed to the statement of objections because they were partially confidential. Since it presumed that in the meantime

ICI had sent to the applicant copies of the documents in question after deleting the confidential parts, the Commission gave the applicant an opportunity to make supplementary observations on the new documents within a period of two weeks.

12 In a letter dated 17 October 1990 the applicant explained that its previous letter did not refer to the documents marked 'X' produced by the Commission during the course of the hearing, which were of little interest to it. The relevant documents were those which ICI had used in its defence at the oral hearing and which ICI had sent to it in the meantime. The relevant items were six documents from ICI, which the applicant claimed were of such a nature as to exculpate it. Furthermore, two other documents had been annexed to the statement of objections only in a form in which passages had been arbitrarily deleted (II.25 and II.34). The applicant criticized that method of proceeding and, in that context, referred to observations submitted by ICI at its hearing.

13 In its reply of 30 October 1990 the Commission stated that the documents contained neither information which was new to the applicant nor evidence which the Commission had used to support the objections made against the undertakings concerned. The Commission stated that it would, however, take into account the arguments put forward by the applicant in its letter of 17 October 1990.

14 According to the documents before the Court, at the end of the abovementioned procedure the college of Commissioners adopted Decision 91/297/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A: Soda-ash — Solvay, ICI, OJ 1991 L 152, p. 1, hereafter 'the decision') at its 1 040th meeting held on 17 and 19 December 1990. That decision finds in substance that the applicant and ICI had been participating since 1 January 1973 until the beginning of 1989 in a concerted practice to share the western European soda-ash market by reserving continental western Europe to the applicant, and the United Kingdom and Ireland for ICI; consequently it imposes a fine of ECU 7 million on each party.

15 At the same meeting the Commission also adopted

— Decision 91/299/EEC, relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay, OJ 1991 L 152, p. 21), in which the Commission found in substance that the applicant had abused its dominant position on the continental western European market and imposed on it a fine of ECU 20 million;

— Decision 91/300/EEC, relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-D: Soda-ash — ICI, OJ 1991 L 152, p. 40), in which the Commission found in substance that ICI had abused the dominant position which it held in the United Kingdom and imposed on it a fine of ECU 10 million. The main elements of the infringement found in Decision 91/300 are the fact that ICI applied 'top-slice rebates' to its customers, namely it induced them to buy not only their 'core' tonnage but also the marginal tonnage or 'the top slice' which they might have purchased from a second supplier, and the fact that in several cases it exerted pressure on its customers to commit themselves to obtaining from it the whole or substantially the whole of their needs in order to reduce to a minimum the competitive effect from other suppliers and to maintain a quasi-monopoly on the United Kingdom market. In that context, point 4 of Decision 91/300 states that ICI enjoyed a monopoly in the supply of soda-ash to the United Kingdom until the late 1970s.

16 The Court of First Instance took formal note in the context of the present case of Decisions 91/299 and 91/300 of 19 December 1990. It introduced them of its own motion into the present proceedings.

17 The decision contested in the present action was notified to the applicant by registered letter dated 1 March 1991.

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

*Procedure before the Court*

19 Those are the circumstances in which the applicant brought this action, lodged at the Registry of the Court of First Instance on 2 May 1991. ICI also brought an action against the decision (T-36/91).

20 The written procedure before the Court followed the normal course. After closure of the written procedure the applicant submitted, on 10 April 1992, a 'supplementary application' in which it put forward a new plea in law to the effect that the contested decision should be declared non-existent. Referring to two articles in the *Wall Street Journal* of 28 February 1992 and in the *Financial Times* of 2 March 1992 it claimed *inter alia* that the Commission had publicly stated that for years the practice of the college of Commissioners was not to authenticate acts adopted by it and that no decision in the past 25 years had been authenticated. Those statements by the Commission referred to cases then pending before the Court of First Instance, in which several actions had been brought against a Commission decision which found that there was a cartel in the polyvinylchloride sector and which led to the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* (hereafter 'the PVC judgment'). The Commission submitted its written observations on the supplementary application within the period granted to it by the President of the First Chamber pursuant to Article 48(2) of the Court's Rules of Procedure.

21 By order of 14 July 1993 the President of the First Chamber ordered that the present case and Case T-36/91 should be joined for the purposes of the oral procedure.

22 In March 1993 the Court of First Instance (First Chamber) decided, by way of measures of organization of procedure, to put to the parties certain questions concerning *inter alia* the applicant's access to the Commission's file. The parties replied to those questions in May 1993. After the Court of Justice had ruled on the appeal against the PVC judgment on 15 June 1994 in its judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, the Court of First Instance (First Chamber, Extended Composition) adopted other measures of organization of procedure which included a request that the Commission produce *inter alia* the text of Decision 91/297/EEC as authenticated at the time in the languages in which they are authentic by the signatures of the President and the Secretary General and annexed to the minutes.

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

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

25 Following that order the Commission produced on 11 November 1994 *inter alia* the text of Decision 91/297/EEC in French and English whose covering page bears an undated form of authentication signed by the President and the Executive Secretary of the Commission. It is agreed that that form was affixed only after a period of more than six months after the bringing of the present action.

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

## Forms of order sought

27 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, annul the contested decision in so far as it imposes on the applicant a fine of ECU 7 million;

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

28 In its supplementary application the applicant claims that the Court should declare the contested decision non-existent or, in any event, void.

29 The Commission contends that the Court should:

— dismiss the application as unfounded;

— dismiss the pleas in law put forward in the supplementary application as inadmissible or, in any event, unfounded;

— order the applicant to pay the costs.

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

**The claim that the decision should be annulled**

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

the file which had been sent to him at a late stage. Finally, the applicant claims that its rights of defence and Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms were infringed on the ground that the Commission used documents which had not been communicated or only communicated in part — in particular Appendices II.25 and II.34 to the statement of objections, parts of which had been deleted — and had also refused to grant it access to certain documents containing matters of use in its defence.

32 In the second group of pleas the applicant pleads infringement of Articles 85 and 190 of the EEC Treaty, infringement of rules relating to the treatment of evidence and the burden of proof and infringement of the principle of equal treatment, in that the decision is, in its view, based on erroneous findings of fact and legal appraisals. Finally, it states that the amount of the fine imposed is excessive and out of proportion to the seriousness of the alleged infringement and moreover, no proper statement of reasons has been given justifying the imposition of that fine.

33 The Court considers it appropriate to examine first the plea that the Commission infringed the rights of the defence in using documents which had not been communicated to the applicant and refusing to grant it access to certain documents containing matters of use in its defence.

*Infringement of the rights of the defence through alleged use by the Commission of documents not communicated to the applicant and refusal to grant it access to certain documents containing matters of use in its defence*

*Arguments of the parties*

34 Referring to letters which were sent by it to the Commission on 20 September and 17 October 1990 during the administrative procedure and which are annexed to its

application, the applicant claims that when the Commission adopted the contested decision it used documents which had not been communicated to it. A number of the documents not communicated and passages deleted by the Commission contain matters of use in its defence. According to the letter of 17 October 1990 (see paragraph 12 above), the documents involved include six documents which had not been sent to it. Even assuming that those documents are confidential — which the applicant contests —, it considers that the requirements of respecting the rights of the defence ought to have taken priority over business secrets.

35 In its reply the applicant adds, first, that the Commission based itself on evidence which it had communicated solely to ICI, either as an appendix to the statement of objections or during the hearing in which the applicant had not taken part and, secondly, that the Commission selected documents for inclusion in the file which supported its arguments, while keeping to itself the unfavourable evidence, which the applicant claims prevents it from putting forward arguments in its defence. Thus, none of the appendices marked 'V' in the statement of objections, concerning the abuse of a dominant position alleged against ICI, were communicated to it. ICI's communication to it of certain documents during the present legal proceedings confirmed that those appendices contain a number of documents supporting the applicant's arguments. An initial examination shows that eight of those documents undermine the Commission's allegations (p. 12 and footnotes 9, 33 and 43 of the reply). The applicant criticizes the fact that neither of the undertakings had access to the documents seized from the other, the consequence of which was that each was dependent on the goodwill of the other in order to substantiate its defence.

36 The applicant adds that document II.34, when compared with its more complete version, as reproduced in document V.40, shows that the Commission selected from the documents those parts favourable to its claims and had therefore 'assembled' a file.

37 As to documents X.1 to X.11, which were produced by the Commission during the hearing in the procedure against ICI, the applicant acknowledges in its reply

that it stated in its letter of 17 October 1990 that they were of little interest. However, it adds that that statement does not mean that those documents were irrelevant or that it had waived its right to rely on the failure to communicate them.

38 The applicant claims that in a procedure applying Article 85(1) of the Treaty it is important that each of the parties to the alleged agreement, decision or concerted practice is sent the same documents. It is not for the Commission to appraise whether or not a document is of use to the defence of one or other of the parties. The decision to be taken as to the existence of an agreement, decision or concerted practice between two undertakings cannot differentiate between the alleged parties to it. It is inconceivable that one of them is a party to the restrictive arrangement and the other is not. Accordingly, if the Commission considered in the present case that certain documents were confidential, it should have either left them out of account or communicated them to each of the parties concerned.

39 In the context of another plea, the applicant claims in its application that the Commission cannot contend that trade between the United Kingdom and the continent was possible while also finding that the applicant and ICI had partitioned their respective markets by means of the practices objected to under Article 86 of the Treaty (p. 47 of the application, where the applicant refers to Cases T-32/91 and T-37/91).

40 According to the Commission, it follows from the correspondence exchanged with the applicant during the administrative procedure that the objection regarding the alleged use of undisclosed documents was considered to be groundless even by the applicant itself. In any event, the contested decision — the only one in dispute in this case — is not based on any document which was not previously disclosed to the applicant.

41 As regards to the alleged failure to disclose documents favourable to the defence, the Commission observes that the documents referred to by the applicant in that

context during the administrative procedure — documents seized at ICI — were not produced at the request of ICI. The appendices to the statement of objections marked 'V', from which the documents referred to by the applicant in that context were taken, do not relate to the present case but contain the documents which are the basis for the decision regarding the abuse by ICI of its dominant position. The documents on which the present decision is based are the appendices marked 'II'; they were disclosed to the applicant and to ICI in an absolutely identical manner. If ICI now considers that some of the documents seized at its premises are no longer confidential vis-à-vis the applicant, the Commission cannot be held responsible for that change in attitude. It is rather the case that the conduct of ICI and the applicant in that respect constitutes a real attempt to misuse the procedures provided for in Regulation No 17.

42 The Commission considers that in such a context the documents produced by the applicant in the proceedings before the Court must, at the very most, be regarded as documents produced to the Court in support of its action, so that they should be considered only when the substance of the case is examined. Moreover, since the Commission is the defendant in proceedings before the Court of First Instance, it is the Commission which can therefore call for its rights of defence to be protected. Respect for those rights should mean that the arguments which the applicant bases on documents submitted only with its reply should be declared inadmissible.

43 In reply to various written questions put by the Court, the Commission explained that the documents obtained by its investigators in the course of their investigations at the soda-ash producers made up approximately 60 files classified by producer according to the place where they had been found, files 39 to 49 containing documents emanating from ICI. Approximately 10 other files contained documents produced in response to requests for information. Having regard to the number of producers and the complexity of the documents the Commission had not subdivided the documents into 'Article 85' files and 'Article 86' files.

44 In the context of Case T-36/91, cited above, joined to the present case for the purposes of the oral procedure, the Commission stated that it had classified the documents seized during its investigation as follows:

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

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

(iii) files 15-19: Rhône-Poulenc

(iv) files 20-23: CFK

(v) files 24-27: Deutsche Solvay Werke

(vi) files 28-30: Matthes & Weber

(vii) files 31-38: Akzo

(viii) files 39-49: ICI

(ix) files 50-52: Solvay Spain

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

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

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

45 The Commission added that experience had shown that, once examined, the large majority of documents were no longer of relevance in the investigation of a case. When an investigation took place the Commission's representatives had neither the time nor the means to make a rigorous selection of the documents presented to them, the only criterion being that they fell within the scope of the investigation's purpose. The only documents of relevance were those on which the objections would be based.

46 The Commission observed that the annex to the statement of objections had contained, in this case, all the documents on which the objections had been based. That set of documents constituted 'the file'. It contained several sections. Section V related to a proceeding initiated against ICI under Article 86 of the Treaty, which did not involve the applicant. That is why the applicant had not received a copy of the appendices relating to section V of the statement of objections and why certain internal documents of ICI relating to section II had been made available only in

part. However, that did not mean that the Commission had denied it access to the file. On the contrary, it could not be disputed that the file sent in the form of an annex to the statement of objections had enabled it to defend itself effectively against the objections raised against it.

47 The Commission stated, moreover, that the applicant had not claimed anywhere else in its application that the Commission should have given it an opportunity to inspect the documents concerning ICI. Furthermore, during the administrative procedure the applicant had never asked the Commission to let it inspect the documents relating to ICI in general or the appendices relating to section V of the statement of objections in particular. Finally, in its pleadings the applicant had not explained its 'passive commercial conduct' by reference to any dominant position of ICI.

48 The Commission concludes from the above that it permitted the applicant to acquaint itself with all the evidence in the file. Furthermore, the appendices in section II of the statement of objections contain more than merely inculpatory documents. The Commission cannot be accused of having carried out an arbitrary selection of any exculpatory evidence or evidence otherwise relevant to the applicant's defence. The applicant has not provided any evidence, either during the administrative procedure or the written procedure before the Court, which could support such a suspicion (judgment of the Court of First Instance in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 35). For the rest, both Article 20(2) of Regulation No 17 and the express requests of ICI that the confidentiality of the whole of its commercial documentation be respected constituted a two-fold barrier to disclosure of that information to the applicant.

49 At the hearing the applicant accepted that during the administrative procedure it had not requested the Commission to grant it general access to the file. It explained that it had known full well that such access would have been refused by the Commission, as it had already been refused when ICI had requested it. The applicant

added that, as a matter of law, it was for the Commission, of its own initiative, to grant undertakings access to the documents in its possession.

*Findings of the Court*

Admissibility and scope of the plea

50 In accordance with Article 38(1)(c) of the Rules of Procedure of the Court of Justice, which were applicable when the action was brought, it should first be examined whether the application contains a summary of the plea in law alleging infringement of the rights of the defence.

51 The applicant alleged in its application that the Commission used documents against it which had not been communicated to it, and also that it failed to send to it other documents containing evidence favourable to it, or did so only in an incomplete manner. In that context, the applicant referred to its letter of 17 October 1990 (Annex 9 to the application), in which it had complained that the Commission had failed to make available to it six documents emanating from ICI. According to that letter, one of the documents, bearing the number 000320, had also been used against ICI in the proceeding initiated under Article 86, since it corresponded to page 3 of document V.9. By producing a photocopy of that document, which bears the reference 'Appendix V.9', the applicant has raised, but only by implication, an objection that the Commission disregarded the fact that one of the documents marked V was of use in its defence.

52 Other documents referred to in that letter of 17 October 1990, and subsequently in the application, are documents emanating from ICI, which the Commission photocopied, but which it did not annex to any of the statements of objections. ICI referred to that in paragraph 8 of the observations which it submitted at the oral

hearing (Annex 5 to ICI's application in Case T-36/91, pp. 14 to 19), and the applicant has expressly referred to that passage (p. 1 of the letter of 17 October 1990). It follows that the applicant has also complained before the Court of First Instance that the Commission disregarded the relevance for its defence of certain documents seized from ICI which were not subsequently included in the files for the investigation of the various cases.

53 The Court considers that, contrary to the doubts expressed by the Commission, those indications satisfy the requirement for a summary of the plea in law. The application itself contains a summary of the fundamental complaints made against the Commission, the extent of which becomes even clearer if they are read in the light of the arguments relating to an alleged contradiction between the proceeding initiated under Article 85 and the proceedings initiated under Article 86 of the Treaty (see paragraph 39 above); according to the application, by disregarding that contradiction the Commission also disregarded the evidential value which ICI's documents (those marked 'V' and also certain others) had for the applicant's defence. The outline of the plea was thereby set out sufficiently in the application, even if no account is taken of the letter of 17 October 1990 annexed to it. That letter contains additional arguments, although they are not arguments which must be included in a summary of the plea. Consequently, the application satisfies the requirements of Article 38(1)(c) of the Rules of Procedure of the Court of Justice.

54 It therefore follows from the foregoing that the plea is in three parts, namely, first, that the Commission used a precise number of inculpatory documents (documents 'X.1 to X.11') which had not been sent to the applicant as an appendix to the statement of objections; secondly, that it failed to disclose to the applicant documents marked 'V' and annexed to the statement of objections addressed to ICI under Article 86 of the Treaty, whereas the relationship between the infringement alleged under Article 86 and that alleged under Article 85 made them relevant to the applicant's defence in the present case; thirdly, that it failed to disclose other documents from ICI likely to be of use in the applicant's defence, since a decision relating to the existence of a restrictive arrangement between two parties cannot differentiate between those parties.

Substance

(i) The first part: use by the Commission of inculpatory documents not communicated to the applicant

55 The documents produced by the Commission for the first time during ICI's oral hearing (documents 'X.1 to X.11') were used in order to show more clearly that the complaint that the applicant and ICI had taken part in a concerted practice was well founded, it being pointed out that documents X.8 and X.9 are the complete versions of documents II.12 and II.17, parts of which had been deleted. As the applicant claimed in its letter of 17 October 1990, without being contradicted on this point by the Commission, the documents in question were not communicated to it by ICI during the administrative procedure. Nevertheless, the applicant expressly stated in the same letter of 17 October 1990 that 'those documents appear to be of only little interest', which does not mean, in the applicant's opinion (p. 11 of the reply) that it intended to waive any right to rely on the failure to communicate those documents.

56 Some of those documents refer expressly to the relationship between the applicant, which is referred to in them, and ICI. In document X.2 it is stated: 'They have not grasped our relationships and likely reaction from Solvay ... since the takeover of Stauffer.' Similarly, documents X.6 and X.7 comment on the 'relationship' of ICI with the applicant. Document X.10 contains a phrase that is at the very least ambiguous: 'Solvay's reaction to any ICI initiative involving a US partner is uncertain and would need testing through the appropriate channels.' Document X.11 contains a 'confidential' report on a meeting held between the applicant and ICI on

14 April 1987 during which certain prices and plant closures were discussed. That brief examination of the documents shows that the documents involved are inculpatory documents of such a kind as to support the complaint that there was a concerted practice between the applicant and ICI.

57 Consequently, it must be examined whether the Commission's approach is reconcilable with the need to observe the applicant's rights of defence. In that regard, the Commission assumed that the applicant had in the meantime received from ICI an expurgated copy of the documents and, in its letter of 1 October 1990, it gave the applicant a period of two weeks to submit any observations. In reply, the applicant stated on 17 October 1990 that it had not received the documents, but that they 'appeared to be of only slight interest'. Despite that reply by the applicant, it must be held that the documents in question cannot have ceased to be inculpatory documents on the ground that the applicant's lawyer, in an ambiguous reference, pronounced on the importance which the documents 'appeared to have'. Consequently, the Court does not rule out that the Commission ought to have proceeded, in accordance with Articles 2(3) and (4) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), to issue a supplementary formal statement of objections.

58 However, even if the use of the documents in question were to be characterized as unlawful on the grounds that it infringed the applicant's rights of defence, such a procedural defect could, in the present case, only result in those documents being excluded as evidence. Far from leading to the annulment of the entire decision, that exclusion would be relevant only in so far as the objection made by the Commission in relation thereto could be proved only by reference to those documents (judgment of the Court of Justice in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30). That question therefore falls within the scope of other pleas in law concerning the correctness of the Commission's factual assessments. Consequently, the first part of the plea must be rejected in any event.

(ii) The second and third parts of the plea: non-disclosure to the applicant of documents marked 'V' and other documents emanating from ICI

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

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

— The Commission's complaints and the evidence used by it

61 In that regard, first, the complaint in the statement of objections can be summarized to the effect that from at least 1 January 1973 the applicant and ICI participated in a concerted practice in that by refraining from competing with each other they continued, in concert, to observe a previous arrangement defining their respective sales territories with respect to soda-ash. The Commission accepted that it did not have any direct evidence of the existence of an express agreement between the applicant and ICI, but considers that there is ample evidence of collusion, from which it can be inferred that the original arrangement, namely an agreement called 'Page 1000' concluded in 1949, continued to be implemented in the form of a concerted practice. The documentary evidence is said to show that:

— the relationship between the applicant and ICI continued to be one of complete cooperation, being one of partnership more than of competition, intended to coordinate their global strategy in the soda-ash sector and to avoid any conflict of interest between them;

— the basis for that continuous relationship was the maintenance of commercial policies adopted in the Brunner, Mond & Co era, namely the mutual recognition of exclusive spheres of activity. Although the previous arrangement was formally terminated by an exchange of letters of 12 October 1972, that relationship had continued, since neither of the parties had ever competed with the other on its market within the Community.

62 The Commission stated, again in the statement of objections, that it regarded the existence of 'joint production' agreements or 'purchase for resale' agreements whose purpose was to help ICI to comply with its supply obligations during the

period from 1983 to 1989 to be 'another important aspect of the close commercial relationship' between the applicant and ICI. However, the Commission did not consider that those agreements constituted in themselves separate infringements.

63 It should be added that the Commission stated in the statement of objections that the western European soda-ash market was at the material time still characterized by separation along national lines, producers tending generally to concentrate their sales in the Member States where they had production facilities. In particular, there were no imports by the applicant, or by another Community producer, which were capable of competing with ICI in the United Kingdom. The principle involved in that instance was the so-called 'home market' principle. The relationship between the applicant and ICI should therefore be assessed in the light of the documents concerning a number of other producers or emanating from those producers, from which it appears that for many years all soda-ash producers in the Community accepted that principle which was, moreover, still in force for the applicant and ICI in 1982. The Commission added that, although there are certain indications tending to show that in 1982 the applicant and Akzo concluded an agreement concerning Akzo's activities in the soda-ash sector in Germany (Appendix II.21 to the statement of objections), that evidence was not regarded as sufficient to justify the initiation of a proceeding under Article 85 of the Treaty against the applicant and Akzo.

64 In order to prove those objections the Commission annexed to the statement of objections sent to the applicant a series of documents marked 'II'. Only three of those documents (II.33, II.34 and II.36) are, at least in part, identical to the documents marked 'V' used in the proceeding against ICI under Article 86 (V.32, V.40 and V.41). All the other documents marked 'V' were therefore not communicated to the applicant.

65 Secondly, as regards the objections set out in the contested decision, it should be observed that, according to Article 1 of the decision, the concerted practice had existed from 1 January 1973 until at least the institution of the proceedings. In order to establish that concerted practice the decision bases itself, in point 58 of the

recitals, in substance on a combination of seven factors. As is apparent from that passage from the decision, as explained by the Commission itself at the hearing before the Court of First Instance, those factors may be summarized in four elements as follows:

— the absence of any trade in soda-ash by the applicant and by ICI across the English Channel throughout the period in question, namely for more than 16 years, which is said to be the result of each producer's policy;

— the precise coincidence of that lack of competition with the terms of the arrangements previously concluded between the applicant and ICI, most recently in the so-called 'Page 1000' agreement of 1949, the formal termination of which did not result in any change in the practice of market separation;

— the conclusion and implementation of 'purchase for resale' agreements consisting of the delivery of soda-ash by the applicant to ICI from 1983 to 1989, which are said to be 'indicative' (see footnote 1 to point 58 of the decision);

— frequent contacts between the applicant and ICI designed to coordinate their strategy in the soda-ash sector.

— The applicant's defence

66 In order to establish whether the applicant's opportunities for defending itself against those objections were affected, it should first be observed that a concerted practice is characterized by the fact that it substitutes for the risks of competition cooperation between undertakings, which lessens each undertaking's uncertainty as to the future attitude of its competitors. If that uncertainty is not lessened, there is no concerted practice (see the judgment of the Court of Justice in Joined Cases

C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraphs 62 to 65).

67 As to the applicant's defence, it should be observed that the applicant claimed in substance that its conduct was explained by its independent commercial policy and that consequently a concerted practice was not proven. The applicant had no interest in investing in an expansionist policy in the United Kingdom, because that would have been strategically absurd in its case. That defence is found in the reply to the statement of objections (see the written observations of 28 May 1990, pp. 5 to 15, paragraph 9 above). In proceedings before the Court of First Instance, that defence was repeated in the context of the pleas contesting the Commission's findings of fact and legal appraisals in the contested decision (see in particular p. 30 of the application: 'Tout porte à croire ... que ... les entreprises continentales n'auront pas intérêt à entamer une entrée en force sur le marché britannique.' ('Everything indicates that continental undertakings will have no interest in entering the United Kingdom market in force.')).

68 Consequently, it is necessary to examine, in the light of the case-law of the Court of Justice on the concept of a concerted practice, whether that defence of the applicant was affected by the non-disclosure of the documents referred to in the second and third parts of the plea in question. In that context, it is not for the Court of First Instance to rule definitively on the evidential value of all the evidence used by the Commission to support the contested decision. In order to find that the rights of the defence have been infringed, it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such an influence can therefore be established if a provisional examination of some of the evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded. If it were proved that the rights of the defence were infringed, the administrative procedure and the appraisal of the facts in the decision would be defective.

69 In that context, the Commission stated in reply to a written question from the Court that it was necessary in particular to refer to the evidence from periods

before 1973 annexed to the statement of objections, namely the old market-sharing agreements, in particular the so-called 'Page 1000' agreement; that evidence may be used to support the allegation of a subsequent infringement. It explained that it had not called into question the period from 1962 to 1973 mainly because the United Kingdom had not been a member of the Community during that period and because any finding of an infringement would have required a different analysis of the effects on intra-Community trade.

70 It follows that, in order briefly to assess the conclusiveness of the evidence used by the Commission to proceed against the applicant, three separate periods must be distinguished. Up to the entry into force of the EEC Treaty and that of Regulation No 17 in 1962 the conduct of the applicant and ICI must be regarded as lawful. With regard to the following period which terminated on 31 December 1972, the old market-sharing agreements have not been formally challenged by the Commission under the adversarial procedure provided for by Regulation No 17, neither on account of their objects or effects, nor even on account of the uncertainty as to whether they were terminated in 1972. Moreover, such a complaint cannot be presumed to be well founded, since the Commission itself states that it would have needed a specific economic analysis in addition to the one performed in the present case. The third period corresponds to the period of the infringement found in the decision.

71 In order to justify the use of the old agreements as evidence showing the existence of a subsequent infringement the Commission relies on the judgment in Case 51/75 *EMI Records* v *CBS United Kingdom* [1976] ECR 811, paragraph 30, in which the Court of Justice held that in order for Article 85 to apply to agreements which are no longer in force it is sufficient that such agreements continue to produce their effects. The Commission adds that the *EMI Records* case involved an agreement which was lawful when concluded, whereas the present case involves agreements which were unlawful from the outset. Consequently, since the applicant and ICI continued to behave in accordance with their — now cancelled — market-sharing agreements after their formal termination, those agreements must be considered to have continued to produce their effects.

72 In that regard, however, it should be noted that the *EMI Records* case, which came before the Court of Justice pursuant to Article 177 of the Treaty, does not concern a procedure such as that which is the subject of the present case, which the Commission initiated under Regulation No 17 and at the end of which it imposed a fine. Furthermore, the *EMI Records* case is not characterized by the existence of a period of 10 years during which no objections were raised to the conduct otherwise objected to and in respect of which the presumption of innocence therefore militates in favour of the undertaking concerned. On the contrary, it involved a dispute pending before a national court between two owners of trademarks which related to the extent of their rights in the light of the competition rules and did not concern the imposition of a fine. Consequently, the Court of First Instance considers that the considerations underlying the *EMI Records* judgment invoked by the Commission cannot be applied in order to decide the outcome of these proceedings.

73 In the present case, the presumption of innocence militating in favour of the applicant requires that the Court assume that up to 31 December 1972 no infringement can be found to have been committed by the applicant. Accordingly, evidence dating from before 1962 referring to conduct which was lawful at that time cannot show that as from 1 January 1973 the applicant and ICI unlawfully acted in concert. The contrary argument for which the Commission contends fails to take account of the possibility that the two undertakings wished to observe the Treaty and abandoned their previous cooperation, a possibility which is not excluded if the 'formal' termination of the previous agreements in 1972 is taken into consideration. In the absence of other evidence, the Commission's contention amounts to presuming that from a date fixed by the Commission the applicant and ICI began to infringe the provisions of the Treaty by implementing a concerted practice. Such a way of proving an infringement is incompatible with the respect for the presumption of innocence.

74 As regards the evidence relating directly to the years during which, according to the Commission, the concerted practice was implemented, it must be held that ICI's purchases for resale from the applicant took place between 1983 and 1989. However, the applicant disputed that those contracts showed unlawful contacts with ICI. According to the applicant, the supplies involved were both rare and sporadic and were concentrated between the months of April 1985 and March 1986.

Furthermore, the Commission itself stated that those purchases for resale do not constitute in themselves separate infringements (footnote 1 to point 58 of the decision). It should be added that documents show that meetings took place between the applicant and ICI between 1985 and 1988 (see point 30 of the decision and the documents numbered II.30 to II.42). There are no documents relating to meetings with regard to the period in which the Commission claims the infringement began. It is at least questionable that in such a situation documents dating from a later period would prove that the infringement had already commenced almost 10 years before, especially since document II.5 of 10 September 1982 refers to a new balance in the relationship ('new arms length relationship') between the applicant and ICI, which might weaken the assumption that a concerted practice existed.

75 Consequently, it would appear that — as in the *Ahlström Osakeyhtiö* case — the proving of parallel and passive conduct on the applicant's and ICI's part is particularly important if any concerted practice is to be proved. In that context, the Court of Justice held that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation of such conduct. The Court concluded that it was necessary to ascertain whether the parallel conduct alleged by the Commission could not, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation, in other words whether the evidence of parallel conduct constituted a firm, precise and consistent body of evidence of prior concertation (see Case C-89/85 *Ahlström Osakeyhtiö*, cited above, paragraphs 70 to 72).

76 On account of the weakness of the documentary evidence relating in particular to 1973 and the years immediately following it, the Commission should, in order to demonstrate to the requisite legal standard the concerted practice alleged against the applicant, have therefore been prompted to make, in the statement of objections, an overall and detailed economic assessment, in particular of the relevant market and the size and conduct of the undertakings active on that market. The Court considers that that assessment, if it was to be complete, objective and balanced,

ought at least to have taken into account, first, the strong positions held by the applicant and ICI on the respective geographical markets and, secondly, the loyalty arrangements with their clients, for which they were criticized in the course of the proceedings initiated under Article 86 of the Treaty.

— Second part of the plea: non-disclosure to the applicant of the documents marked 'V'

77 With regard to the second part of the plea, the Court considers that it follows from the foregoing that some of the documents marked 'V' which were not communicated to the applicant were capable of substantiating its defence. The documents referring to the alleged loyalty arrangements with ICI's customers might possibly help to provide an explanation for the applicant's alleged passive and parallel conduct other than one based on unlawful concertation. In the context of a market whose structures, in particular the setting up of production sites and neighbouring sites where soda-ash is used by customers, had developed since the last century and on which transport costs apparently played an important role, the documents showing that ICI may have induced loyalty from its customers by an elaborate system of rebates could have been used by the applicant to rebut the contention that a concerted practice existed. Those documents might have shown that the passive conduct alleged against the applicant was based on its own independent decisions, motivated by the difficulty of penetrating a market, access to which was blocked by an undertaking in a dominant position. That analysis is reinforced by the consideration that some of the evidence on which the Commission relied might not have had the probative value or might, at least, have had weaker value than that which the Commission attributed to it (see paragraphs 69 and 71 above). In reply to a written question from the Court, which was therefore put after the administrative procedure, the applicant argued in effect that, in so far as the Commission complained that ICI had closed the United Kingdom market by abusive practices, that was another factor explaining why it was impossible for it to penetrate that market; this was therefore a decisive factor militating against the existence of a market-sharing agreement.

78 It is true that the Commission alleges that ICI abused a dominant position only as from 1983. However, the Commission itself considers that that dominant position of ICI was a direct extension of the strong position which it had established through the pre-1973 market-sharing agreements; moreover, Decision 91/300 refers explicitly to indications showing ICI's economic power which date from the pre-1983 period, as for example the reference in point 4 of that decision to the fact that ICI enjoyed a monopoly in the supply of soda-ash to the United Kingdom until the late 1970s (see paragraph 15 above).

79 Since the Commission states in reply to a written question from the Court that it is, rather, the fact that each of the two dominant undertakings kept out of the other's market which ensured the dominant position of each undertaking on 'its own market', it should be repeated that in the present context it is not a question of definitively ruling on that question of substance but of verifying whether the applicant's opportunities for defending itself were affected by the circumstances in which the statement of objections was sent to it and by the circumstances in which the Commission then examined the case.

80 It should be added, of course, that the applicant was aware of the strong position held by ICI in the United Kingdom (see the written observations of 28 May 1990, pp. 8 and 9: '... it is ICI's industrial installations in Great Britain which give it its power in the British Isles ... All those factors ... lead ... to a certain geographical partitioning'). However, that awareness does not invalidate the finding that at least some of the documents marked 'V' might have been of use in its defence.

81 In that context the Commission observes that although its officials themselves examined and re-examined all the documents in its possession, they found no evidence which might exculpate the applicant, so that there was no point in disclosing them. In that regard, it should be stated that in the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence. Where, as in the present case, difficult and

complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.

82 That is particularly true where parallel conduct is concerned, which is characterized by a set of actions that are prima facie neutral, where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way. The Court considers that in such circumstances any error made by the Commission's officials in categorizing as 'neutral' a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence. The opposite view, for which the Commission contends, would mean that such an error could not be discovered in time, before adoption of the Commission's decision, except in the exceptional case where the undertakings concerned cooperated spontaneously, which would present unacceptable risks for the sound administration of justice (see paragraph 85 below).

83 Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, the Commission's view cannot be upheld. The Court considers that it is not acceptable for the Commission alone to have had available to it, when taking a decision on the infringement, the documents marked 'V', and for it therefore to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence.

84 Consequently, in the present case, the Commission was not entitled to separate the evidence — on the one hand, as regards the infringement alleged under Article 85

and, on the other hand, as regards that alleged under Article 86 — in the statement of objections, that separation continuing into the subsequent examination of the case and into the deliberations of the college of Commissioners with the result that separate decisions were adopted. That manner of proceeding prevented the applicant from examining the documents marked 'V' which were used only against ICI. Subject to the arguments considered below, it follows that as from notification of the statement of objections the Commission infringed the applicant's rights of defence by excluding from the proceeding documents which it possessed and which might have been of use in the applicant's defence. It should be added that such an infringement of the rights of the defence is objective in nature and does not depend upon whether or not the Commission's officials acted in good or bad faith.

85 To rebut a finding that the defendant's rights were infringed, the Commission contends, first, that ICI could have sent to the applicant the documents emanating from it and which were useful in its own defence. However, such an approach does not take account of the fact that the defence of one undertaking cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations. Since the Commission is responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict. In the present case, the applicant might have tried to show that ICI held a dominant position, whereas ICI had every interest in denying that.

86 Consequently, in determining whether the rights of the defence were infringed it does not matter that the applicant and ICI exchanged some documents, initially during the administrative procedure when the applicant received documents from ICI, and then from the time when the two companies were no longer competitors on the relevant market, namely at the end of 1991. Such cooperation between the undertakings, which was only haphazard, cannot in any case lessen the Commission's own duty to ensure that during the investigation of an infringement of competition law the rights of defence of the undertakings concerned are respected.

87 The Commission also referred to the confidentiality which it had to observe in order to protect the business secrets of third-party undertakings, in particular those of ICI, which, in its letters of 13 April and 14 September 1989, had invoked the confidential nature of all documents emanating from it which had come into the Commission's possession. It adds that the applicant also claimed similar protection in its letters of 27 April and 18 September 1989.

88 In that regard, it must be observed first of all that, according to a general principle which applies during the course of the administrative procedure and which is expressed in Article 214 of the Treaty and various provisions of Regulation No 17, undertakings have a right to protection of their business secrets (see the judgments of the Court of Justice in Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, paragraph 28, and in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 36). However, the Court of First Instance considers that that right must be balanced against the safeguarding of the rights of the defence.

89 As the Commission indicated in reply to a question put to it by the Court in Case T-36/91, cited above, in such circumstances it had two possible courses. It could either annex to the statement of objections all the documents which it wished to use to demonstrate the objections raised, including evidence which might 'clearly' be considered to be evidence in favour of exculpating the undertaking concerned, or send that undertaking a list of relevant documents and grant it access 'to the file', that is to say, allow it to inspect the documents at the Commission's premises (see also the Commission's Eighteenth Report on Competition Policy published in 1989, p. 53).

90 In the present case, the Commission cannot base its outright refusal to make disclosure on the ground that in the abovementioned letters the applicant and ICI had themselves requested confidential treatment of their documents. Those letters are worded in very general terms which may be interpreted as meaning that only the confidentiality of certain sensitive information contained in those documents was

to be safeguarded, by, for example, deleting the relevant passages. Moreover, the Commission itself interpreted ICI's letter in that sense, since in its reply of 24 April 1989 (see Case T-36/91) it expressly stated that if those documents were material in proving an infringement they would be disclosed to the undertakings concerned and only parts relating to true business secrets would be deleted.

91 The Commission in fact used the same documents, in their full form or in expurgated form, in the course of the three separate proceedings initiated under Articles 85 and 86 of the Treaty against the applicant and ICI in the appendices common to both which were marked 'II', on the one hand, and the separate appendices marked 'IV' and 'V', on the other hand. That is shown, for example, by the partially identical nature of Appendices IV.19 and V.23, IV.24 and V.34, IV.29 and V.41, IV.28 and II.35, V.40 and II.34 and also V.32 and II.33. Thus, when it considered it to be necessary, the Commission took no account of the supposedly general confidentiality of the documents in question.

92 Consequently, the fact that the Commission excluded the documents marked 'V' from the proceeding directed against the applicant can likewise not be justified by the need to protect ICI's business secrets. The Commission could have protected those secrets by deleting the sensitive passages from the copies of the documents sent to the applicant, in accordance with the general practice of the Directorate-General for competition (DV IV) in this area, which was even followed in part in the present cases.

93 If protecting ICI's business secrets or other sensitive information by preparing non-confidential versions of all the documents in question proved difficult, the Commission could have used the second method, that of sending to the applicant a list of documents marked 'V'. In that case, the applicant could have requested access to specific documents contained in the Commission's 'files'. Before granting it access to documents which may have contained business secrets, the

Commission could have contacted ICI in order to ascertain which passages referred to sensitive information and was therefore to be kept from the applicant. It could then have had access to the documents with ICI's business secrets deleted.

94 The purpose of having such a list meant that the information contained in it should provide to the applicant information sufficiently precise to enable it to ascertain, with knowledge of the facts, whether the documents described were likely to be relevant for its defence. As regards questions of confidentiality, the applicant had to be able to identify the specific document from ICI which was claimed to be non-accessible in order to be able to discuss with ICI whether it was prepared to waive confidentiality.

95 It follows from the foregoing considerations that the confidential treatment which documents and/or the list to be provided to the applicant may have required in no way justified the Commission's outright refusal to disclose them. Accordingly, since it failed, when notifying the statement of objections, to disclose the documents marked 'V', either in the form of appendices or in the form of a list, the Commission infringed the applicant's rights of defence.

96 It must then be considered whether the existence of such an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure and whether that undertaking was obliged to request the Commission to grant it access to its file or have it send particular documents to it. In that context, it should be noted that neither Regulation No 17 nor Regulation No 99/63/EEC, cited above, provide that such a request must be made beforehand or that the defendant's rights are time-barred if it is not made. In any event, in the present case the fact that the applicant had failed to make any such request during the administrative procedure was explained at the hearing by the obvious pointlessness of doing so, as had been

shown by the rejection of ICI's request. In those particular circumstances, the applicant's failure cannot have any time-barring effect on the ground that infringement of the rights of the defence was raised at too late a stage.

97 The Court's assessment does not conflict with the judgment in *AEG* v *Commission*, cited above. In that case the Court of Justice held that certain inculpatory documents used against an undertaking had to be annexed to the statement of objections and that because that obligation had not been observed the documents in question had to be excluded. However, according to the judgment in *AEG* v *Commission* the plea of infringement of the rights of the defence was not of general scope and did not therefore imply that the procedure as a whole was irregular. Consequently, the Court considered whether, after excluding the documents in question, the objections could still be regarded as having been proved (paragraph 30 of the judgment). Unlike in the *AEG* case, in the present case the applicant's defence was affected in a general way by the unlawful failure to disclose certain documents which, though not specifically inculpatory, might have been useful in its defence.

98 Moreover, any infringement of the rights of the defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. If during the administrative procedure the applicant had been able to rely on documents which might exculpate it, it might have been able to influence the assessment of the college of Commissioners, at least with regard to the conclusiveness of the evidence of its alleged passive and parallel conduct as regards the beginning and therefore the duration of the infringement. The Court cannot therefore rule out the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount.

99 Consequently, the second part of the plea must be upheld and the contested decision annulled in so far as it concerns the applicant (see *Cimenteries and Others* v *Commission*, cited above, paragraph 47).

— Third part of the plea: non-disclosure to the applicant of other documents emanating from ICI

100 Unlike the situation pertaining to its examination of the second part of the plea, the Court does not know which ICI documents other than those marked 'V' which have not been made available to the applicant, except of course for those marked 'X'. However, the applicant rightly argues that the decision to be taken regarding the existence of a collusive arrangement is indivisible in relation to those allegedly party to it. If the Commission is bound to find that one of two undertakings acted independently without colluding with its alleged partner, no concerted practice between them can be proved. In the present case, if ICI had been able to clear itself, the Commission would have been unable to maintain the objection that the applicant had been party to a concerted practice. Consequently, the documents referring to ICI's conduct were also likely to be of use in the applicant's defence.

101 It should be repeated that it was not for the Commission to decide on its own whether the documents seized in the investigation of the present cases were exculpatory or not. The principle of equality of arms and its corollary in competition cases, namely the principle that the information available to the Commission and the defence should be the same, required that the applicant should be able to assess the probative value of the documents emanating from ICI which the Commission had not annexed to the statement of objections. It is not acceptable that when the Commission investigated the infringement it was the only party which had the documents contained in 'files' 39 to 49 (ICI) and was therefore able to decide all by itself whether or not to use them in order to prove the infringement, whereas the applicant had no access to them and so could not likewise decide whether or not to use them in its defence. Consequently, the Commission ought at least to have drawn up a sufficiently detailed list enabling the applicant to assess whether it was appropriate to request access to particular ICI documents which might be useful in the defence of the two parties to the alleged concerted practice. Since the applicant cannot be required to show the probative value of particular documents which may exculpate ICI — of which, in the absence of a list, it has no knowledge —, the possibility that such documents may exist must be a sufficient ground for finding that the rights of the defence have been infringed. It follows that a second infringement of the rights of the defence has been established.

102 The Court of First Instance is aware that, as the Commission stated at the hearing, the preparation of lists and the protection of business secrets which may be needed before granting 'access to the file' involves a considerable administrative burden for the Commission's departments. However, respect for the rights of the defence should not be allowed to conflict with technical and legal difficulties which an efficient administration can and must overcome.

103 It should be repeated that a defect affecting the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, in which judicial review is performed only in relation to the pleas raised and which cannot therefore be a substitute for a full investigation of the case by way of an administrative proceeding. If the applicant had discovered, by means of an appropriate list, ICI documents exculpating the two undertakings, it might have been able, during the administrative procedure, to influence the assessments made by the Commission. The third part of the plea should therefore be upheld.

104 Consequently, the second and third parts of the plea alleging infringements of the rights of the defence must be upheld and the contested decision annulled in so far as it concerns the applicant, it being unnecessary to consider the complaint that the Commission based the contested decision on documents which were sent to the applicant only in partially expurgated form, in particular those in Appendices II.25 and II.34 to the statement of objections. Nor is it necessary to rule on the other pleas raised in support of the claims for annulment, in particular the plea alleging irregular authentication of the contested decision, which does not relate to all the administrative procedure before the Commission (see, in that context, the judgment of even date in Case T-32/91 *Solvay* v *Commission*, [1995] ECR II-1825).

## Costs

105 Under the first paragraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the

successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, it being unnecessary to take into account the applicant's partial withdrawal, namely of its claim that the decision be declared non-existent.

On those grounds,

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

hereby:

1. **Annuls Commission Decision 91/297/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A: Soda-ash — Solvay, ICI) in so far as it concerns the applicant;**

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

Cruz Vilaça Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 29 June 1995.

H. Jung J. L. Cruz Vilaça

Registrar President