JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

17 December 2009 *

In Case T-57/01,

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 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 [EC]

* Language of the case: French.

(COMP/33.133-C: Soda ash — Solvay) (OJ 2003 L 10, p. 10) 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 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 On 7 February 1978, the applicant entered into 'total requirements' contracts with three Belgian glassmakers, its three main traditional customers in Belgium, for a period of five years; those contracts included price alignment clauses.

4 Those agreements led to judicial proceedings brought before the Belgian courts by a United States soda ash producer. By judgment of 20 October 1989, the Liège Court of Appeal, to which the case had been referred by the Court of Cassation, dismissed the United States producer's action.

5 At the same time, the Commission of the European Communities initiated a proceeding pursuant to Article 81 EC. By letter of 21 October 1980, the Commission informed the applicant of the elements of the agreements which in its view were open to challenge by reference to Community competition law. The Commission stated, in particular, that it was unable to accept agreements of the 'total requirements' or 'percentage of total requirements' type, but that it would permit 'tonnage' contracts in so far as they left the customer free to obtain supplies, for a not insignificant part of its requirements, from other producers. The Commission fixed the duration of those supply contracts at a maximum of two years and reserved judgment on the competition clause.

6 On 16 December 1980, the applicant sent the Commission a draft letter which it proposed to send to its national directorates, with a view to their adopting 'tonnage' contracts in accordance with certain guidelines drawn up in the light of the observations formulated by the Commission.

7 By letter of 2 February 1981, the Commission informed the applicant that the guidelines in its draft letter of 16 December 1980 were consistent with its requests for amendment of the soda ash supply contracts. However, it expressed reservations about the competition clause, known as an 'English clause', and requested that the contracts with the three Belgian glassmakers be amended.

8 In accordance with the Commission's observations on the competition clause, the applicant adapted the draft letter and on 19 February 1981 sent a letter to the different national directorates requesting them to amend their tonnage contracts with the glass industry following the Commission's observations. By letter of 29 October 1981, the applicant informed the Commission of the progress made in the negotiations with the glass industry designed to ensure that existing contracts complied with the requirements of Community competition law.

9 In those circumstances, the Commission decided to close the proceeding initiated pursuant to Article 81 EC. It also issued a press release on 5 February 1982, in which it stated that, in the soda ash sector, the applicant had amended its supply contracts in order to make them compatible with Community competition law.

10 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.

11 In 1987, the applicant's total production capacity was approximately 4 million tonnes and its production in Europe was approximately 3,7 million tonnes.

12 In a fax sent on 2 November 1988, neither dated nor signed but bearing the applicant's letterhead and addressed to the Commission, it is stated that in 1988 the worldwide production capacity of soda ash was around 37 million tonnes and the worldwide consumption of soda ash was around 31 million tonnes.

13 In 1988, the applicant had, inter alia, 52,5% of the German market, 96,9% of the Austrian market, 82% of the Belgian market, 99,6% of the Spanish market, 54,9% of the French market, 95% of the Italian market, 14,7% of the Netherlands market, 100% of the Portuguese market and 76,1% of the Swiss market.

14 In 1989, soda ash consumption in the European Community was around 5,5 million tonnes, with a market value of around ECU 900 million.

15 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.

16 The applicant's customers were undertakings in the glass, chemical and metallurgical sectors. At the material time, its largest customer was Saint-Gobain SA and the other companies in the same group ('the Saint-Gobain Group'), not only for soda ash but also for all the applicant's activities. The Saint-Gobain Group had subsidiaries in various western European States, which obtained supplies of soda ash from the applicant's national directorates.

17 In 1988, imports from the countries of eastern Europe, which were subject to anti-dumping duties on entering the Community, represented, inter alia, 8,1% of the German market, 2% of the Austrian market, 2,1% of the Belgian market, 1,4% of the French market and 3% of the Italian market.

18 Imports from the United States were also subject to anti-dumping duties, although certain imports were made under the inward processing rules. In 1988, imports of soda ash from the United States represented 2,4% of the Belgian market, 0,9% of the French market and 3% of the Netherlands market, but did not cover the German market.

19 On 5 April 1989, the Commission adopted a decision relating to an investigation to be carried out at the premises of Akzo, CFK, ICI, Matthes & Weber, Rhône-Poulenc and Solvay, pursuant to Article 14(3) of Council Regulation No 17 (Case IV/33.133) ('the decision ordering the investigation'), which contained, in particular, the following grounds:

'… the information obtained by the Commission shows that the market for dense soda ash in the [Community] is strictly divided according to national borders, each producer in principle limiting its sales to its "home" market, that is to say, to the Member State or Member States in which its own production centres are sited;

… Solvay, which has seven factories in the [Community], is the only producer delivering supplies in most of the Member States; it does not deliver any supplies in the United Kingdom and the Republic of Ireland, which are the territories reserved for ICI;

… ICI does not appear to deliver in the [Community] outside its home market, consisting of the United Kingdom and Ireland, and the other producers also appear to confine their deliveries to their traditional national markets;

… according to the information at the Commission's disposal, there are different price scales for each Member State, but purchasers obtain supplies only from the national producer, as producers do not wish to sell on the national markets of other producers;

… in addition, in Member States where several producers exist, those producers apply identical price scales and apply price increases that are both almost simultaneous and uniform;

… it is necessary to determine whether the apparent rigidity of the market in the [Community] and the apparent lack of competition [are] the result of agreements or concerted practices between producers within the meaning of Article [81 EC];

… it is also necessary to establish whether agreements that might fall under Article [81 EC] extend to light soda ash, which is also manufactured by the six producers;

… any agreement or concerted practice entailing the partitioning of national markets and/or collusion on prices might constitute serious infringements of Article [81 EC] and their very nature makes it likely that they are applied according to extremely secret procedures;

… in order to allow the Commission to be aware of all the factual elements concerning any agreements or concerted practices and also the identity of the parties concerned, a decision must be adopted requiring the undertakings to submit to an investigation pursuant to Article 14(3) of Regulation No 17 …'

20 Following that statement of the grounds, Article 1 of the decision ordering the investigation states that the applicant and its German and Spanish subsidiaries were 'required to submit to an investigation relating to … their possible participation in agreements and/or concerted practices contrary to Article [81 EC] having the effect of partitioning the national markets and collusion on the prices of soda ash [and on] the implementation of exclusive purchase agreements with purchasers that might restrict or eliminate competition and reinforce the rigidity of the market for soda ash in the [Community]'.

21 On the basis of the decision ordering the investigation, the Commission carried out investigations at the premises of the various soda ash producers established in the Community. It seized various documents at the premises of the undertakings concerned.

22 On 21 June 1989, the Commission sent the applicant a request for information pursuant to Article 11 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, and then, on 8 July 1989, it sent a request for information to the applicant's German subsidiary; those requests referred to both Article 81 EC and Article 82 EC.

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

24 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.

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

26 As regards the present case, the Commission concluded under Section IV of the statement of objections, entitled 'Solvay', that the applicant had abused the dominant position which it held on the soda ash market in continental western Europe.

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

28 On 19 December 1990, 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 that decision, which was notified to the applicant by letter of 1 March 1991, the Commission 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]'.

29 Article 3 of Decision 91/299 provides that '[a] fine of ECU 20 million is imposed on [the applicant] in respect of the infringement … specified …'.

30 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.

31 On the same date, moreover, 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 which it 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.

32 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.

33 On 2 May 1991, the applicant brought an action before this Court for annulment of Decision 91/299. On the same date, the applicant also sought annulment of Decisions 91/297 and 91/298. On 14 May 1991, ICI sought annulment of Decisions 91/297 and 91/300.

34 By judgment of 29 June 1995 in Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825 ('*Solvay III*'), the Court annulled Decision 91/299 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.

35 On the same date, the Court also annulled Decision 91/298, in so far as it concerned the applicant (Case T-31/91 *Solvay* v *Commission*, not published in the ECR; '*Solvay II*'), 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 two cases, on the ground that there had been a breach of the right of access to the file.

36 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 35 above, *Solvay III*, paragraph 34 above, and *ICI II*, paragraph 35 above.

37 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 35 above, *Solvay II*, paragraph 35 above, and *Solvay III*, paragraph 34 above.

38 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].'

39 On 13 December 2000, the Commission adopted Decision 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; 'the contested decision').

40 On the same date, the Commission also adopted Decisions 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) 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).

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

'*Article 1*

Solvay … infringed Article [82 EC] from 1983 until around the end of 1990 by a course of conduct aimed at excluding or severely limiting competition and consisting of:

(a) the conclusion of agreements with customers which required them to purchase the whole or a very large proportion of their requirements of soda ash from Solvay for an indefinite or excessively long period;

(b) 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] bought all or most of their requirements from Solvay;

(c) making the granting of rebates dependent upon the customer agreeing to buy the whole of its requirements from Solvay.

Article 2

A fine of EUR 20 million is imposed on Solvay in respect of the infringement specified in Article 1(b) and (c).

…'

42 The contested decision is drafted in virtually the same terms as Decision 91/299. The Commission merely made a few editorial amendments and added a new section entitled 'Proceedings before the [General Court] and the Court of Justice'.

43 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 199).

44 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 91/299 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 204 and 205). Thus, taking account of the circumstances

of the case, the Commission considered that it had until September 2004 to adopt a new decision (recital 207). It also stated that the rights of the defence were not infringed if the new decision was taken within a reasonable time (recital 199).

45 As regards the actual infringement, the Commission stated in the contested decision that the product and geographic area in which the applicant's economic power fell to be assessed was the market for soda ash in the Community, excluding the United Kingdom and Ireland (recital 136).

46 In order to assess the applicant's market power for the purposes of the present case, the Commission examined the relevant economic factors and concluded in the contested decision that, throughout the period under consideration, the applicant had occupied a dominant position within the meaning of Article 82 EC (recitals 137 to 148).

47 As regards the abuse of that dominant position, the Commission stated in the contested decision that the applicant had 'tied' its customers by means of a number of devices which all served the same exclusionary purpose (recital 150). In that regard, the Commission explained that:

— from 1982, the applicant had adopted a system of progressive rebates specifically intended to ensure customer fidelity and exclude or limit competition (recitals 151 to 160);

— the applicant had entered into a secret protocol with Saint-Gobain, intended to confirm the applicant in the position of Saint-Gobain's exclusive or near-exclusive supplier in western Europe apart from France. Thus, payment of the 1,5% 'group' rebate, calculated on all Saint-Gobain's purchases in Europe, was

conditional upon Saint-Gobain continuing to give the applicant priority as its supplier (recitals 161 to 165);

— the applicant had entered into express and de facto exclusivity agreements with some of its customers (recitals 166 to 176);

— various forms of competition clauses and similar mechanisms strengthened the tie with the applicant, limited the opportunities for the customer to change supplier and made it more difficult for competitors to supply the applicant's established customers (recitals 177 to 180);

— the rebate system applied by the applicant constituted discriminatory practices (recitals 181 to 185).

48 In the words of the contested decision, '[t]he fidelity rebates and other inducements to exclusivity applied by [the applicant] affected trade between Member States by reinforcing the links between the customers and the dominant supplier' and '[t]he various devices employed by [the applicant] to tie customers had the result of reinforcing the structural rigidity and the division of the soda ash market along national lines, and thus harmed or threatened to harm the attainment of the objective of a single market between Member States' (recital 187).

49 The Commission stated in the contested decision that the infringements had been of extreme gravity since the applicant was the major producer of soda ash in the Community and the infringements had enabled it to consolidate its hold over the market by excluding effective competition in a large part of the common market (recital 191).

50 The Commission further indicated in the contested decision that the infringements had begun around 1983, very shortly after the negotiations with the Commission and the closure of the file, and had continued until at least the end of 1990 (recital 195).

51 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

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

53 In the application, the applicant requested the Court to order the Commission to produce all the documents in its file in order to ascertain whether access to those documents during the administrative procedure would have been capable of affecting the exercise of its rights of defence.

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

55 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*').

56 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.

57 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 documents had been accessible to the applicant during the administrative procedure.

58 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.

59 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 rereading 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.

60 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.

61 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.

62 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 as to the definition of the relevant geographic market, the absence of a dominant position and the absence of abuse of a dominant position.

63 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.

64 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.

65 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.'

66 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.'

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

68 On 15 July 2005, the applicant submitted its observations on the usefulness for its defence of the documents consulted. On 18 November 2005, the Commission responded to the applicant's observations.

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

70 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.

71 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.

72 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.

73 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

74 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 20 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 COMP/33.133;

— order the Commission to pay the costs.

75 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

76 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*

77 The applicant raises, in substance, six 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, incorrect definition of the geographic market by the Commission; fourth, absence of a dominant position; fifth, absence of abuse of a dominant position; and, sixth, breach of the right of access to the file.

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

78 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

79 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.

80 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 91/299, which had retroactively ceased to exist, but the judgment in *Solvay III*, paragraph 34 above, annulling that decision. 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.

81 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.

82 The applicant refers to paragraph 1098 of the judgment of this Court in *PVC II*, paragraph 43 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.

83 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 27 January 2000, well before the contested decision was adopted.

84 The applicant also observes that that interpretation was not contradicted in the judgment of this Court in *PVC II*, paragraph 43 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*.

85 In the reply, the applicant further submits that the Commission's argument would amount to depriving the judgment in *Solvay III*, paragraph 34 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.

86 Last, in the observations which it submitted following the judgment of the Court of Justice in *PVC II*, paragraph 55 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.

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

— Findings of the Court

88 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).

89 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 55 above, paragraph 140).

90 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.

91 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.

92 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 31 December 1990 and that adoption and notification of Decision 91/299 had not interrupted the running of the limitation period, it had at least until the end of 1995 to adopt its decision (recital 203).

93 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 204). 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 206). Consequently, the Commission considered that it had until September 2004 to adopt a new decision (recital 207).

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

95 Such reasoning is consistent with the limitation rules applicable in the present case.

96 First of all, the infringements which the applicant was found to have committed ceased with the adoption of Decision 91/299, on 19 December 1990. The limitation period therefore began to run on that date.

97 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.

98 Last, it follows from paragraph 157 of the judgment of the Court of Justice in *PVC II*, paragraph 55 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'. Thus, in the present case, 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.

99 Consequently, following that suspension of the limitation period, no period of more than five years elapsed, in the present case, after the end of the infringements or after any interruption of the limitation period.

100 The contested decision was therefore adopted in compliance with the limitation rules laid down in Regulation No 2988/74.

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

102 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.

103 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 55 above, paragraph 144).

104 Third, as regards the argument that the judgment of this Court in *PVC II*, paragraph 43 above, is not relevant for the outcome of the present dispute, it is clear, on the contrary, from the wording of that judgment, upheld on appeal, 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.

105 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.

106 Fifth, as regards the applicant's argument that the Commission ought to have adopted a new decision without awaiting the judgment of the Court of Justice, it must be observed that the Commission was indeed not formally prevented from acting following the annulment of the initial decision by this Court, but that does not mean that the Commission necessarily had to adopt a new decision without awaiting the judgment of the Court of Justice. Nor is the Commission to be criticised for having exercised its rights of defence by lodging an appeal and awaiting the judgment of the Court of Justice before adopting a new decision. Such an interpretation of Article 3 of Regulation No 2988/74, moreover, is consistent with the principle of legal certainty, which aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 29).

107 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.

108 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.

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

Second part: breach of the 'reasonable time' principle

— Arguments of the parties

110 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 91/299 and then in the contested decision the Commission found that it had committed infringements of 'extreme gravity' and imposed a fine of EUR 20 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.

111 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.

112 Following the judgment in *Solvay III*, paragraph 34 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 82 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 37 above, whereas, in the case giving rise to the judgment of this Court in *PVC II*, paragraph 43 above, the new decision had been adopted within one and a half months.

113 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.

114 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.

115 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. In particular, the applicant asserts that it is unable to undertake detailed analyses of the conditions in which soda ash was produced and supplied in the 1980s, since several of its production units have since closed and the records relating to those production units were not systematically preserved.

116 The applicant maintains that the Commission's negligent failure to act during the five and a half years following the judgment in *Solvay III*, paragraph 34 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.

117 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.

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

— Findings of the Court

119 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 55 above, paragraph 179).

120 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 91/299 by the judgment in *Solvay III*, paragraph 34 above.

121 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 III*, paragraph 34 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.

122 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.

123 That argument must be rejected.

124 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 91/299 and the validity of the judgment in *Solvay III*, paragraph 34 above, cannot be taken into account in determining the duration of the procedure before the Commission (see, to that effect, the judgment of this Court in *PVC II*, paragraph 43 above, paragraph 123).

125 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 37 above, and the adoption of the contested decision.

126 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 37 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.

127 During that period, the Commission merely made a number of formal amendments to Decision 91/299, 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.

128 From that perspective, the period of eight months and seven days between the delivery of the judgment in *Commission* v *Solvay*, paragraph 37 above, and the adoption of the contested decision cannot be considered unreasonable.

129 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 91/299, 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 91/299 on 1 March 1991.

130 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.

131 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.

132 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 43 above, paragraph 122).

133 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.

134 However, the Commission did not carry out any measure of investigation between the delivery of the judgment in *Commission* v *Solvay*, paragraph 37 above, and the adoption of the contested decision.

135 Furthermore, it is clear from the contested decision that that decision is based on the same grounds as those forming the basis of Decision 91/299, 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.

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

137 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 91/299 is concerned.

138 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).

139 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.

140 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.

141 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.

142 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 with respect to the adoption and authentication of the contested decision

143 The second plea consists, essentially, of eight 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, the use of documents seized in breach of Regulation No 17; seventh, breach of the right of access to the file; and, eighth, breach of the principles of impartiality, sound administration and proportionality.

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

First part: breach of the principle of collegiality

— Arguments of the parties

145 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.

146 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 91/299 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.

147 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.

148 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 91/299, on the ground that the applicant had never challenged the substance of the latter decision. The applicant contends that it had criticised 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.

149 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.

150 The Commission disputes the arguments put forward by applicant.

— Findings of the Court

151 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).

152 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 82 above, paragraphs 64 and 65).

153 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.

154 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.

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

156 Furthermore, even on the assumption that the Commission's spokesperson did state that the applicant had never contested the substance of Decision 91/299, such an argument is ineffective. It follows from recital 199 to the contested decision that the Commission adopted a new decision the content of which was virtually identical to the content of Decision 91/299 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 91/299 is irrelevant.

157 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.

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

Second part: breach of the principle of legal certainty

— Arguments of the parties

159 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 82 above, paragraphs 73 to 76, and *Commission* v *Solvay*, paragraph 37 above, paragraphs 44 to 49.

160 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).

161 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.

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

— Findings of the Court

163 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.

164 Such a plea of illegality must be held admissible.

165 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 43 above, paragraphs 286 and 287).

166 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.

167 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 43 above, paragraphs 288 and 289 and the case-law cited).

168 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.

169 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.

170 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.'

171 In the judgment of this Court in *PVC II*, paragraph 43 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.'

172 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 43 above, paragraphs 302 to 304).

173 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 43 above.

174 Following the 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.'

175 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.

176 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.

177 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

178 The applicant acknowledges that at paragraphs 246 to 252 of the judgment of this Court in *PVC II*, paragraph 43 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.

179 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 Commission's use of documents seized for a purpose other than that for which it was permitted to examine those documents and 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.

180 Thus, the annulment of Decision 91/297 affected the validity of the measures preparatory to the contested decision. In *Solvay I*, paragraph 35 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 relating to the application of Article 82 EC and that concerning Article 81 EC. 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.

181 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 43 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.

182 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 presented the alleged infringements of Articles 81 EC and 82 EC as supporting each other, 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 or participated in its philosophy, in breach of the presumption of innocence.

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

— Findings of the Court

184 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 this Court in *PVC II*, paragraph 43 above, paragraphs 246 to 253, upheld by the judgment of the Court of Justice in *PVC II*, paragraph 55 above, paragraphs 83 to 111).

185 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 55 above, paragraph 93).

186 In the present case, the Commission repeated virtually the entire content of Decision 91/299. It supplemented the contested decision solely by a passage concerning the proceedings before the General Court and the Court of Justice.

187 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 35 above. That part contains, inter alia, references to ICI.

188 However, Decision 91/299, 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 91/299). 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 91/299.

189 Furthermore, that information, which is purely factual, is not relevant to the infringements which the applicant was found to have committed in the present case. In this case, the conduct in which the applicant is found to have engaged is the abuse of a dominant position and not an agreement with another undertaking or concerted practices which had the effect of preventing, restricting or distorting competition within the common market.

190 It must therefore be held that the contested decision and Decision 91/299 have substantially the same content and are based on the same grounds.

191 Consequently, in accordance with the case-law cited at paragraphs 184 and 185 above, in the present case the Commission was not required to hear the applicant again before adopting the contested decision.

192 Furthermore, as regards the arguments alleging the use of documents seized contrary to Regulation No 17 and breach of the right of access to the file, they form the subject-matter of autonomous complaints and will therefore be examined elsewhere.

193 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

194 The applicant disputes the assessment made at paragraphs 254 to 257 of the judgment of this Court in *PVC II*, paragraph 43 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.

195 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 37 above, and in particular on the question of compliance with the 'reasonable time' principle.

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

— Findings of the Court

197 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.'

198 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.'

199 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 55 above, paragraph 115).

200 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.

201 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 91/299. The applicant does not dispute the existence or the regularity of that consultation.

202 Accordingly, in so far as the contested decision does not contain substantial amendments by comparison with Decision 91/299, 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 55 above, paragraph 118).

203 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

204 The applicant submits that, after the Advisory Committee on Restrictive Practices and Dominant Positions had been consulted prior to the adoption of Decision 91/299 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.

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

— Findings of the Court

206 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.'

207 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).

208 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 43 above, paragraphs 322 and 323).

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

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

Sixth part: use of documents seized in breach of Regulation No 17

— Arguments of the parties

211 The applicant observes that under Article 14(3) of Regulation No 17, in the version applicable at the material time, the Commission was able to order investigations at the undertakings' premises by decision, which must specify the subject-matter and purpose of the investigation, and that, under Article 20(1) of that regulation, in the version applicable at the material time, information acquired as a result of the application of Article 14 could be used only for the purpose for which it was requested.

212 In the present case, in the applicant's submission, the decision of 5 April 1989 ordering the investigation, on the basis of which the Commission carried out investigations at the applicant's premises and the premises of its German and Spanish subsidiaries, referred only to Article 81 EC and ordered the six producers concerned to submit to an investigation relating, first, to their possible participation in agreements and/or concerted practices having the effect of partitioning national markets and collusion on the price of soda ash and, second, to the implementation of exclusive purchase arrangements with purchasers that might restrict or eliminate competition and reinforce the rigidity of the soda ash market in the Community.

213 Furthermore, it is clear from documents abandoned at the applicant's premises by one of the officials involved in the investigation that the Commission had no advance information, no suspicion and no indication whatsoever of an infringement of Article 82 EC. In addition, the Commission was interested in relationships with customers in so far as the contracts with those customers might constitute a market-sharing agreement. It is apparent from an exchange of correspondence between the applicant and the Commission, moreover, that the Commission had on 22 May 1989 accepted the explicit reservation expressed by the applicant and aimed at prohibiting the use of the documents seized for a purpose other than investigations in the context of a proceeding pursuant to Article 81(1) EC.

214 The applicant further observes that on 21 June 1989 the Commission sent requests for information to the applicant and on 8 July 1989 to one of its German subsidiaries, namely DSW. Unlike the decision ordering the investigation, those requests referred to both Article 81 EC and Article 82 EC. The applicant asserts that the request sent to it also mentions that the Commission was examining the 'compatibility with the competition rules of the contracts of supply with customers aimed at ensuring exclusivity of supply by means of discriminatory fidelity discounts'.

215 The applicant acknowledges that the Commission was entitled, first, to seize the documents which it discovered during the investigations in so far as they came within the

scope of the decision ordering the investigation and, second, to initiate an investigation in order to ascertain the existence of a presumed infringement of Article 82 EC of which it became aware following the investigations which it carried out. On the other hand, in the applicant's submission, the Commission was not entitled to use the seized documents in the context of the subsequent procedure aimed at establishing the existence of a presumed infringement of Article 82 EC, except as a basis for the decision to open that procedure. The applicant maintains, however, that the vast majority of the documents mentioned in the part of the statement of objections relating to the alleged abuse of a dominant position were apparently seized during the investigations carried at its and its subsidiaries' premises. The Commission thus used the documents in question for a different purpose from that for which they were obtained. In doing so, the Commission breached the applicant's rights of defence and the right to business secrecy, as safeguarded by Article 14(3) and Article 20(1) of Regulation No 17, in the version applicable at the material time.

216 The applicant infers that the documents annexed to the statement of objections and relied upon to support the objections based on Article 82 EC ought to have been disregarded, with the exception of the documents submitted by the applicant and its subsidiary in response to the requests for information sent to them after the investigations. Furthermore, owing to the passage of time, the applicant maintains that it was not in a position to determine, among the documents annexed to the statement of objections, those which had been seized at its premises and those which had been communicated to the Commission in response to the requests for information. Since each of the Commission's objections is based on documents which ought to have been disregarded, the contested decision should therefore be annulled in its entirety. In addition, the Commission's objections have as their basis, at least implicitly, certain inculpatory documents annexed to the statement of objections, although the Court is not in a position to appraise the precise influence which those documents had on the formulation of the objections set out in the contested decision. It follows that the Court is not in a position to review the legality of the contested decision and the lawfulness of the reasoning on which it is based.

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

— Findings of the Court

218 It must be borne in mind, as a preliminary point, that both the purpose of Regulation No 17 and the list of powers conferred on the Commission's officials by Article 14 thereof show that the scope of investigations may be very wide. In that regard, the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings. That right of access would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude. Although Article 14 of Regulation No 17 thus confers wide powers of investigation on the Commission, the exercise of those powers is subject to conditions serving to ensure that the rights of the undertakings concerned are respected. In that regard, it should be noted first that the Commission is required to specify the subject-matter and purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence (*Hoechst* v *Commission*, paragraph 199 above, paragraphs 26 to 29).

219 It follows that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. In that regard, it should be made clear that although the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate (*Hoechst* v *Commission*, paragraph 199 above, paragraph 41).

220 In the present case, it should be noted that the decision ordering the investigation refers solely to Article 81 EC.

221 However, since the Commission was not required to undertake a precise legal analysis of the infringements, the fact that the decision does not expressly refer to Article 82 EC cannot in itself lead to the conclusion that the Commission infringed Article 14 of Regulation No 17.

222 It is true that it follows from the wording of the decision ordering the investigation that the Commission expressly sought only to ascertain whether the applicant was participating in agreements and/or concerted practices. There is no reason to consider that an abuse of a dominant position was also suspected. In addition, the Commission did not request the documents which it used in the procedure relating to Article 82 EC in the context of new instructions to carry out investigations.

223 However, it follows from Article 1 of the contested decision that '[the applicant] infringed Article [82 EC] … by a course of conduct aimed at excluding or severely limiting competition and consisting of … the conclusion of agreements with customers which required 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] bought 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]'.

224 Accordingly, it must be held that the 'implementation of exclusive purchase arrangements' referred to in the second indent of Article 1 of the decision ordering the investigation corresponds to what was ultimately established as against the applicant in the contested decision. The infringements of Article 82 EC which the applicant is found in the contested decision to have committed were committed in the context of

its contractual relationship with some of its customers and consisted, in substance, in exclusivity arrangements.

225 There is thus a material similarity between the practices which the Commission considered to be at the origin of the abuses of a dominant position established in the contested decision and those which it had instructed its officials to investigate in the second indent of Article 1 of the decision ordering the investigation.

226 Since a part of the facts with respect to which the Commission's officials had been instructed to obtain evidence of an infringement of Article 81 EC were the same as those which subsequently formed the basis of the objections of abuse of a dominant position raised against the applicant in the contested decision, the seizure of documents did not go beyond the framework of legality constituted by the decision ordering the investigation. That decision contains the essential elements required by Article 14(3) of Regulation No 17.

227 Consequently, it is apparent that, irrespective of whether they were seized during the investigation carried out in April 1989 or whether they were communicated following requests for information subsequently sent to the applicant pursuant to Article 11 of Regulation No 17, the documents used in the context of the contested decision in support of the objections relating to an infringement of Article 82 EC were obtained lawfully by the Commission.

228 It also follows from the foregoing that the Commission used those documents lawfully as evidence in the context of the contested decision, based on Article 82 EC.

229 Furthermore, it follows from the Commission's letter of 22 May 1989 that the Commission confirmed only that the provisions of Article 20 of Regulation No 17, in the

version applicable at the material time, applied to the documents obtained during the investigations and that the documents in question would not be used as evidence in the context of an anti-dumping procedure. The Commission did not therefore take a position in the sense that the investigation related only to infringements of Article 81 EC and that to characterise the infringements in question as an abuse of a dominant position would be outside the purpose of the investigation.

230 Accordingly, the sixth part of the second plea must be rejected.

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

— Arguments of the parties

231 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.

232 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.

233 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 91/299.

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

— Findings of the Court

235 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.

236 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 91/299. In that regard, it must be held that the Commission stated its reasons for choosing to adopt Decision 91/299 again at recitals 196 to 207 to the contested decision, which are added to Decision 91/299. The applicant's complaint is therefore factually incorrect.

237 Consequently, the eighth part of the second plea must be rejected.

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

Third plea: incorrect definition of the geographic market

Arguments of the parties

239 The applicant refers to the case-law of the Court of Justice and claims that although the market share test is an important element for the purpose of proving the existence of a dominant position, it is never in itself decisive, especially where those market shares are reasonable. Other factors should also be taken into account, such as, in particular, barriers to market entry, vertical integration, financial power, technological advance, customers' countervailing power or the costs structure.

240 The applicant takes issue with the fact that the Commission determined that the geographic market had a Community dimension, after listing various factors which 'all argue in favour of a national dimension'. If the Commission had carried out a preliminary analysis of the conditions of competition, it would have concluded that the extent of the market was limited to the national territory.

241 The inaccuracy of the Commission's assessment is confirmed by the decision of the 'Italian competition authority' of 10 April 1997 in the *Solvay/Sodi* case, in which the relevant geographic market had been defined as the Italian market for soda ash. In the communication made pursuant to Article 19(3) of Regulation No 17 concerning [a] request for negative clearance or for exemption pursuant to Article 81(3) [EC] (Case

No IV/E-2/36.732 — Solvay-Sisecam) (OJ 1999 C 272, p. 14), the Commission also recognised that the delimitation of the geographic market in question was 'particularly complex' and that the division in national markets had been eroded.

242 Furthermore, the applicant contends that the Commission made an error of law in considering that its sphere of influence corresponded to continental western Europe. The applicant maintains that that analysis was based on the existence of an agreement between it and ICI and had the sole objective of arriving at the conclusion that the applicant had a significant market share, in absolute and relevant terms, on the 'chosen market'. The Commission therefore failed to take into account the normal criteria for the precise delimitation of the relevant geographic market, namely the territory on which market conditions are sufficiently homogeneous for all the operators present on the market to compete with each other.

243 The applicant also claims that, by failing to set out its reasons for departing from its consistent practice in defining the relevant geographic market, the Commission did not properly state the reasons on which the contested decision was based.

244 The applicant further submits that the Commission made a manifest error of assessment in that it decided that Benelux and the United Kingdom constituted separate markets and at the same time that Benelux and Portugal, where the applicant had a de facto monopoly, belonged to the same market.

245 The applicant adds that, at recital 132 to the contested decision, the Commission stated that 'Solvay's traditional market area covered the whole of the Community with the exception of the United Kingdom and Ireland, where because of their anti-competitive arrangements entirely different competitive conditions prevailed'. However, in the applicant's contention, the Commission contradicted that assertion by stating in the defence that ICI and the applicant were not in competition by excluding the United

Kingdom and Ireland from the relevant geographic market. Furthermore, in the contested decision, the Commission does not mention the conditions of competition on the Italian, Spanish, Portuguese, Greek and Danish markets, although it concludes, without the slightest further justification, that the conditions of competition were homogeneous throughout the territory of continental Europe. As regards its shares of the national markets, the applicant observes that these were not at all homogeneous, since, depending on the State in question, its market share was either non-existent, or 15, 50, 80 or 100%. In those circumstances, the applicant requests the Court to invite the Commission to explain what induced it to consider that the market structure was identical everywhere in continental western Europe.

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

Findings of the Court

247 According to consistent case-law, in examining whether an undertaking holds a dominant position within the meaning of the first paragraph of Article 82 EC, it is of fundamental importance to define the market in question and to define the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition (Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 32, and Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 57).

248 In that regard, it must be borne in mind that the approach to defining the market differs according to whether Article 81 EC or Article 82 EC is to be applied. For the purposes of Article 82 EC, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the

existence of a dominant position on a given market, which presupposes that such a market has already been defined. On the other hand, for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230, and Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 27).

249 In the structure of Article 82 EC, the geographic market can be defined as the territory in which all traders operate under the same conditions of competition in so far as the relevant products are concerned. It is not at all necessary for the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are the same or sufficiently homogeneous (Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraphs 44 and 53, and Case T-139/98 *AAMS* v *Commission* [2001] ECR II-3413, paragraph 39). Accordingly, only areas in which the objective conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 92).

250 Last, it follows from consistent case-law that, although as a general rule the Community judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 64, and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 87).

251 In the present case, it must be observed that in the part of the contested decision devoted to the relevant market, the Commission defined the relevant geographic market as follows:

> '136. The appropriate product and geographic area in which Solvay's economic power falls to be assessed is thus the market for soda ash in the Community (excluding the United Kingdom and Ireland).'

252 In answer to a written question put by the Court, the Commission stated that other passages in the contested decision referred to the same geographic market as that identified at recital 136 to the contested decision.

253 The Commission refers, in particular, to recitals 8, 18 to 20, 23, 26, 36 to 38, 40 to 42, 43, 133, 137, 138, 188 and 191, which refer to 'western Europe', 'west Europe' or 'the Community'.

254 Nor is the definition of the geographic market set out at recital 136 to the contested decision inconsistent with other recitals to the contested decision. It follows from the case-law cited at paragraph 249 above that it is sufficient if the conditions of competition are the same or sufficiently homogeneous so far as the relevant products are concerned. Accordingly, several national markets may together form a geographic market, for the purposes of Article 82 EC, where the objective conditions of competition are sufficiently homogeneous.

255 Furthermore, the fact that producers tended to concentrate their sales in the Member States in which they had production facilities does not preclude the possibility that the objective conditions of competition were sufficiently homogeneous.

256 In any event, it follows from the examination of the applicant's fourth plea (see paragraphs 261 to 305 below) that the applicant is in a dominant position, whether the relevant geographic market is defined as being the Community, excluding the United Kingdom and Ireland, or as being each of the States in which the applicant is found to have committed the infringements on the market for soda ash.

257 As recital 147 to the contested decision states:

'… [E]ven if each of the national markets particularly concerned by Solvay's exclusionary conduct were considered [to be] a separate market, Solvay was still dominant in each one, and most of the considerations set out above apply equally.'

258 It follows from the market shares which it held that the applicant was also in a dominant position in each of the States in which it was found to have infringed Article 82 EC.

259 It follows that, even on the assumption that the Commission did not properly define the relevant geographic market, that error could not have had a decisive influence on the outcome. Such an error, even on the assumption that it is established, cannot warrant annulment of the Commission's decision (see, to that effect, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49 and the case-law cited).

260 Accordingly, the third plea must be rejected.

Fourth plea: absence of a dominant position

Arguments of the parties

261 The applicant disputes the Commission's analysis, which indicates that the applicant's own documents confirm the existence of a dominant position in western Europe.

262 In the first place, the applicant submits that the Commission's argument is not supported by the facts.

263 In that regard, the applicant observes that, at recital 147 to the contested decision, the Commission stated that, even if each of the national markets particularly concerned by the exclusionary conduct were considered to constitute a separate market, the applicant was still dominant in each one.

264 However, in the applicant's submission, its market share on the national markets was not 70%, and, even if that market share were significant, it would not reveal a significant degree of market power. Thus, during the period under consideration, its market share was only 56,7% in Benelux, 54,9% in France and 52,5% in Germany. The applicant also maintains that the fact that it was the only producer of soda ash active throughout the Community is irrelevant. Its total production capacity in Europe, in the absence of any significant supplies from its various production units on the other national markets where it had production units, is also irrelevant. At national level, its production capacities were comparable to those of its national competitors.

265 The applicant likewise contends that the protection which would have been conferred on it by the anti-dumping measures was only relative, in so far as imports from East Germany to West Germany were not subject to anti-dumping duties or customs duties and as, in any event, the inward processing rules allowed glass manufacturers to purchase significant quantities of soda ash from United States producers and east European producers free from anti-dumping duties.

266 Furthermore, the applicant claims that the Commission ought to have taken account of the possibility that customers would use caustic soda and cullet in place of soda ash. In its relations with its customers, the applicant considers that it was subject to competitive pressure caused by those products.

267 The applicant concludes that it did not have a dominant position on the national markets under consideration, the only ones that could be acknowledged in geographical terms.

268 Nor, according to the applicant, did the Commission take account of the significant countervailing purchasing power of certain of its glass manufacturing customers. The Commission failed to ascertain the extent to which the tonnages taken by those customers were necessary for its long-term survival, owing in particular to the very high fixed costs in that heavy industry. It also failed to gauge the role of local competitors or the impact of imports from the United States or eastern Europe.

269 Even on the assumption that the relevant geographic market has a European dimension, the Commission's analysis is imprecise and 'badly reasoned'. In that regard, the applicant refers to the competitive pressure exerted, first, by Community competitors belonging to large industrial groups; second, by United States competitors and those from the east European countries, who were able to offer attractive prices; and, third, by customers also belonging to large groups.

270 The applicant also asserts that there is a contradiction between recital 39 to the contested decision, which states that the main danger to the applicant came not from other European producers but from United States natural ash, and recital 53 to the contested decision, which states that '[the applicant's] main concern … appears to have been to preserve its dominant position [o]n the European market against "unrest" from smaller producers, as well as the perceived threat of imports from eastern Europe and the United States'. The market power of its competitors was all the greater since, at the time of its investigation in 1980 and 1981, the Commission had not required them to alter their contractual practices, with the consequence that they were able to protect their customers by entering into long-term 'total requirements' contracts.

271 In the second place, the applicant contends that the Commission made a number of errors of law in concluding, at recital 148 to the contested decision, that the applicant had occupied a dominant position throughout the period under consideration.

272 In that regard, the applicant observes, in particular, that the Commission completely ignored the test of the countervailing power of customers, to which this Court referred in Joined Cases T-68/89, T-77/89 and T-78/99 *SIV and Others* v *Commission* [1992] ECR II-1403. Likewise, in the Commission decision of 25 November 1998 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.1225 — Enso/Stora) (OJ 1999 L 254, p. 9), the question of the countervailing purchasing power of customers on the market for packaging board for liquids was examined. The applicant maintains that, owing to the structure of production costs, since variable costs were low by comparison with total costs, its customers could threaten it with the loss of a significant part, or indeed all, of its supplies. The applicant therefore contends that the Commission ought to have ascertained whether or not the applicant was capable of acting, to a significant extent, independently of its customers.

273 In the third place, the applicant claims that the Commission did not properly state the reasons on which the contested decision was based, in that it failed, first, to specify which of the criteria it used in order to appraise the applicant's dominant position on the Community market applied to the analysis of its position on the national markets

and, second, actually to apply those criteria with respect to the conditions prevailing on those markets.

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

Findings of the Court

275 According to consistent case-law, the dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained 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 (*United Brands and United Brands Continentaal* v *Commission*, paragraph 249 above, paragraph 65, and *Microsoft* v *Commission*, paragraph 250 above, paragraph 229). Unlike a monopoly or quasi-monopoly situation, such a position does not preclude some competition but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it and without suffering any adverse effects as a result of its attitude (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 39).

276 The existence of a dominant position derives in general from a combination of several factors which, taken separately, would not necessarily be determinative (*United Brands and United Brands Continentaal* v *Commission*, paragraph 249 above, paragraph 66). The examination of the existence of a dominant position on the relevant market must be carried out by examining first of all its structure and then the competitive situation on that market (see, to that effect, *United Brands and United Brands Continentaal* v *Commission*, paragraph 249 above, paragraph 67).

277 Very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of supply which its stands for — without those having much smaller market shares being able rapidly to meet the demand from those who would like to break away from the undertaking which has the largest market share — is in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffmann-La Roche* v *Commission*, paragraph 275 above, paragraph 41, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154).

278 Thus, a market share of 70 to 80% constitutes in itself a clear indication of the existence of a dominant position (see, to that effect, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 92, and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 907).

279 Likewise, according to the case-law of the Court of Justice, a market share of 50% constitutes in itself, save in exceptional circumstances, evidence of the existence of a dominant position (see, to that effect, Case C-62/86 *Akzo* v *Commission* [1991] ECR I-3359, paragraph 60).

280 In the present case, the Commission stated, at recital 137 to the contested decision, that the applicant held a market share of 'some 70% in continental western Europe' and did so 'over the whole of the period under consideration'.

281 In its application, the applicant does not deny having a very high market share, even on the assumption that the market has a Community dimension. It thus states that, if the market is European, its market share varied between 60 and 70%.

282 It also follows from the figures supplied by the applicant, and not disputed by the Commission, that in 1988 the applicant had, inter alia, 52,5% of the German market, 96,9% of the Austrian market, 82% of the Belgian market, 99,6% of the Spanish market, 54,9% of the French market, 95% of the Italian market, 14,7% of the Netherlands market and 100% of the Portuguese market.

283 It follows from the fact that it held such market shares that, save in exceptional circumstances particular to the case, the applicant held a dominant position either on the Community market or on the different national markets on which it was found to have committed the infringements of Article 82 EC in question, on the assumption that the geographic market should be defined as such.

284 At recital 138 to the contested decision, the Commission relies on various elements which supplement its examination of the applicant's market shares and tend to show that the applicant had a dominant position.

285 Since, by definition, those elements cannot relate to exceptional circumstances capable of supporting the view that the applicant is not in a dominant position, there is no need to examine the objections which the applicant raises against them.

286 In addition, the applicant relies on three arguments which must be examined in order to determine whether, in the present case, such exceptional circumstances within the meaning of the case-law of the Court of Justice did exist.

287 First, the applicant claims that there was significant competitive pressure from both Community and non-Community undertakings.

288 In that regard, it must be borne in mind at the outset that the existence of a certain degree of competition is not incompatible with the existence of a dominant position on the relevant market.

289 It must be observed, moreover, that, so far as the Community competitors are concerned, the applicant adduces no specific evidence in support of its arguments.

290 In any event, it follows from the figures supplied by the applicant itself in the application that the Commission did not make a manifest error of assessment when it found, at recital 138 to the contested decision, that the applicant had a high market share in Benelux, France and Germany, and also a monopoly or near-monopoly in Italy, Spain and Portugal.

291 As regards non-Community competitors, the applicant maintains that imports from East Germany amounted to 8% of total sales in West Germany, a percentage which is not disputed by the Commission. However, whether the geographic market has a Community dimension or a national dimension, such a percentage does not permit the conclusion that the applicant did not have a dominant position on the relevant market.

292 As regards imports from the United States, recital 31 to the contested decision states that, until 1990, total supplies by United States producers to continental western Europe were only 40000 tonnes, and almost all of that amount was imported under the inward processing rules.

293 As the Commission correctly observes, even if that quantity is considered to have been achieved in one year, it represented only approximately 0,07% of total soda ash

consumption in the Community, which came to around 5,5 million tonnes in 1989. Such a market share cannot be considered significant.

294 Last, as regards the applicant's assertion that its customers threatened to use the inward processing rules to obtain supplies from United States producers and producers in eastern Europe, it is not supported by any evidence. In any event, that argument is ineffective, since the mere fact that customers use such a threat cannot constitute an exceptional circumstance that would preclude a dominant position.

295 Second, the applicant refers to the possibility that caustic soda and cullet could be substituted for soda ash, which in its submission constituted competitive pressure in its relations with its customers.

296 In that regard, it must be noted that, at recitals 139 to 145 to the contested decision, the Commission undertook a detailed analysis of the possible substitutability of caustic soda for soda ash and found that, in practice, the possibilities of substitution did not act as a significant constraint on the exercise of the applicant's market power. In the application, the applicant adduces no evidence to call that analysis into question.

297 As regards cullet, the Commission stated, at recital 144 to the contested decision, that a customer's requirements of soda ash for the production of container glass could be reduced by up to 15% by the use of cullet. That figure is not disputed by the applicant. The Commission also acknowledged that it was possible that the use of cullet would reduce customers' dependence on soda ash producers generally, but would not reduce the capacity of a powerful soda ash producer to exclude small producers. It must therefore be considered that, contrary to the applicant's assertion, the Commission took account of the possibility that cullet could be substituted for soda ash.

298 In those circumstances, the applicant has not shown that the Commission had made a manifest error of assessment in concluding that the possibilities of substitution did not act as a significant constraint on the applicant's market power.

299 Third, the applicant claims that the Commission ought to have taken into account the competitive pressure brought to bear by customers.

300 However, according to the figures supplied by the applicant itself, and confirmed by the Commission, the applicant's total production in Europe at the material time was around 3,7 million tonnes and its total sales in Europe were around 3,1 million tonnes.

301 At recital 42 to the contested decision, the Commission stated that the applicant's largest customer was the Saint-Gobain Group, with which it had concluded 'evergreen' contracts in the different Member States, covering sales of more than 500 000 tonnes per year in western Europe.

302 Consequently, sales by the applicant to Saint-Gobain, its largest customer, represented around 14% of its production and 16% of its sales in Europe.

303 Accordingly, even on the assumption that the Commission ought to have taken the criterion of the countervailing power of the applicant's customers into account, it follows from the percentages indicated above that neither Saint-Gobain nor any other of the applicant's customers was in a position to offset its market power.

304 In conclusion, the arguments put forward by the applicant do not constitute grounds for accepting the existence of exceptional circumstances that would warrant calling into question the finding that the applicant was in a dominant position on the relevant market.

305 Consequently, the fourth plea must be rejected.

Fifth plea: absence of abuse of a dominant position

306 The fifth plea consists of five parts relating, respectively, to the rebates on marginal tonnage, the 'group' rebate granted to Saint-Gobain, the exclusivity agreements, the competition clauses and the discriminatory nature of the applicant's impugned practices.

First part, relating to the rebates on marginal tonnage

— Arguments of the parties

307 The applicant claims that it did not establish a general policy of fidelity rebates. In that regard, the strategy papers referred to at recitals 53 to 55 to the contested decision dealt with the intention to favour customers giving long-term commitments, which is economically justified. The objective was to pay for the economic benefit which the applicant derived from the assurance that its production capacities would be used for a limited, but certain, period, of no more than two years, which was expressly accepted by the Commission in 1981.

308 The fact that the rebates granted relate to marginal tonnage is justified by the particular costs structure of the production of soda ash. Variable costs represent a very small proportion of total costs. When the selling price of soda ash was being negotiated and determined at the beginning of the year, all the total costs, allocated over the tonnages which its customers committed themselves to take, were taken into consideration. As regards any additional quantities purchased by customers under the contract, the applicant observes that, as fixed costs had already been covered by the fixed quantities, it had greater latitude in setting prices and in determining the amount of the rebate to be granted to each of the customers concerned.

309 In particular, the applicant maintains that the Commission incorrectly assessed the effects arising from the grant of fidelity rebates by the German national directorate to its German customers. The Commission wrongly considered that the other soda ash producers were competitors only for the marginal tonnages. In the applicant's submission, competitors of the applicant wishing to sell to its customers who received rebates on marginal tonnages could offer to supply them with quantities in excess of the marginal tonnages, indeed with their total requirements, which would have enabled them to offer competitive prices. Furthermore, the Commission did not examine competitors' production capacities and their existing costs structure.

310 In addition, the applicant contends that the duration of the contracts, which was limited to two years, enabled its competitors to challenge its position in the short term. When the customers' bargaining power is taken into account, they would even have been able, during the contractual period, to challenge their 'tonnage commitment'.

311 Consequently, the rebate system set up in the present case is consistent with the case-law of the Court of Justice, which authorises rebate systems where they are economically justified by a countervailing advantage.

312 In addition, the applicant refers to Commission Regulation (EC) No 823/95 of 10 April 1995 imposing a provisional anti-dumping duty on imports of disodium carbonate originating in the United States of America (OJ 1995 L 83, p. 8) and infers that the system of rebates on the higher tranche had a very limited effect in Europe, in so far as that system was applied exclusively to small quantities on specific markets.

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

— Findings of the Court

314 According to consistent case-law, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche* v *Commission*, paragraph 275 above, paragraph 91, and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 549).

315 Whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57, and *Microsoft* v *Commission*, paragraph 250 above, paragraph 229). Likewise, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is

to strengthen that dominant position and thereby abuse it (*United Brands and United Brands Continentaal* v *Commission*, paragraph 249 above, paragraph 189, and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 55).

316 With more particular regard to the granting of rebates by an undertaking in a dominant position, it is apparent from a consistent line of decisions that a fidelity rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 82 EC. Such a rebate is designed, through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 518, and *Michelin* v *Commission*, paragraph 315 above, paragraph 56).

317 A rebate system which has a foreclosure effect on the market will be regarded as contrary to Article 82 EC if it is applied by an undertaking in a dominant position. For that reason, the Court of Justice has held that a rebate which depended on a purchasing target being achieved also infringed Article 82 EC (*Michelin* v *Commission*, paragraph 315 above, paragraph 57).

318 Quantity rebate systems linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 82 EC. If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (*Michelin* v *Commission*, paragraph 315 above, paragraph 58).

319 It follows that a rebate system in which the rate of the discount increases according to the volume purchased will not infringe Article 82 EC unless the criteria and rules

for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends, following the example of a fidelity and target rebate, to prevent customers from obtaining their supplies from competitors (*Hoffmann-La Roche* v *Commission*, paragraph 275 above, paragraph 90, and *Michelin* v *Commission*, paragraph 315 above, paragraph 59).

320 In determining whether a quantity rebate system is abusive, it will therefore be necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition (*Hoffmann-La Roche* v *Commission*, paragraph 275 above, paragraph 90, and *Michelin* v *Commission*, paragraph 315 above, paragraph 60).

321 In the present case, in the part of the contested decision devoted to the applicant's exclusionary conduct, the Commission first of all referred, at recitals 53 to 55 to the contested decision, to the applicant's commercial strategy since 1982.

322 In that regard, the Commission relied on two 1988 strategy papers, according to which the applicant sought to 'tie in' its customers by granting contractual rebates.

323 At recitals 56 to 80 to the contested decision, the Commission then examined the rebate system put in place by the applicant in Germany and France.

324 In particular, the Commission stated that:

'Besides the usual quantity rebates on basic tonnage for major customers, from 1982 onwards Solvay granted two additional forms of rebate in Germany:

— a rebate on marginal tonnage (called "Spitzenrabatt"), almost invariably of 20% off list price,

— a special annual payment by cheque (up to DEM [German marks] 3,4 million in one case) dependent upon the customer's obtaining most or all of its requirement from Solvay.

…

Thus, for Vegla, a member of the Saint-Gobain [G]roup and Solvay's largest customer in Germany, the rebate system operated as follows for 1989:

1. on the basic contractual tonnage of 85 000 tonnes, a rebate of 10%;

2. for the "marginal" tonnage of 43 000 tonnes, a rebate of 20%;

3. a cheque attributable to the marginal tonnage of DEM 3 349 000.

…

In most cases, such as that of Vegla, the rebate system ensured that Solvay was secure in the position of exclusive supplier. The rebate system also operated however to ensure that where customers did have a policy of splitting their business between two suppliers the dominant share of Solvay was maintained. Flachglas, Solvay's second largest customer in Germany, divided its business roughly 70:30 between Solvay and M&W. From 1983 onwards, Solvay's pricing conditions to Flachglas involved an 8,5% quantity rebate for tonnage up to 70 000 tonnes, 20% on any marginal tonnage, and a cheque for DEM 500 000 to DEM 750 000. The additional cheque rebate meant that the real price for any marginal tonnage taken over 70 000 tonnes was (depending on the quantity) as low as DEM 250 or DEM 260 per tonne. It was extremely difficult for the second supplier to break into Solvay's "core" share of the business, which (as Solvay's own documents show) was protected by the rebate "barrier". While the second supplier might be able to match the invoiced price of DEM 322,40 (list price – 20%) it was highly unlikely that the customer would risk losing the substantial cheque payment, which was clearly dependent upon its purchasing an appropriate tonnage from Solvay in addition to the basic contractual tonnage. Documentation obtained from Matthes & Weber confirms that it was impossible for that company to make any inroads into Solvay's share of the Flachglas business.'

325 The applicant does not at any point dispute the elements relied on as against it with respect to the system set up in France, but refers only to the system put in place in Germany.

326 Accordingly, it is necessary only to examine whether the system of rebates which the applicant set up in Germany constituted a system of quantitative rebates whereby the applicant allowed its customers to benefit from the economies of scale achieved as a

result of their purchasing commitments or indeed a system of fidelity rebates which, by means of an advantage not based on any economic service justifying it, sought to restrict the applicant's customers' freedom to choose their sources of supply.

327 In that regard, the applicant does not deny the existence or the content of the two 1988 strategy papers, but claims that their purpose was to favour customers giving long-term commitments, which would be economically justified.

328 In accordance with the case-law, it is necessary to assess the circumstances as a whole, and in particular the criteria and rules for granting the rebates.

329 It follows from the contested decision that, unlike in the case of a quantity rebate linked solely to the volume of purchases, there was no provision for a progressive increase in the rate of the rebates granted on the basic quantities and the marginal quantities, as the system provided for a transition from a rate of around 7 to 10% on the former to a rate of 20% on the latter, that amount, moreover, being supplemented by a special payment by cheque.

330 Furthermore, the rate of 20% became applicable immediately the customer placed orders with the applicant for quantities in excess of those fixed by contract, irrespective of the size in absolute terms of the latter quantities, as may be seen from recital 160 to the contested decision.

331 The price reduction therefore did not come about gradually, depending on the quantities fixed by contract, but only when the quantities reached a certain threshold fixed at a level around the needs determined when the contract was being negotiated. However, in a quantity rebate system, the advantage must be reflected in the price of the basic tonnage, depending on the quantities purchased.

332 The cumulative application of those rebates had the consequence that the unit price offered for marginal quantities was significantly below the average price paid by the customer for the basic quantities fixed by contract, as the Commission emphasises at recitals 61 and 62 to the contested decision.

333 Consequently, customers had an incentive to obtain supplies from the applicant for the tonnages in excess of the quantities fixed by contract as well, since it would have been difficult for other suppliers to be able to offer competitive prices on those tonnages by comparison with the prices offered by the applicant (recitals 63 to 66 to the contested decision).

334 Furthermore, in accordance with *Michelin* v *Commission*, paragraph 315 above, paragraphs 107 to 109, the applicant must show that its rebate system was based on objective economic justification; yet the applicant has produced no firm evidence that that was so. It merely indicates that the intention was to pay for the economic advantage that it derived from the assurance that its production capacities would be used.

335 Such an argument is too general and cannot constitute justification capable of explaining precisely why those rebate rates were chosen.

336 In addition, the fact that the rebate system put in place was aimed at 'tying in' its customers is apparent from the documentary evidence examined at recitals 68 to 71 to the contested decision, which is not disputed by the applicant.

337 As regards the anti-dumping proceedings, moreover, the reference to Regulation No 823/95 is irrelevant, since it was adopted in an entirely different legal framework.

338 Last, even on the assumption that the rebates were applied on only small quantities, it follows from the case-law that, for the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (*Michelin* v *Commission*, paragraph 315 above, paragraph 239).

339 That is the case here of the system of rebates on marginal tonnage which the applicant set up in Germany.

340 In conclusion, it must be held that the applicant has not demonstrated that the Commission had erred in concluding that the purpose of the system of rebates which the applicant had set up in Germany was to 'tie in' customers and that it was capable of having the effect of foreclosing competition.

341 Accordingly, the first part of the fifth plea must be rejected.

Second part, relating to the 'group' rebate granted to Saint-Gobain

— Arguments of the parties

342 The applicant claims that the secret protocol concluded with Saint-Gobain was not an exclusive or near-exclusive contract, as the applicant supplied only around 67% of Saint-Gobain's total requirements in Europe.

343 The applicant maintains that supplies were made at national level for reasons to do with economic reality, namely, essentially, transport costs. In addition, the 1,5% rebate was granted on quantities actually purchased by the national subsidiaries and was granted at Saint-Gobain's request. This was an additional quantity rebate limited to a modest level in order to avoid any contravention of the Community competition rules.

344 The applicant adds that that rebate was not calculated on total group purchases. The basis for the rebate for each of Saint-Gobain's subsidiaries consisted of the selling price to that undertaking, multiplied by the sales made to that subsidiary. Consequently, the rebate is linked to the purchases which Saint-Gobain's subsidiaries undertook to make directly from the applicant's various national directorates.

345 Furthermore, the applicant observes that, after the Commission had adopted Decision 91/299, it accepted a contract which the applicant had concluded with the Saint-Gobain Group in 1994 under which Saint-Gobain's companies benefited from privileged conditions with respect to supplies of soda ash, in view of the fact that the duration of the contract was three years and it was not extended.

346 Last, the applicant claims that the secret protocol concluded with the Saint-Gobain Group did not prevent the national subsidiaries of the Saint-Gobain Group from using the threat to cease obtaining supplies from the applicant in order to negotiate more advantageous contractual conditions, or even from breaching their contract, as in the case of Saint-Gobain France.

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

— Findings of the Court

348 At recital 161 to the contested decision, the Commission stated that the secret 'protocol' was intended to confirm the applicant in the position of Saint-Gobain's exclusive or near-exclusive supplier in western Europe, apart from France.

349 The applicant does not dispute the existence of that secret protocol, or the content of clause 4 thereof, which was drafted as follows:

'In the context of the present protocol, Solvay also grants Saint-Gobain an additional rebate of 1,5% on all purchases of soda ash by Saint-Gobain from Solvay in Europe.'

350 The applicant contends that that rebate was a supplementary quantity rebate, granted according to Saint-Gobain's subsidiaries' purchases from the applicant's different national directorates.

351 As for the Commission, it claims that the 1,5% rebate did not represent a quantity rebate, since each of Saint-Gobain's subsidiaries received a rebate which was not exclusively linked to its own purchases, but which also depended on the quantities purchased by the other subsidiaries. As it was calculated on the performance of the entire group, that rebate, which did not correspond to an economic advantage linked with the quantities supplied, therefore had the object and the effect of 'tying in' the entire group and was therefore a fidelity rebate.

352 In that regard, it follows from the very wording of clause 4 of the secret protocol that the rebate was calculated on 'all purchases' of soda ash by Saint-Gobain from the applicant in Europe.

353 Furthermore, when invited by the Court to clarify its argument by means of a written question put to the applicant in the context of the measures of organisation of procedure, the applicant merely asserted that the rebate was not, 'as the protocol might suggest', calculated or granted on the basis of Saint-Gobain's total purchases from the applicant in Europe.

354 Accordingly, in the absence of substantiated considerations of such a kind as to invalidate the literal interpretation of clause 4 of the secret protocol, it must be held that the 1,5% rebate, granted independently of any consideration linked with the economic advantages in terms of efficiency and economies of scale which each of Saint-Gobain's subsidiaries would have obtained as a result of its own purchases of soda ash, constituted a fidelity rebate.

355 The applicant further observes that the very moderate amount of the rebate made it possible to avoid any anti-competitive effect. In that regard, it is sufficient to state that, even where it is moderate, the amount of a fidelity rebate has an impact on the conditions of competition.

356 As regards the fact that the Commission agreed to the conclusion of a contract under which Saint-Gobain benefited from privileged conditions granted by the applicant, it is sufficient to state that the letter from the Commission which the applicant produced states that 'the application of Article [82] of the Treaty could not be ruled out'.

357 Last, as regards the argument that the secret protocol did not prevent Saint-Gobain's national subsidiaries from using the threat to cease obtaining supplies from the

applicant in order to negotiate more advantageous contractual conditions or even from breaching their contract in the case of Saint-Gobain France, the applicant has adduced no evidence to support that assertion. In any event, that argument is ineffective since it does not relate to an exceptional circumstance that would justify the conduct characterised as an abuse of a dominant position.

358 Consequently, it must be held that the Commission was correct to consider that the 'group' rebate granted to Saint-Gobain was contrary to Article 82 EC.

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

Third part, relating to the exclusivity agreements

— Arguments of the parties

360 The applicant maintains that, for the exclusivity agreements concluded with different undertakings, the Commission incorrectly inferred from various documents that some of the applicant's customers agreed or were forced to agree to obtain supplies exclusively from the national directorate concerned.

361 As regards de facto exclusivity, the applicant observes that there is no evidence in the file to show that it imposed the quantities to be supplied specified in the contract by satisfying itself in advance that they were approximately equal to the customer's total requirements. Furthermore, the determination of those quantities was entirely proper, given the customers' lack of storage capacity and the need for regular and consistent supplies of soda ash.

362 In addition, the applicant contends that the Commission's approach was inconsistent. On the one hand, in 1981 the Commission authorised the applicant to replace the existing contracts by contracts of a maximum duration of two years or by indefinite contracts with two years' notice of termination. On the other hand, the Commission now considers that that duration is excessive.

363 Last, the applicant claims that during the period under consideration both Glaverbel and Saint-Gobain terminated their contracts with the applicant so far as France was concerned.

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

— Findings of the Court

365 According to consistent case-law, an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position (*Hoffmann-Laroche* v *Commission*, paragraph 275 above, paragraph 89). Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based on an economic transaction

which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market (*Hoffmann-Laroche* v *Commission*, paragraph 275 above, paragraph 90).

366 In the present case, in the contested decision, the Commission mentioned the existence of explicit exclusivity and de facto exclusivity.

367 As regards Vegla, Oberland Glas and Owens Corning, the Commission stated, at recital 170 to the contested decision, that the express understanding was that the customer would obtain all its requirements from the applicant. The Commission relies in that regard on the documentary evidence described in the first part of the contested decision (recitals 92 to 97 and 110).

368 Following a written question put by the Court, the Commission specified the references in the documents in the file on which it had relied in order to arrive at the finding of the existence of express exclusivity agreements.

369 The applicant does not dispute the existence of those documents, but claims that they were misinterpreted by the Commission.

370 As regards Vegla, the applicant acknowledges that 'it is no doubt true that the applicant's German subsidiary (DSW) seems to have sometimes interpreted that contract in the sense of exclusivity'. It observes, however, that DSW's interpretation was not always the same, but without supporting that assertion by any facts or evidence.

371 As regards Oberland Glas, the applicant maintains that this was an 'isolated event', but does not dispute its existence.

372 As for Owens Corning, the applicant acknowledges that proposals were made by certain of its national directorates. Its sole defence consists in asserting that the documents in question do not show that those offers or undertakings of exclusivity were accepted.

373 It follows from all those elements that the Commission was entitled to take the view that the applicant had entered into express exclusivity agreements.

374 As regards de facto exclusivity, the Commission stated, at recital 171 to the contested decision, that, in cases other than the express exclusivity agreements, the contractual tonnage stipulated in the main 'evergreen' contract, which required two years' notice of termination, corresponded to the customer's total requirements, but allowed for a margin, usually 15%, up or down, and that the customer indicated to the applicant at the beginning of each year what its exact requirements would be within that range.

375 First of all, it must be borne in mind that, in accordance with the case-law cited at paragraph 365 above, the fact that exclusivity is established at the request of the customer is irrelevant. The applicant's argument that quantities were determined by its customers in accordance with their wishes must therefore be disregarded.

376 Next, it should be observed that the applicant does not dispute the findings set out in the contested decision with respect to the exclusivity agreements with BSN, Verlipack and Verreries d'Albi.

377 Furthermore, as the Commission observes, a letter of 21 December 1989 to the Commission from Saint-Roch, which is in the file, states that the applicant supplied 100% of the tonnages purchased by Saint-Roch between 1982 and 1987, and then in 1989, and virtually all the tonnages purchased in 1988. It must therefore be held that Solvay effectively had de facto exclusivity so far as Saint-Roch is concerned.

378 Likewise, the Commission relies on a letter sent to it by Glaverbel on 18 December 1989, also in the file, which confirms that all the supplies which it did not obtain from East Germany came from the applicant.

379 It follows from the foregoing that, on the relevant market, the applicant supplied, for their total requirements, at least two undertakings among those referred to in the contested decision, namely Saint-Roch and Glaverbel.

380 It must therefore be concluded that the Commission was correct to take the view that the applicant had concluded express exclusivity agreements and that de facto exclusivity existed.

381 As regards the applicant's argument that the Commission's approach was inconsistent, it follows from recitals 192 and 193 to the contested decision that, after having accepted a notice period of two years in the case of 'evergreen' contracts, the Commission imposed a fine on the applicant only in respect of the fidelity rebates and the 'unofficial exclusivity agreements'. It must therefore be held that the applicant's argument is factually incorrect.

382 Last, the applicant's argument that Glaverbel and Saint-Gobain terminated their respective contracts with the applicant so far as France was concerned, apart from being unsubstantiated, does nothing to alter the illegal nature of the exclusivity agreements.

383 Consequently, the third part of the fifth plea must be rejected.

Fourth part, relating to the competition clauses

— Arguments of the parties

384 The applicant states that the competition clauses in its contracts, which are challenged, had been adjusted in accordance with the Commission's comments.

385 Furthermore, at recital 177 to the contested decision, the Commission wrongly treated the safeguard clauses in certain contracts as competition clauses. It follows from recital 123 to the contested decision that the Commission considered that those clauses were not objectionable per se, but that, while the safeguard clauses allowed the customer to use competing offers to bring down the price to be paid to the applicant, it was unlikely that the competitor would ever actually succeed in obtaining and retaining a share of the business.

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

— Findings of the Court

387 At recitals 112 to 122 to the contested decision, the Commission provides a detailed description of the competition clauses in the contracts concluded by the applicant.

388 The applicant does not dispute the existence of those competition clauses.

389 Its only argument is that those clauses had been accepted by the Commission in 1981.

390 In that regard, however, the Commission had not accepted in 1981 the 'competition clause' or 'English clause' in respect of which it takes issue with the applicant in the present case at recitals 112 to 122 to the contested decision.

391 As regards the safeguard clauses, it must be observed that, at recital 177 to the contested decision, the Commission distinguished the 'various forms of competition clause' from the 'other similar mechanisms set out in recitals 111 to 123'. Accordingly, the applicant's argument is factually incorrect. The essential part of the Commission's argument, moreover, concerns the competition clauses properly so-called.

392 The fourth part of the fifth plea must therefore be rejected.

Fifth part, relating to the discriminatory nature of the impugned practices

— Arguments of the parties

393 The applicant claims that the objection that its practices were discriminatory is not supported by any factual element stated in the contested decision. The only reference to an alleged difference in treatment is to be found at recital 160 to the contested decision, in the part devoted to the legal description of the rebates on marginal tonnage. It is also incorrect to claim, first, that the subsidiaries of the Saint-Gobain Group, and in particular Vegla, were given more favourable treatment and, second, that Vegla was less well treated than PLM. Flat glass producers, like Vegla, are active on a different market from hollow glass producers, like PLM.

394 In any event, the Commission incorrectly assessed the role which the price of soda ash played in glass manufacturers' costs. While soda ash is the most important raw material used in the manufacture of glass, it represents only 2 to 6% of the average selling price of the glass. A difference in the amount of a rebate on the price of soda ash cannot therefore have a significant impact on the competitive position of the glass manufacturers concerned.

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

— Findings of the Court

396 According to the case-law of the Court of Justice, an undertaking occupying a dominant position is entitled to offer its customers quantity discounts linked solely to the volume of purchases made from it. However, the rules for calculating such discounts must not result in dissimilar conditions being applied to equivalent transactions with other trading parties within the meaning of subparagraph (c) of the second paragraph of Article 82 EC. In that connection, it should be noted that it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices or — which amounts to the same — higher average reductions than those offered to smaller purchasers of that product or users of that service. It should also be noted that even where there is a linear progression in quantity discounts up to a maximum discount, initially the average discount rises (or the average price falls) mathematically in a proportion greater than the increase in purchases and subsequently in a proportion smaller than the increase in purchases, before tending to stabilise at or near the maximum discount rate. The mere fact that the result of quantity discounts is that some customers enjoy in respect of specific quantities a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase is inherent in this type of system, but it cannot be inferred from that alone that the system is discriminatory. None the less, where as a result of the thresholds of the various discount bands, and the levels of discount offered, discounts (or additional discounts) are enjoyed by only some trading parties, giving them an economic advantage which is not justified by the volume of business they bring or by any economies of scale they allow the supplier to make compared with their competitors, a system of quantity discounts leads to the application of dissimilar conditions to equivalent transactions. In the absence of any objective justification, having a high threshold in the system which can only be met by a few particularly large partners of the undertaking occupying a dominant position, or the absence of linear progression in the increase of the quantity discounts, may constitute evidence of such discriminatory treatment (Case C-163/99 *Portugal* v *Commission* [2001] ECR I-2613, paragraphs 50 to 53).

397 In the present case, as already indicated in the context of the examination of the first part of the fifth pea, the applicant does not dispute the findings relating to the system of rebates set up in France.

398 The rebate system set up by the applicant did not follow a linear progression by reference to quantities, even among undertakings benefiting from such rebates. It follows from the contested decision that the rebates granted to Durant and Perrier were of different amounts (recitals 75 and 76).

399 Accordingly, for that reason alone, contrary to the applicant's assertion, the objection relating to the existence of discriminatory practices was based on elements of fact set out in the contested decision.

400 As regards the applicant's argument relating to the existence of a different market for producers of hollow glass and producers of flat glass, it must be borne in mind that the relevant market is the market for soda ash and not the market for glass. Consequently, there is no need to draw a distinction between producers of glass among the customers of the producers of soda ash.

401 The applicant also refers to the low costs of soda ash. However, that assertion is unsubstantiated and is not of such a kind as to call in question the discriminatory nature of the applicant's practices.

402 Accordingly, the fifth part of the fifth plea and, consequently, the fifth plea in its entirety must be rejected.

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

403 The sixth plea consists, in substance, of three parts, whereby the applicant alleges, respectively, that it did not have access to inculpatory documents; 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.

404 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 (*Hoffmann-La Roche* v *Commission*, paragraph 275 above, paragraph 11, and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 49).

405 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 88 above, paragraph 145).

406 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 405 above, paragraphs 73 to 76, and *Hoechst* v *Commission*, paragraph 88 above, paragraph 146).

407 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 405 above, paragraphs 73 to 76).

408 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 lack of access to inculpatory documents

— Arguments of the parties

409 The applicant claims that the Commission does not state what documentary evidence serves as the basis for certain assertions made against it, notably those set out at recitals 138 and 176 to the contested decision.

410 The applicant also contends that the Commission's assertions against it must be rejected, since the documents annexed to the statement of objections contain nothing capable of supporting those assertions.

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

— Findings of the Court

412 In the words of recital 138 to the contested decision:

'To assess market power for the purposes of the present case, the Commission took into account all the relevant economic evidence, including the following elements:

…

(ix) Solvay's traditional role of price leader;

(x) the perception of Solvay by other Community producers as the dominant producer and their reluctance to compete aggressively for Solvay's traditional customers.'

413 Furthermore, recital 176 states the following with respect to the conclusion of exclusivity agreements:

'Since it is impossible to predict with any certainty what conditions will prevail in two years' time, the long period of notice acted as a strong deterrent against terminating the link with Solvay. Some customers at least considered the length of the notice period oppressive.'

414 It should be noted that those three assertions are general appraisals, found in the second part of the contested decision, on the legal assessment.

415 In that regard, the applicant does not explain to what extent those appraisals might have an impact on the finding that it committed the infringements. It must be borne in mind that, as regards the inculpatory evidence, it is for the undertaking concerned to demonstrate that the result which the Commission reached in its decision would

have been different if a document which was not disclosed and on which the Commission relied to make a finding of infringement against it ought to have been excluded as inculpatory evidence.

416 The first part of the sixth plea must therefore be rejected.

Second 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

417 It follows from the case-law that 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 file 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. 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 (see *Hoechst* v *Commission*, paragraph 88 above, paragraphs 145 and 146 and the case-law cited).

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

419 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 relevant geographic market, the relevant product market, the existence of a dominant position and the abuse of that dominant position.

— The relevant geographic market

420 The applicant claims that the documents consulted show that the question of the geographic market is particularly complex. First, the Commission ignored the significance of the costs of transporting soda ash, whereas those costs do not allow a foreign producer to compete against a local producer in the natural customer catchment area of its factory. Second, customers give preference to the local producer, who guarantees continuity of deliveries and therefore greater security of supplies. The applicant relies in that regard on documents relating to Akzo and Rhône-Poulenc.

421 In the applicant's submission, if the definition of the relevant geographic market in the contested decision does not correspond to reality as perceived by its competitors, it does not seem possible to define the relevant geographic market as being strictly along national lines. The market is characterised by regional groupings whose outlines are difficult to determine precisely. In any event, the determination of the relevant geographic market is not possible on the basis of the incomplete investigation carried out by the Commission.

422 That argument must be rejected.

423 As regards the significance of the costs of transporting soda ash, it should be observed that the applicant has not established that the non-disclosure of the Akzo and Rhône-Poulenc documents was able to influence, to its detriment, the conduct of the procedure and the content of the contested decision. It follows from the file that the applicant was not unaware of that factor, since in its response to the statement of objections it stated that soda ash is a product 'which is not particularly sophisticated and is therefore not particularly expensive' and that 'the cost of transport is therefore an important element of the cost price for users'. The applicant could therefore have put forward that argument during the administrative procedure, even though it did not have access to the Akzo and Rhône-Poulenc documents.

424 As regards the fact that customers gave preference to local producers, it must also be concluded that the applicant was not unaware of that factor, since, on 19 February 1981, the applicant sent a letter to its different national directorates requesting them to alter their tonnage contracts with the glass industry following the Commission's comments. Accordingly, the applicant cannot rely on the preference given to local producers to establish that the non-disclosure of the Akzo and Rhône-Poulenc documents was able to influence, to the applicant's detriment, the conduct of the procedure and the content of the contested decision.

425 The complaint put forward by the applicant must therefore be rejected.

— The relevant product market

426 The applicant asserts that the documents found at its competitors' and customers' premises would have enabled it to challenge the Commission's analysis with respect to the definition of the relevant product market. The applicant maintains that caustic soda exerted competitive pressure on producers of soda ash during the main part of the infringement period found in the contested decision.

427 In that regard, it must be held that the applicant, the largest producer of soda ash in Europe at the material time, was capable of supplying for the Commission's assessment the necessary information about the substitution of caustic soda for soda ash. According to recital 143 to the contested decision, the applicant was, moreover, one of the largest producers of caustic soda.

428 Nor do the elements put forward by the applicant following consultation of the file call in question the Commission's analysis in the contested decision, since the Commission acknowledged the possible substitutability of caustic soda for soda ash (recitals 139 to 143).

429 The applicant has therefore not established that the non-disclosure of the documents in question was able to influence, to its detriment, the conduct of the procedure and the content of the contested decision.

430 Accordingly, the complaint put forward by the applicant must be rejected.

— The existence of a dominant position

431 In the applicant's submission, examination of the documents seized from its competitors, in particular from Rhône-Poulenc and Akzo, confirms that the Commission failed to analyse two fundamental elements, namely the actual capacity of the other continental producers to compete with the applicant and customers' countervailing power. The Commission also failed to take proper account of the competitive pressure exerted by imports from eastern Europe and the United States. It follows from those elements that the existence of a dominant position on the applicant's part in the regions in which it was found to have engaged in anti-competitive practices has not been demonstrated.

432 In that regard, it must be noted that the applicant had already developed those arguments in its response to the statement of objections. In particular, it had stated the following:

'Not only is [Solvay] not in a position to act on the market without taking account of competition, notably competition from producers in the countries of [e]ast[ern] Europe and [United States] producers, but also, and above all, it is in a situation of dependence or, at least, interdependence vis-à-vis its customers.'

433 In that regard, the applicant supplied the Commission with various documents in the context of the administrative procedure.

434 In those circumstances, it should be pointed out that the observations which the applicant submitted after consulting the file do not demonstrate to what extent the various documents relied on, from, in particular, Akzo and Rhône-Poulenc, could have been of use for its defence.

435 Accordingly, the complaint put forward by the applicant must be rejected.

— Abuse of the dominant position

436 The applicant contends that the documents found at its competitors' premises show that the contested decision is 'deficient' with respect to the analysis of the 'exclusionary practices' in which it is found to have engaged. Those practices had neither the object nor the effect ascribed to them in the contested decision. Rhône-Poulenc's and

Akzo's factories operated at maximum capacity during the major part of the period under consideration. The applicant also observes that it did not foreclose sales opportunities for all competitors.

437 Furthermore, in the applicant's submission, a study by Akzo on the direct production costs of various factories shows that the applicant had a legitimate economic interest in granting rebates on marginal tonnages once the fixed costs had been covered. In addition, granting rebates on marginal tonnage is normal practice on the market.

438 However, first, it should be observed that, in the statement of objections, the Commission mentioned that, 'at the beginning of the 1980s, demand for soda ash [had] fallen in developed countries, the main reasons being the economic recession, the recycling of glass and the replacement of glass packaging by plastic and/or aluminium packaging', that '[i]n recent years an appreciable adjustment of world demand [had been] observed and total production of soda ash [might] have fallen' and that '[p]lants [were still] working at maximum capacity'.

439 At recital 17 to the contested decision, the Commission also stated that plants were running at maximum output in 1990.

440 Consequently, the Commission was aware of that factual situation at the time of the administrative procedure and when, at recital 191 to the contested decision, it considered that the applicant had 'foreclos[ed] for a long time sales opportunities for all competitors'.

441 Accordingly, the applicant has not established that the non-disclosure of the Akzo and Rhône-Poulenc documents had influenced, to its detriment, the conduct of the procedure and the content of the contested decision.

442 Second, as to whether it was in the applicant's economic interest to grant rebates on marginal tonnage, it should be observed that the applicant was able to develop that argument during the administrative procedure, in the light of its own costs, without there being any need for it to rely on its competitors' documents.

443 The applicant, moreover, relied on that argument in its response to the statement of objections, where it indicated that those rebates corresponded to an 'advantage for [Solvay]'. The applicant also added the following:

'The thresholds fixed for each customer were in reality merely the reflection of the threshold of profitability of the soda plants. It is known that once that threshold is reached by covering costs, every additional tonne sold generates an increasingly large profit. The Commission, which bears the burden of proof, does not demonstrate, in that regard, that the rebates at issue, which are indisputably linked to volumes, are set at a rate such that they do not correspond to any specific economic advantage for [Solvay].'

444 Third, as regards the rebates granted on marginal tonnage, it is sufficient to state that the applicant's argument that those rebates are normal practice is not capable of demonstrating that, when the rebates on marginal tonnage are granted by an undertaking in a dominant position, they are compatible with Article 82 EC.

445 Consequently, the complaint put forward by the applicant must be rejected.

446 In conclusion, 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 rights of the defence. Accordingly, the second part of the sixth plea must be rejected.

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

— Arguments of the parties

447 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 91/299, 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 35 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 relevant geographic market, the existence of a dominant position and the abuse of the dominant position. The fact that the evidence deteriorated owing to the passage of time since the facts complained of took place made access to the file even more important.

448 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.

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

— Findings of the Court

450 It should be observed, as a preliminary point, that, during the administrative procedure preceding the adoption of Decision 91/299, 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.

451 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 91/299, 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.

452 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.'

453 It follows from those rules that, during the administrative procedure preceding the adoption of Decision 91/299, 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).

454 Accordingly, it must be held that, in the context of the case leading to the adoption of Decision 91/299, 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.

455 Next, it should be observed that, as Decision 91/299 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.

456 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.

457 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 *General Electric* v *Commission*, paragraph 314 above, paragraph 632).

458 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 405 above, paragraph 102).

459 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 405 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 55 above, paragraph 318).

460 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.

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

462 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.

463 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.

464 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.

465 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 35 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 459 above, paragraph 127).

466 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.

467 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 405 above, paragraph 127). 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 (*Solvay I*, paragraph 35 above, paragraph 60).

468 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 35 above, paragraph 59).

469 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.

470 As regards the existence of a dominant position, it must be observed that the Commission relied essentially on the market share held by the applicant in order to establish that it had a dominant position on the relevant market. There is no reason to presume that the applicant might have discovered in the missing 'sub-files' documents casting doubt on the finding that it held a dominant position on the soda ash market (see, to that effect, *ICI II*, paragraph 35 above, paragraph 61). Furthermore, as established in the case-law cited at paragraph 277 above, extremely large market shares constitute in themselves, save in exceptional circumstances, proof of the existence of a dominant position. The arguments put forward by the applicant and relating to facts that might constitute exceptional circumstances are either contradicted by the figures appearing in the application and provided by the applicant or appearing in the contested decision and not disputed by the applicant or are ineffective. Last, even on the assumption that such facts did exist and were mentioned in the documents in the missing 'sub-files', the applicant could not be unaware of them in view of the circumstances of the case, so that there was no breach of its rights of defence in that regard.

471 As concerns the definition of the geographic market, it must be borne in mind that it was held at paragraph 259 above that any error on the Commission's part in that regard could not have had a decisive influence on the outcome. It follows that the applicant could not have found in the missing binders any documents capable of casting doubt on the finding that it occupied a dominant position.

472 As regards the abuse of the dominant position, it must be observed, first of all, that the applicant does not at any point dispute the findings relating to the rebate system set up in France.

473 Next, it should be observed that the fact that the rebate system put in place by the applicant was intended to create 'loyalty' amongst customers emerges from specific documentary evidence. Where, as in the present case, the Commission relied in the contested decision solely on specific documentary evidence in order to prove the various infringements, the applicant must endeavour to prove to what extent other evidence might have cast doubt on the 'tying-in' nature of the rebate system or, at the very least, which different light might have been shed on the specific documentary evidence that was not disputed. In the light of the way in which matters were proved in the contested decision, in so far as the contracts entered into by the applicant are intended to 'tie in' customers, access to the missing 'sub-files' could not have altered the outcome of the administrative procedure (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 ('*Cement*'), paragraphs 263 and 264 and the case-law cited).

474 As regards the 'group' rebate granted to Saint-Gobain, it must be borne in mind that the applicant does not dispute either the existence of the secret protocol or the content of clause 4 of that protocol (see paragraph 349 above) and that it follows from the very wording of that clause that the rebate was calculated on 'all purchases' of soda ash by Saint-Gobain from the applicant in Europe (see paragraph 352 above). In those circumstances, the applicant ought to have endeavoured to indicate to what extent other evidence might have cast doubt on the content of the secret protocol or, at the very least, shed different light on it.

475 As regards the applicant's argument that the secret protocol did not prevent Saint-Gobain's national subsidiaries from using the threat to cease obtaining supplies from the applicant in order to negotiate more advantageous contractual conditions or even from breaching their contract, it was found at paragraph 357 above that that argument is ineffective. Even on the assumption that the missing 'sub-files' contain documents supporting that argument, that would not be of use for the applicant's defence.

476 As regards the express exclusivity agreements, it must be emphasised that the Commission relied on specific documentary evidence and that the applicant has not explained how documents in the missing 'sub-files' could have cast doubt on the

existence of the exclusivity agreements or shed different light on the documentary evidence.

477 As regards the de facto exclusivity, it must be borne in mind that, as regards the agreements concluded with several glass producers, the applicant does not dispute the findings set out in the contested decision (see paragraph 376 above).

478 As concerns the competition clauses, it must be borne in mind that the applicant does not dispute their existence and is wrong to assert that the Commission accepted such clauses in 1981 (see paragraphs 388 to 390 above). As regards the safeguard clauses, moreover, it must be borne in mind that the applicant's argument that the Commission treated those clauses as competition clauses is factually incorrect (see paragraph 391 above).

479 The possibility that the applicant might have found documents of use for its defence on those points in the missing 'sub-files' can therefore be precluded.

480 Last, as regards the discriminatory nature of the practices in which it was found to have engaged, the arguments whereby the applicant seeks to disprove that discriminatory nature are ineffective.

481 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.

482 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 third part of the sixth plea must be rejected and the sixth plea must therefore be rejected in its entirety.

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

483 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 infringements; second, incorrect assessment of the duration of the infringements; third, the existence of attenuating circumstances; fourth, the disproportionate nature of the fine; and, fifth, failure to take the lapse of time into account.

First plea: incorrect assessment of the gravity of the infringements

Arguments of the parties

484 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.

485 As regards the fine imposed on it by the contested decision, the applicant puts forward a number of arguments to challenge the amount.

486 First, the applicant claims that it never foreclosed the sales opportunities of all competitors, as its market share was well below 100% on the relevant national markets. Furthermore, the duration of the contracts with its customers was a maximum of two years, which is manifestly not a long time, as the Commission acknowledged in 1981. In addition, it has not been demonstrated that the allegedly abusive practices had a negative effect on consumers.

487 Second, the applicant maintains that, as regards the reference in the contested decision to infringements of Article 81 EC committed by the applicant, the Commission has disregarded the fact that, following the annulment of Decision 91/297 by the judgment in *Solvay I*, paragraph 35 above, no new decision was adopted pursuant to Article 81 EC.

488 Third, the applicant observes that certain of its senior managers, who had been alerted to the obligation to comply with Community competition law, had believed that they were doing so by acting in accordance with the instructions resulting from the negotiations with the Commission in 1981. In addition, the contested decision contains a contradiction at recitals 192 and 193 in that, on the one hand, the Commission stated that it had taken the fidelity rebates and the unofficial exclusivity agreements into account only in so far as the applicant could legitimately think that the competition clauses, the tonnage contracts with a margin of plus or minus 15% and the 'evergreen' contracts with two years' notice had been accepted and, on the other hand, the Commission considered that in practice those provisions tended to reinforce the applicant's exclusivity.

489 Fourth, the applicant asserts that the fact that it was previously ordered to pay substantial fines for collusion in the chemical industry cannot be regarded as an aggravating circumstance so far as the applicant is concerned. According to the

Guidelines, a repeated infringement assumes infringements of the same type. The applicant observes that it has never been found by the Commission to have abused a dominant position.

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

Findings of the Court

491 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 Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 358).

492 In the first place, as regards the application of the Guidelines, it must be borne in mind that, as Decision 91/299 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.

493 Since the content of the contested decision is virtually identical to that of Decision 91/299, 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 91/299 was adopted.

494 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 91/299 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.

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

496 In the second place, it must be observed that the Commission considered that the infringements which the applicant was found to have committed, namely the fidelity rebates and the unofficial exclusivity agreements, were of 'extreme gravity' (recitals 191 to 193 to the contested decision).

497 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).

498 Thus, in order to appraise the gravity of the infringements of the Community competition rules attributable to an undertaking, for the purposes of determining the amount of a fine which will be proportional to such gravity, the Commission may take into account the exceptional duration of certain infringements, the number and diversity of the infringements, which concerned all or almost all the products of the undertaking concerned and some of which affected all Member States, the particular gravity of infringements forming part of a deliberate and coherent strategy seeking by various eliminatory practices towards competitors and by a policy of retaining customers to maintain artificially or to strengthen the undertaking's dominant position on markets where competition was already limited, the particularly harmful effects of abuse in terms of competition and the benefit gained by the undertaking from

its infringements (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 240 and 241).

499 In the present case, it must be held that the practices in which the applicant was found to have engaged justified the characterisation of 'extreme gravity' applied by the Commission.

500 By granting rebates on marginal tonnages to its customers and entering into fidelity agreements with them, the applicant artificially maintained or strengthened its dominant position on the relevant market, where competition was already limited.

501 Nor do any of the arguments put forward constitute grounds for considering that the Commission erred in assessing the gravity of the infringements.

502 First, as regards the objection that the applicant foreclosed sales opportunities for all competitors, it must be held, first of all, that by its policy of 'tying in' its customers the applicant sought to exclude its competitors from the market. In that regard, that fact that its market share was below 100% does not permit the view that its practice did not have an exclusionary effect.

503 Next, it should be observed that the Commission was not required to demonstrate specifically that the applicant's practices had a negative effect on consumers. Where there has been an infringement of Article 82 EC, it is not necessary to examine whether the conduct in question caused prejudice to consumers (see, to that effect, Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraphs 106 and 107 and the case-law cited).

504 Second, as regards the reference to Article 81 EC, it must be held that, at recital 191 to the contested decision, the Commission stated only that, under the specific circumstances of the case, the infringements in question were more serious than the infringements of Article 81 EC in which the applicant was also involved. The Commission therefore did not ignore the fact that the infringements of Article 82 EC and those of Article 81 EC were autonomous and that they must thus be treated separately.

505 Third, as regards the fact that the applicant varied its contracts and the alleged contradiction at recital 193 to the contested decision, it is sufficient to state that the fine imposed on the applicant does not concern the provisions accepted by the Commission in 1982.

506 Fourth, as regards the repeated infringement, it must be observed that, in response to a written question from the Court, the Commission confirmed that the objection set out at recital 194 to the contested decision, that the applicant had already been the subject of substantial fines for collusion in the chemical industry (peroxides, polypropylene, PVC), constituted an aggravating circumstance.

507 In that regard, it must be borne in mind that, according to the case-law, the analysis of the gravity of the infringement must take account of any repeated infringement (*Aalborg Portland and Others* v *Commission*, paragraph 405 above, paragraph 91, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 348).

508 The concept of repeated infringement, as understood in a number of national legal orders, implies that a person has committed new infringements after being

punished for similar infringements (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 617).

509 Although they are not applicable to the present case, the Guidelines make similar provision where they refer to an 'infringement of the same type'.

510 However, it must be pointed out that the infringements for which the applicant has on several previous occasions been the subject of substantial fines for collusion in the chemical industry all relate to Article 81 EC. As the Commission has stated, the fines in question were imposed by Decision 85/74/EEC of 23 November 1984 relating to a proceeding under Article [81 EC] (IV/30.907 — Peroxygen products) (OJ 1985 L 35, p. 1), Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81 EC] (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1) and, last, Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article [81 EC] (IV/31.865, PVC) (OJ 1989 L 74, p. 1). In addition, the practices forming the subject-matter of the decisions mentioned above are very different from the practices at issue in the present case.

511 The Commission was therefore wrong to find that an aggravating circumstance existed in the applicant's case and, accordingly, it is appropriate to vary the contested decision by reducing the amount of the fine imposed on the applicant by 5%.

512 In consequence, the amount of the fine must be reduced by EUR 1 million.

Second plea: incorrect assessment of the duration of the infringements

Arguments of the parties

513 The applicant submits that, in the absence of any centralised policy on its part and given that the contractual terms were fixed at national level, the Commission was required to take account of the geographic scope of the alleged infringements, and should have concluded that the duration of the infringements was different for each of the Member States concerned. That would also have had an effect on the amount of the fine, particularly as concerns the turnover to be taken into consideration.

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

Findings of the Court

515 According to recital 195 to the contested decision, the infringements began in about 1983, that is to say, very shortly after the negotiations between the applicant and the Commission and the closure of the Commission's file, and continued up to at least the end of 1990.

516 Furthermore, the Commission defined the relevant geographic market as having a Community dimension.

517 It follows that the Commission was not required to determine the duration of the infringements by undertaking a State-by-State examination. As it was required to do, it established the starting date and the finishing date of the infringements on the relevant geographic market, namely the whole of continental western Europe.

518 In any event, if the Commission had been required to distinguish the duration of the infringements according to different national markets, it would then have imposed several fines, the total amount of which would not have been lower than that applied by the contested decision. It follows that any error on the Commission's part as to the definition of the relevant geographic market would not warrant either the annulment of the contested decision or a reduction in the fine.

519 The second plea must therefore be rejected.

Third plea: the existence of attenuating circumstances

520 The third plea consists of five parts, relating, respectively, to the absence of a repeated infringement; to the applicant's cooperation with the Commission; to the protection of the applicant's legitimate expectations and good faith; to the principle of legal certainty; and to the Commission's 'surprising attitude'.

First part, relating to the absence of a repeated infringement

521 The applicant maintains that it has never been the subject of proceedings brought by the Commission under Article 82 EC.

522 In that regard, as stated above, the analysis of the gravity of the infringement must take account of any repeated infringement, which may provide a ground for increasing the amount of the fine.

523 On the other hand, the absence of a repeated infringement cannot constitute an attenuating circumstance, since, as a matter of principle, an undertaking is required not to infringe Article 82 EC.

524 Consequently, the first part of the third plea must be rejected.

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

525 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.

526 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.'

527 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).

528 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.

529 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.

530 The second part of the third plea must therefore be rejected.

Third part, relating to the protection of the applicant's legitimate expectations and good faith

531 The applicant submits that, following the negotiations conducted at the time of the first procedure in 1981, it believed that its contracts, as adapted, and its commercial policy met the Commission's requirements. The applicant also claims that the 1981 discussions are evidence of its good faith, since it immediately amended all its contracts in order to ensure that they complied with the Commission's observations at the time.

532 Furthermore, following the judgment of the Liège Court of Appeal of 20 October 1989 in *FMC*, the applicant could legitimately believe that it did not have a dominant position.

533 First of all, as regards the negotiations conducted between 1980 and 1982, it must be borne in mind that, as stated at recital 193 to the contested decision, the fine imposed on the applicant does not concern the provisions accepted by the Commission in 1982.

534 Next, it must be held that the arguments based on the judgment of the Liège Court of Appeal of 20 October 1989 cannot be upheld. In the case giving rise to that judgment, the Liège Court of Appeal did not adjudicate on the substantive issue of whether or not the applicant held a dominant position.

535 The third part of the third plea must therefore be rejected.

Fourth part, relating to the principle of legal certainty

536 The applicant maintains that the uncertain nature of the concept of a 'dominant position' and its application to the applicant's situation, in view of the reasonable nature of its market share, the countervailing power of its customers and its relative market power, ought to have been taken into consideration when the fine was set.

537 In that regard, it is appropriate to have regard, first of all, to the case-law on the determination of the dominant position of an undertaking on the Community market which was already well defined. In particular, in *Hoffmann-La Roche* v *Commission*, paragraph 275 above, the Court of Justice precisely defined the concept of 'dominant position'. At paragraph 38 of that judgment, the Court stated that the dominant position referred to in Article 82 EC relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained 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.

538 Next, it must be observed that the applicant itself maintains that its 'market shares are essentially around 50% if the markets are national and 60 to 70% if the market is European'. Accordingly, in the light of the case-law cited at paragraph 277 above, the applicant had extremely large market shares which, save in exceptional circumstances, constitute proof of the existence of a dominant position.

539 Consequently, the fourth part of the third plea must be rejected.

Fifth part, relating to the Commission's 'surprising attitude'

540 In the applicant's submission, the Commission had accepted in 1981 practices since considered to be very serious infringements. The Commission therefore went back on its position without explaining why.

541 In that regard, it is sufficient to recall that, at recital 193 to the contested decision, the Commission drew a distinction between the practices which it condemned in the present case and those which it had accepted in 1982, in respect of which it did not impose a fine.

542 Consequently, the fifth part of the third plea must be rejected and the third plea must be rejected in its entirety.

Fourth plea: the disproportionate nature of the fine

543 The applicant claims that the Commission imposed a fine on it the amount of which was disproportionate. It maintains that that amount was 'exorbitant' at the time when the impugned facts took place. First, the Commission ought to have taken account of attenuating circumstances, in particular the applicant's good faith, its legitimate expectations and the principle of legal certainty. Second, the Commission ought to have taken account of the turnover generated by the activities actually concerned by the contested decision, namely the applicant's activities in France, Germany and Belgium.

544 In that regard, it must be borne in mind that the Commission correctly considered that the infringements committed by the applicant were of 'extreme gravity'. At recital

191 to the contested decision, the Commission stated, in particular, that the applicant was the major producer of soda ash in the Community, that the infringements had enabled it to consolidate its hold over the market by excluding effective competition in a large part of the common market and that, by foreclosing for a long time sales opportunities for all competitors, the applicant had caused lasting damage to the structure of the market concerned, to the detriment of consumers.

545 The Commission was therefore entitled to impose a fine of EUR 20 million on the applicant.

546 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.

547 As regards the existence of attenuating circumstances, it is sufficient to note that the applicant's arguments were rejected at paragraphs 536 to 542 above.

548 As regards the location of the infringements that must be taken into account, it follows from the case-law that the turnover referred to in Article 15(2) of Regulation No 17 as the upper limit of a fine must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market. Article 15(2) of Regulation No 17 contains no territorial limit in regard to the turnover. Provided that it remains within the limit laid down by Article 15(2), the Commission may choose which turnover to take in terms of territory and products in order to determine the fine (see *Cement*, paragraph 473 above, paragraphs 5022 and 5023 and the case-law cited).

549 Accordingly, in the present case, the Commission was not required to take a territorial criterion into account when setting the fine.

550 Nor does the applicant claim that the Commission exceeded the maximum amount of the fine that may be imposed on it under Article 15(2) of Regulation No 17.

551 The fourth plea must therefore be rejected.

Fifth plea: failure to take the lapse of time into account

552 The applicant submits that the Commission ought to have taken into account the fact that more than 11 years had elapsed sine the end of the alleged infringements. 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.

553 First of all, it must be borne in mind 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.

554 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 (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 106, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 272).

555 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 infringements of extreme gravity.

556 Accordingly, the fifth plea must be rejected.

557 In conclusion, as stated at paragraphs 507 to 512 above, it is appropriate to vary the contested decision, in that it incorrectly applies the aggravating circumstance of a repeated infringement committed by the applicant.

558 Consequently, the amount of the fine imposed on the applicant is set at EUR 19 million.

Costs

559 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.

560 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 its own costs and pay 95% of those incurred by the Commission, and that the Commission should bear 5% of its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Solvay SA in Article 2 of Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 [EC] (COMP/33.133-C: Soda ash — Solvay) at EUR 19 million;**

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

3. **Orders the applicant to bear its own costs and to pay 95% of the costs incurred by the European Commission;**

4. **Orders the Commission to bear 5% of its own costs.**

Meij Vadapalas Dittrich

Delivered in open court in Luxembourg on 17 December 2009.

[Signatures]

Table of contents

Facts ..... II - 4638

Procedure ..... II - 4653

Forms of order sought by the parties ..... II - 4658

Law ..... II - 4659

1. The claim seeking annulment of the contested decision ..... II - 4660

First plea: failure to take into account the time that had elapsed ..... II - 4660

First part: incorrect application of the limitation rules ..... II - 4660

— Arguments of the parties ..... II - 4660

— Findings of the Court ..... II - 4662

Second part: breach of the 'reasonable time' principle ..... II - 4667

— Arguments of the parties ..... II - 4667

— Findings of the Court ..... II - 4670

Second plea: breach of essential procedural requirements with respect to the adoption and authentication of the contested decision ..... II - 4675

First part: breach of the principle of collegiality ..... II - 4676

— Arguments of the parties ..... II - 4676

— Findings of the Court ..... II - 4677

Second part: breach of the principle of legal certainty ..... II - 4679

— Arguments of the parties ..... II - 4679

— Findings of the Court ..... II - 4680

Third part: breach of the applicant's right to be heard again ..... II - 4683

— Arguments of the parties ..... II - 4683

— Findings of the Court ..... II - 4685

Fourth part: failure to consult the Advisory Committee on Restrictive Practices and Monopolies again ..... II - 4687

— Arguments of the parties ..... II - 4687

— Findings of the Court ..... II - 4688

Fifth part: irregular composition of the Advisory Committee on Restrictive Practices and Dominant Positions ..... II - 4690

— Arguments of the parties ..... II - 4690

— Findings of the Court ..... II - 4690

Sixth part: use of documents seized in breach of Regulation No 17 ..... II - 4691

— Arguments of the parties ..... II - 4691

— Findings of the Court ..... II - 4694

Eighth part: breach of the principles of impartiality, sound administration and proportionality ..... II - 4697

— Arguments of the parties ..... II - 4697

— Findings of the Court ..... II - 4698

Third plea: incorrect definition of the geographic market ..... II - 4699

Arguments of the parties ..... II - 4699

Findings of the Court ..... II - 4701

Fourth plea: absence of a dominant position ..... II - 4705

Arguments of the parties ..... II - 4705

Findings of the Court ..... II - 4708

Fifth plea: absence of abuse of a dominant position ..... II - 4714

First part, relating to the rebates on marginal tonnage ..... II - 4714

— Arguments of the parties ..... II - 4714

— Findings of the Court ..... II - 4716

Second part, relating to the 'group' rebate granted to Saint-Gobain ..... II - 4723

— Arguments of the parties ..... II - 4723

— Findings of the Court ..... II - 4725

Third part, relating to the exclusivity agreements ..... II - 4727

— Arguments of the parties ..... II - 4727

— Findings of the Court ..... II - 4728

Fourth part, relating to the competition clauses ..... II - 4732

— Arguments of the parties ..... II - 4732

— Findings of the Court ..... II - 4733

Fifth part, relating to the discriminatory nature of the impugned practices .... II - 4734

— Arguments of the parties .... II - 4734

— Findings of the Court .... II - 4735

Sixth plea: breach of the right of access to the file .... II - 4737

First part, relating to the lack of access to inculpatory documents .... II - 4739

— Arguments of the parties .... II - 4739

— Findings of the Court .... II - 4739

Second 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 .... II - 4741

— The relevant geographic market .... II - 4742

— The relevant product market .... II - 4743

— The existence of a dominant position .... II - 4744

— Abuse of the dominant position .... II - 4745

Third part, relating to the absence of consultation of the complete file by the applicant .... II - 4748

— Arguments of the parties .... II - 4748

— Findings of the Court .... II - 4749

2. The claims seeking annulment or reduction of the fine .... II - 4757

First plea: incorrect assessment of the gravity of the infringements .... II - 4757

Arguments of the parties .... II - 4757

Findings of the Court .... II - 4759

Second plea: incorrect assessment of the duration of the infringements ..... II - 4764

Arguments of the parties ..... II - 4764

Findings of the Court ..... II - 4764

Third plea: the existence of attenuating circumstances ..... II - 4765

First part, relating to the absence of a repeated infringement ..... II - 4765

Second part, relating to the applicant's cooperation with the Commission .... II - 4766

Third part, relating to the protection of the applicant's legitimate expectations and good faith ..... II - 4768

Fourth part, relating to the principle of legal certainty ..... II - 4769

Fifth part, relating to the Commission's 'surprising attitude' ..... II - 4770

Fourth plea: the disproportionate nature of the fine ..... II - 4770

Fifth plea: failure to take the lapse of time into account ..... II - 4772

Costs ..... II - 4774