JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

25 June 2010 *

In Case T-66/01,

Imperial Chemical Industries Ltd, formerly Imperial Chemical Industries plc**,** established in London (United Kingdom), represented by D. Vaughan QC, D. Anderson QC and S. Lee, Barrister, and by S. Turner, S. Berwick and R. Coles, Solicitors, and then by D. Vaughan QC, S. Berwick, Solicitor, S. Lee and S. Ford, Barristers,

applicant,

v

European Commission, represented by J. Currall and P. Oliver, acting as Agents, and by J. Flynn QC and C. West, Barrister,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision 2003/7/EC of 13 December 2000 relating to a proceeding under Article 82 [EC] (Case COMP/33.133-D: Soda ash — ICI) (OJ 2003 L 10, p. 33) or, in the alternative, for cancellation 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, Imperial Chemical Industries Ltd, formerly Imperial Chemical Industries plc, is a company established under the law of the United Kingdom which is active in the chemicals sector. At the material time it produced, 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 common salt and limestone in the 'ammonia-soda" process developed by the Solvay brothers in 1863.

3 In April 1989, the Commission of the European Communities carried out investigations at the premises of various Community producers of soda ash pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ English special edition 1959-1962 p. 87), in the version applicable at the material time.

4 On 19 June 1989, the Commission sent the applicant a request for information pursuant to Article 11 of Regulation No 17, to which the applicant replied on 14 September 1989.

5 On 19 February 1990, the Commission decided to open a proceeding on its own initiative against the applicant, Solvay and Chemische Fabrik Kalk ('CFK') pursuant to Article 3(1) of Regulation No 17.

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

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

8 As regards the present case, the Commission concluded in Part V of the statement of objections that the applicant had abused the dominant position it held on the market for soda ash in the United Kingdom.

9 On 31 May 1990, the applicant submitted its written observations in response to the Commission's objections. It was heard by the Commission on 26 and 27 June 1990.

10 On 19 December 1990, 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 that decision, notified to the applicant by letter of 1 March 1991, the Commission stated that '[the applicant had] infringed the provisions of Article [82 EC]

from about 1983 until the present time 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 bought all or most of their requirements from the applicant; securing the agreement of customers to buy the whole or substantially the whole of their requirements from [it] and/or to restrict their purchases of competitive material to a specified tonnage and in one case at least making the granting of rebates and other financial benefits dependent upon the customers agreeing to buy the whole of their requirements from [it]'.

11 Under Article 3 of Decision 91/300, 'a fine of ECU 10 million [was] imposed on [the applicant] in respect of the infringement … specified'.

12 On the same date, the Commission also adopted Decision 91/297/EEC relating to a proceeding under Article [81 EC] (IV/33.133-A: Soda ash — Solvay, ICI) (OJ 1991 L 152, p. 1) in which it stated that 'Solvay and [the applicant 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 Solvay and the United Kingdom and Ireland for [the applicant]'. A fine of ECU 7 million was imposed on both Solvay and the applicant respectively.

13 On the same date, the Commission also 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 stated that 'Solvay and CFK [had] infringed Article [81 EC] by participating from about 1987 until the present time in a market-sharing agreement by which Solvay guaranteed to CFK a minimum annual sales tonnage of soda ash in Germany calculated by reference to CFK's achieved sales in 1986, and compensated

CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum'. A fine of ECU 3 million was imposed on Solvay and a fine of ECU 1 million was imposed on CFK.

14 On the same date, the Commission adopted, in addition, Decision 91/299/EEC relating to a proceeding under Article [82 EC] (IV/33.133-C: Soda ash — Solvay) (OJ 1991 L 152, p. 21) in which it stated that 'Solvay [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 Solvay 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 they buy all or most of their requirements from Solvay; making the granting of rebates dependent upon the customer agreeing to buy the whole of its requirements from Solvay'. A fine of ECU 20 million was imposed on Solvay.

15 On 2 May 1991, Solvay sought the annulment of Decisions 91/297, 91/298 and 91/299. On 14 May 1991, the applicant brought an action before the Court of First Instance (now "the General Court') seeking annulment of Decisions 91/297 and 91/300.

16 By judgment of 29 June 1995 in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901 ('*ICI II*'), the General Court held that the plea alleging breach of the rights of the defence relating to access to the file had to be rejected in its entirety, but went on to annul Decision 91/300 on the ground that the authentication of that decision had been carried out after its notification, which constituted an infringement of an essential procedural requirement within the meaning of Article 230 EC.

17 On the same date, the General Court also annulled Decision 91/297 (Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775; '*Solvay I*' and T-36/91 *ICI* v *Commission* [1995] ECR II-1847; '*ICI I*') inasmuch as that decision concerned the applicants in the two cases, for breach of right of access to the file. In addition, the General Court annulled Decision 91/298 (Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821; '*Solvay II*') in so far as it concerned Solvay, and Decision 91/299 (Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825; '*Solvay III*'), on the basis of the unlawful authentication of the contested decisions.

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

19 By judgments of 6 April 2000 in Case C-268/95 P *Commission* v *ICI* [2000] ECR I-2341, and in Joined Cases C-287/95 P and C-288/95 P *Commission* v *Solvay* [2000] ECR I-2391, the Court dismissed the appeals against the judgment in *ICI II*, paragraph 16 above, and the judgments in *Solvay II* and *Solvay III*, paragraph 17 above.

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

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

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

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

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

21 On 13 December 2000, the Commission adopted Decision 2003/7/EC relating to a proceeding under Article 82 [EC] (COMP/33.133-D: Soda ash — ICI) (OJ 2003 L 10, p. 33; 'the contested decision').

22 On the same date, the Commission also adopted Decision 2003/5/EC relating to a proceeding under Article 81 [EC] (COMP/33.133-B: Soda ash — Solvay, CFK) (OJ 2003 L 10, p. 1) and Decision 2003/6/EC relating to a proceeding under Article 82 [EC] (COMP/33.133-C: Soda ash — Solvay) (OJ 2003 L 10, p. 10).

23 The contested decision contains the following provision:

'*Article 1*

[The applicant] 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:

(a) 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 [the applicant];

(b) securing the agreement of customers to buy the whole or substantially the whole of their requirements from [the applicant] and/or to restrict their purchases of competitive material to a specified tonnage;

(c) in one case at least making the granting of rebates and other financial benefits dependent upon the customers agreeing to buy the whole of its requirements from [the applicant].

Article 2

A fine of EUR 10 million is imposed on [the applicant] in respect of the infringement specified in Article 1.

…'

24 The contested decision is drafted in practically the same terms as Decision 91/300. The Commission merely made a few editorial amendments and added a new section entitled 'Proceedings before the Court of First Instance and the Court of Justice'.

25 In that new section of the contested decision, the Commission, referring to the judgment of the General Court 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 ('judgment of the General Court in *PVC II*'), held that it was 'entitled to re-adopt a decision which has been annulled for purely procedural defects … without conducting a fresh administrative procedure' and that it was 'not required to hold a new oral Hearing if the text of the new decision does not contain any new objections besides those set out in the original decision' (recital 164).

26 The Commission also stated in the contested decision that the limitation period had to be extended by the period during which proceedings against Decision 91/300 were pending before the General Court and the Court of Justice, under 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 169 and 170). Thus, taking into account the circumstances of the case, the Commission considered that it had until the end of 2003 to issue a new decision (recital 172). Moreover, it indicated that the rights of the defence would not be infringed if the new decision were adopted within a reasonable time (recital 164).

27 As regards the actual infringement, the Commission stated in the contested decision that 'the appropriate product and geographical area' in which the applicant's economic power '[fell] to be assessed [was] thus the market for soda ash in the United Kingdom' (recital 125).

28 In order to assess the applicant's market power for the purposes of the present case, the Commission noted that the market share held by the applicant on the relevant market was historically over 90% over the whole of the period under consideration, which was in itself strong evidence of a significant degree of market power (recital 127). Then, it examined the relevant economic factors and concluded in the contested decision that, at all material times, the applicant occupied a dominant position within the meaning of Article 82 EC (recitals 128 to 136).

29 As regards the abuse of that dominant position, the Commission stated in the contested decision that the applicant had implemented a practice of 'tying' customers by means of a number of devices which all served the same exclusionary purpose (recital 138). In that regard, it stated, in recital 139 of the contested decision, that rebates on marginal tonnage were intended to exclude effective competition by:

— inducing customers to obtain from the applicant the marginal tonnage which might otherwise be obtained from a second supplier;

— minimising or neutralising the competitive impact of General Chemical by containing its presence [on] the market in terms of price, tonnage and customers within limits that insured the continuance of the applicant's effective monopoly;

— eliminating Brenntag from the market or at least minimising its competitive effect;

— minimising the risk of the customers turning to alternative sources of supply;

— maintaining and reinforcing the applicant's virtual monopoly of the United Kingdom market for soda ash.

30 In addition, in recital 147 of the contested decision, the Commission points out that 'the agreements with [its] major customers meant that they were tied to [the applicant] for substantially the whole of their requirements (and in one case at least, their total requirements) while the competitive effect of other suppliers was minimised'.

31 The Commission also stated in the contested decision that other financial inducements consolidated the applicant's dominant position in a manner which was incompatible with the concept of competition inherent in Article 82 EC (recital 149).

32 As regards the effect on trade between Member States, the Commission stated in the contested decision that, although the measures taken by the applicant to ensure the continuance of its dominant position and effective monopoly in the United Kingdom were aimed in the first place at direct competition from outside the Community (the United States and Poland) rather than other Community producers, the rebates on marginal tonnage and other exclusionary devices had to be examined in the overall context of the phenomenon of strict separation of national markets in the Community. In that regard, it explained that the applicant was particularly anxious that General Chemical should remain in the relevant market as an alternative, and had it left the market entirely, the customers might have been encouraged to look for alternative and possibly cheaper sources of supply in Continental Western Europe. Furthermore, it noted that the maintenance and reinforcement of the applicant's dominant position in the United Kingdom affected the whole structure of competition in the common market and ensured that the status quo, based on market separation, would be maintained (recitals 151 to 154).

33 The Commission explained in the contested decision that the infringements committed were of particular gravity in that they 'were part of a deliberate policy aimed at consolidating the applicant's control over the [market for soda ash in the United Kingdom] in a manner which was in fundamental conflict with the basic objectives of the Treaty' and 'were specifically directed at restricting or damaging the business of particular competitors' (recital 156).

34 The Commission also indicated in the contested decision that the infringement had begun in about 1983 and continued at least up to the end of 1989. It stated, lastly, that it took account of the fact that the applicant had abandoned the system of top-slice rebates with effect from 1 January 1990 (recitals 160 and 161).

35 By letters of 18 January, 26 January and 8 February 2001, the applicant made a request for access to the Commission's file. By letter of 14 February 2001, the Commission refused that request.

Procedure

36 By application lodged at the Registry of the General Court on 20 March 2001, the applicant brought the present action.

37 In the application, the applicant requested the Court, inter alia, to order the Commission to produce all the documents on its file in Case COMP/33.133.

38 On 4 May 2001, the case was allocated to the Fourth Chamber of the Court and a Judge-Rapporteur was appointed.

39 Following authorisation from the Court, the applicant and the Commission submitted their observations on 18 and 23 December 2002 respectively on the inferences to be drawn in the present case from the judgment of the Court of Justice 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 ('judgment of the Court of Justice in *PVC II*'). In its observations, the applicant advised the Court that it was no longer pursuing its plea alleging infringement of the principle of *non bis in idem*.

40 As the composition of the Chambers of the Court changed with effect from 1 October 2003, the Judge-Rapporteur was assigned to the First Chamber, to which the present case was accordingly allocated on 8 October 2003.

41 As the composition of the Chambers of the Court changed with effect from 13 September 2004, the Judge-Rapporteur was assigned to the Fourth Chamber in its new composition, to which the present case was accordingly allocated on 19 October 2004.

42 On 11 January 2005, the Court requested the Commission to lodge at the Court Registry a detailed, numbered list of all the documents which made up the administrative file. That list had to include a succinct indication making it possible to identify the author, the nature and the content of each document. It also had to indicate which of those documents were not accessible to the applicant and specify, where appropriate, the reasons which, according to the Commission, precluded their disclosure.

43 By letters of 28 January 2005, the Commission lodged at the Court Registry the numbered list requested by the Court and indicated that the documents to which the applicant had access during the administrative procedure were those on which the Commission had relied to support its objections, and which were therefore appended to its statement of objections. It also stated that it regretted 'to inform the Court that it [then appeared] that, no doubt as a result of several office removals in the last ten years, some files [could] no longer be found, despite extensive searches' and that it considered that it was its duty to inform the Court and the applicant without delay that 'while the list attached to these observations is a complete list of the file in its possession, it [did] not cover the missing files'. According to the Commission, the procedure followed in 1990 was consistent with the case-law then applicable in respect of access to the file. It added that there were no indications at that time that there were documents in the file which could have had a genuine influence on the adoption of Decision 91/300, even taking into account the development of the case-law since 1990.

44 By letter of 13 April 2005, the Court asked the applicant to indicate those documents appearing on the numbered list which had not been communicated to it during the administrative procedure and which, in its view, were likely to contain elements which might have been useful to its defence.

45 By letter of 9 May 2005, the applicant stated that some of the missing documents would have been useful to its defence. It also indicated, among the documents appearing on the list, those which appeared to it to be useful to its defence and which it wished to consult. According to it, those documents might have enabled it to develop its lines of argument regarding the definition of the relevant geographical market, the existence of a dominant position, the abuse of that dominant position and the effect on trade between Member States.

46 By letter of 7 June 2005, the Court asked the Commission to lodge at the Court Registry the originals of the documents comprising the administrative file and contained in files 2 to 38, 50 to 59 and 60 to 65, with the exception of internal documents. The Commission was also asked to lodge non-confidential versions or non-confidential summaries instead and in place of documents containing commercial secrets, information which had been communicated to the Commission during the administrative procedure subject to observance of its confidentiality or other confidential information. The Commission was also asked to produce the full version, including the confidential information, of the documents mentioned above for the purposes of verification of their confidential nature.

47 On 21 June 2005, the Commission asked the Court to permit it to lodge a single original accompanied by CD-ROMs, bearing in mind the length of the documents. That request was granted on 4 July 2005.

48 By letter of 20 July 2005, the Commission lodged at the Court Registry the documents requested by the Court. The Registrar then sent the CD-ROMs lodged by the Commission to the applicant.

49 On 13 October 2005, the applicant submitted its observations on the usefulness to its defence of the documents comprising the administrative file. The Commission replied to the applicant's observations on 26 October 2007.

50 Following the departure of the Judge-Rapporteur initially appointed at the end of his term of office, the President of the Court, by decision of 22 June 2006, appointed a new Judge-Rapporteur.

51 As the composition of the Chambers of the Court changed with effect from 25 September 2007, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was accordingly allocated on 8 November 2007.

52 On 13 February 2008, as Judge Tchipev was prevented from sitting, the President of the Court, under Article 32(3) of the Court's Rules of Procedure, designated Judge Dittrich to complete the Chamber.

53 On hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put written questions to the applicant and the Commission. The applicant and the Commission replied to those questions within the prescribed time-limit.

54 The parties presented oral argument and replied to the Court's oral questions at the hearing on 26 and 27 June 2008.

55 At the hearing, the Court authorised the applicant to submit observations on the Commission's written replies of 16 June 2008. The applicant submitted its observations on 9 July 2008 and the Commission replied to those observations on 3 September 2008.

Forms of order sought by the parties

56 The applicant claims that the Court should:

— declare the application admissible;

— declare that as a result of the passage of time the Commission had no power to take the contested decision or, alternatively, no power to impose a fine on the applicant;

— annul the contested decision;

— cancel or reduce the fine imposed by Article 2 of the contested decision;

— order the Commission to produce all of its internal documents relating to the taking of the contested decision, and in particular the minutes of the meeting of the College of Commissioners and all the annexed documents, and any documents put before the College of Commissioners on that occasion;

— order the Commission to produce the documents on its file in COMP/33.133;

— order the Commission to pay the costs, including the costs (inclusive of interest) of any guarantee provided by the applicant in respect of the fine imposed by the contested decision.

57 The Commission contends that the Court should:

— dismiss the action as unfounded;

— reject the request for access to the file;

— declare the request for a specific order that it pay the applicant's costs, including the costs (inclusive of interest) of any guarantee provided in respect of the fine, to be inadmissible or in any event to reject it as unfounded;

— order the applicant to pay the costs.

Law

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

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

59 The applicant raises, in essence, six pleas seeking annulment of the contested decision. Those pleas allege, first, that the Commission lacked the power to adopt the contested decision; second, infringement of essential procedural requirements; third, incorrect assessment of the relevant market; fourth, absence of a dominant position;

fifth, absence of abuse of a dominant position and, sixth, absence of an effect on trade between Member States.

First plea: the Commission's lack of power to adopt the contested decision

60 The first plea comprises two parts alleging, respectively, incorrect application of the limitation rules and infringement of the principle that action must be taken within a reasonable time.

First part: the incorrect application of limitation rules

— Arguments of the parties

61 The applicant points out that, whilst the limitation period laid down in Regulation No 2988/74 applies only to the part of the decision imposing the fine, that is a very significant part of the decision.

62 According to the applicant, Article 3 of Regulation No 2988/74 does not apply so as to extend the period of limitation in relation to legal proceedings the subject-matter of which is a final decision of the Commission. The period of limitation is suspended only in the event of appeals against decisions adopted in the course of the administrative procedure, namely measures of management and administration including

the adoption of a statement of objections or measures under the general powers of investigation conferred by Regulation No 17. The interpretation adopted by the Commission in the contested decision is contrary to the wording of Article 3 of Regulation No 2988/74. The Commission misinterprets the expression 'in proceedings' in Articles 1 to 3 of Regulation No 2988/74 and fails to appreciate that its final decision has to take place before the expiry of the limitation period. Moreover, the Commission's interpretation undermines the application of Article 2(3) of Regulation No 2988/74 and misunderstands the structure of that regulation in so far as the limitation implications which flow from a decision are dealt with in Articles 4 to 6, not in Articles 1 to 3. Lastly, such an interpretation is contrary to the principle that, in order to ensure legal certainty, the Commission must conclude its proceedings within a defined time period and the Commission's final decision must be taken within an absolute maximum period of 10 years from the cessation of the infringement, except where the Commission has been prevented from concluding its investigations and procedures by reason of legal actions brought against preliminary decisions. In the present case, the Commission was not prevented from concluding its procedures.

63 The applicant takes the view that the approach in the judgment of the General Court in *PVC II*, paragraph 25 above, is inconsistent with the statement in paragraph 1098 of that judgment that the 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. An action against a final decision to impose a fine does not prevent the Commission from acting, as that final decision is fully enforceable until such time as it is annulled or declared non-existent by the Court.

64 In any event, the reasoning that the Commission was prevented from acting cannot, in the present case, be applied to the appeal brought against *ICI II*, paragraph 16 above. It was perfectly open to the Commission to retake Decision 91/300 immediately after delivery of the judgment in *ICI II*, paragraph 16 above. The further delay resulting from the Commission's appeal was thus entirely 'attributable' to the Commission. Furthermore, that appeal was pointless in the light of the ruling in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, and taking account of

the Commission's intention to retake Decision 91/300. Thus, the Commission cannot benefit from its 'own procedural error' and from the five-year delay which it caused.

65 Moreover, the Commission's interpretation is contrary to Article 60 of the Statute of the Court of Justice, according to which an appeal is not to have suspensory effect. According to the applicant, even if the duration of proceedings before the General Court should be taken into account, the limitation period is suspended only for a period of about 4 years, 1 month and 15 days. The Commission ought to have, therefore, adopted Decision 91/300 again before April 1999.

66 In addition, it is apparent from Article 3 of Regulation No 2988/74 that, in the event of an appeal, it is not the Commission's decision which is the subject of the proceedings, but the judgment of the General Court.

67 Furthermore, in the judgment of the General Court in *PVC II*, paragraph 25 above, the issue whether the Commission's appeal should be taken into account for any suspension of the limitation period was not specifically addressed, inasmuch as, in the case giving rise to that judgment, the Commission needed only to establish that the period of the proceedings before the General Court suspended the limitation period. Thus, the remarks of the General Court with regard to the effect of the appeal on the suspension of the limitation period were merely *obiter dictum*.

68 The applicant adds that a decision adopted by the Commission in contravention of its own internal Rules of Procedure cannot have the effect of extending the limitation period. The Commission did not correctly authenticate Decision 91/300. Therefore, that decision cannot have the effect of extending the Commission's powers to impose fines beyond the normal limitation period laid down in Regulation No 2988/74. Such a result would not only be contrary to the principle that a party may not benefit from

its own error but would be contrary to natural justice. The delay was entirely attributable to the Commission's actions and it cannot, in any event, seek to take advantage of Article 3 of Regulation No 2988/74.

69 Lastly, the interpretation of Articles 2 and 3 of Regulation No 2988/74 in the judgment of the General Court in *PVC II,* paragraph 25 above, would enable the Commission to adopt a series of successive decisions extending into the latter half of the 21st century. Such an interpretation is therefore unlawful in so far as it infringes the right to judgment within a reasonable time.

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

— Findings of the Court

71 As a preliminary point, it should be observed 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 competition rules (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 324, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 223).

72 Thus, in accordance with Article 1(1)(b) and (2) and Article 2(3) of Regulation No 2988/74, the limitation period in proceedings expires if the Commission has not imposed a fine or a penalty within 5 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 39 above, paragraph 140).

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

74 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, after the creation of the General Court (formerly the Court of First Instance), as referring, in the first place, to proceedings pending before the General Court since actions imposing sanctions or fines in the field of competition law come within its jurisdiction.

75 In the present case, the applicant does not dispute that, subject to the question of suspension of the limitation period pursuant to Article 3 of Regulation No 2988/74, the five-year limitation period would have expired in 1995.

76 Therefore, it is necessary to examine only whether, pursuant to Article 3 of Regulation No 2988/74, the Commission was entitled to adopt the contested decision on 13 December 2000.

77 In that regard, it follows from paragraph 157 of the judgment of the Court of Justice in *PVC II*, paragraph 39 above, that, for the purposes 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'. Therefore, in the present case, the limitation period was suspended for the duration of the proceedings before the General Court and for the duration of the proceedings before the Court of Justice in the context of the appeal, and there is no need to rule on the period between the delivery of the General Court's judgment and the appeal to the Court of Justice.

78 Following the action brought by the applicant before the General Court on 14 May 1991, the judgment delivered on 29 June 1995, then the appeal before the Court of Justice brought by the Commission on 30 August 1995 and the judgment delivered on 6 April 2000, the limitation period was suspended for a minimum period of 8 years, 8 months and 22 days, as the Commission correctly states in recital 171 of the contested decision.

79 Consequently, following that suspension of the limitation period, a period of five years has not expired, in the present case, between the end of the infringements at issue or any interruption to the limitation period and the adoption of the contested decision on 13 December 2000.

80 Therefore, the contested decision was adopted in compliance with the limitation rules established in Regulation No 2988/74.

81 None of the arguments put forward by the applicant can invalidate that finding.

82 First, it cannot in any way be inferred from the wording of Articles 2 and 3 of Regulation No 2988/74 that the 'decision of the Commission', referred to in Article 3, which

is the subject of judicial proceedings before the Courts of the European Union suspending the limitation period can only be one of the acts referred to in Article 2 as interrupting that limitation period, or that the list of those acts is exhaustive (judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 141). Article 3 protects the Commission against the effect of the limitation period in situations in which it must await the decision of the Courts of the European Union in proceedings beyond its control before knowing whether the contested act is or is not vitiated by illegality. Article 3 therefore deals with cases in which the inaction of the institution is not the result of a lack of diligence. Such situations arise both in the case of actions against the interruptive measures listed in Article 2 of Regulation No 2988/74 which are open to challenge and in the case of an action against a decision imposing a fine or penalty. Accordingly, the wording and the purpose of Article 3 cover both actions brought against the challengeable measures referred to in Article 2 and actions brought against a final decision of the Commission. Consequently, an action brought against a final decision imposing penalties suspends the limitation period in proceedings pending delivery by the Courts of the European Union of a final ruling on that action (judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraphs 144 to 147).

83 Second, the applicant claims that the introduction of an action challenging a decision imposing a fine in no way prevents the Commission from adopting a decision of that kind. However, were that interpretation to be upheld, it would mean that the institution would withdraw the contested decision in order to replace it with another decision taking account of the aspects challenged. It would effectively deny the Commission the very right to have the Courts of the European Union establish, where appropriate, the legality of the contested decision (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 149).

84 Third, the applicant cannot argue that a decision imposing penalties is fully enforceable until it has been judicially annulled. By definition, measures to enforce a decision penalising an infringement cannot be regarded as acts relating to the preliminary investigation of, or the taking of action against, an infringement. Such measures, the legality of which is, moreover, dependent on that of the decision which is the subject

of the action, cannot therefore interrupt the limitation period in the event of annulment of a judicially contested decision (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 150).

85 Fourth, 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 Courts of the European Union — of all effect. The applicant's claim 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 effects.

86 Fifth, the applicant cannot claim that, following the annulment of Decision 91/300 on the ground that it had not been authenticated, the Commission cannot benefit from its own error by imposing a fine after the expiry of the five-year limitation period laid down in Regulation No 2988/74. Any annulment of a measure which the Commission has adopted is necessarily imputable to it, in the sense that it reveals an error on the Commission's part. Therefore, to exclude suspension of the limitation period where the action leads to recognition of an error imputable to the Commission would deprive Article 3 of the regulation of all meaning. It is the very fact that an action is pending before the General Court or the Court of Justice which justifies the suspension, and not the conclusions reached by those courts in their judgment (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 153).

87 Sixth, in an action for annulment the General Court must examine whether the contested act is or is not vitiated by illegality (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 144).

88 Seventh, the interpretation of Article 3 of Regulation No 2988/74 proposed by the applicant would lead to serious practical difficulties. If the Commission had to adopt a new decision following the annulment of a decision by the General Court without awaiting the judgment of the Court of Justice, there is a risk that there would be two co-existing decisions having the same subject-matter in the event that the Court of Justice were to set aside the judgment of the General Court.

89 Eighth, it is contrary to the requirements of economy of administrative procedure to require the Commission, with the sole aim of avoiding the lapse of the limitation period, to adopt a new decision before knowing whether the initial decision is or is not vitiated by illegality.

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

Second part: breach of the principle that action must be taken within a reasonable time

— Arguments of the parties

91 The applicant asserts that, irrespective of the issues of limitation, the passage of time since the alleged infringements affects the Commission's power to take the whole of the contested decision, and not just that part relating to fines.

92 Referring to paragraph 121 of the judgment of the General Court in *PVC II*, paragraph 25 above, and to the principle that action must be taken within a reasonable time, the applicant is of the opinion that it is necessary to examine whether the Commission adopted the contested decision within a reasonable time after the end of the administrative proceedings relating to competition policy.

93 According to the applicant, it may be presumed that the Commission has breached the principle that action must be taken within a reasonable time when more than 11 years 6 months have passed between the opening of the investigation and the adoption of the contested decision in a case.

94 The applicant notes that, while the proceedings before the General Court and those before the Court of Justice lasted 105 months in total, the Commission devoted 35 months to the adoption of its decision, including 9 months between the judgment in *Commission* v *ICI*, paragraph 19 above, and the contested decision. Moreover, it is legitimate to take into account the duration of the judicial proceedings, in particular where those proceedings concern a different decision and pre-date the contested decision.

95 According to the applicant, the part of the delay attributable to the appeal to the Court of Justice is unacceptable. Following the judgments in *ICI II*, paragraph 16 above, and *Commission* v *BASF and Others*, paragraph 64 above, the Commission was aware that Decision 91/300 was vitiated because of a failure to authenticate. If the Commission was intending to adopt a new decision, it should have done so at that stage, instead of bringing an appeal before the Court of Justice which has had the effect of delaying the adoption of the decision by five and a half years.

96 Referring to the judgment of the European Court of Human Rights in *Garyfallou AEBE* v. *Greece* of 27 September 1997 (Reports of Judgments and Decisions 1997-V, p. 1821), the applicant considers that it is necessary to examine the proceedings in their entirety to determine whether the matter has been decided upon within a reasonable time.

97 In addition, the applicant contends that the time which has passed since the alleged infringements has prevented it from fully exercising its rights of defence. First, it points out that it sold its soda ash business to an independent buyer on 6 October 1991 and is no longer active on the market for soda ash in the United Kingdom. Next, it claims that the members of its staff responsible for these matters at the time have left and they are no longer available to give it the necessary assistance. Furthermore, the passage of time since the alleged infringements increases its financial loss, for example by adding to the costs incurred in relation to guarantee charges and/or the effects of interest rates. In any event, the judgment of the General Court in *PVC II*, paragraph 25 above, is contrary to the case-law of the European Court of Human Rights, according to which protection under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), is not dependent upon it being proved that the delay caused actual harm to the interests of an applicant. Breach of a primary ECHR obligation can result only in the annulment of the contested decision and not merely in the payment of compensation and interest.

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

— Findings of the Court

99 As a preliminary point, it should be recalled that in competition matters the principle that action must be taken within a reasonable time must be observed in administrative proceedings pursuant to Regulation No 17 which may lead to the penalties provided for therein, and must also be observed in judicial proceedings (judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 179).

100 In the first place, the applicant claims that the duration of the administrative procedure, taken as a whole, that is to say from the commencement of the investigation to the adoption of the contested decision, exceeded a reasonable time.

101 That argument must be rejected.

102 When a complaint alleging infringement of the principle that action must be taken within a reasonable time is being examined, a distinction must be drawn between the administrative procedure and judicial proceedings. Thus, the period during which the Courts of the European Union examined the legality of Decision 91/300 and the validity of the judgment in *ICI II*, paragraph 16 above, cannot be taken into account in determining the duration of the procedure before the Commission (see, to that effect, judgment of the General Court in *PVC II*, paragraph 25 above, paragraph 123).

103 Second, the applicant criticises the duration of the administrative procedure between the delivery of the judgment in *Commission* v *ICI*, paragraph 19 above, and the adoption of the contested decision.

104 In that regard, it should be borne in mind that that period began on 6 April 2000, the date on which the judgment in *Commission* v *ICI*, paragraph 19 above, was delivered, and ended on 13 December 2000 with the adoption of the contested decision. That stage in the administrative procedure thus lasted eight months and seven days.

105 During that period, the Commission merely made a number of formal amendments to Decision 91/300, in particular by inserting a new passage on 'Proceedings before the Court of First Instance and Court of Justice' concerning the assessment of compliance with the limitation period. 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 undertaken 10 years earlier. It must be acknowledged,

however, that, even in those circumstances, some checks and consultations within the administration may prove essential for the purposes of arriving at such an outcome.

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

107 Third, the applicant criticises, in essence, the duration of the administrative procedure which led to the adoption of Decision 91/300 (see paragraph 94 above).

108 However, if the duration of the administrative procedure from the time of the statement of objections is taken into account together with the duration of the procedure before then (see, in that regard, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 51), it must be noted that that period is not excessively long, in the light of the investigations carried out from April 1989, the requests for information which followed and the initiation of the proceeding by the Commission, on its own initiative, on 19 February 1990. In those circumstances, the duration of the administrative procedure which led to the adoption of the Decision 91/300 cannot be regarded as unreasonable.

109 It must be added that, in any event, a breach of the principle that action must be taken within a reasonable time would justify the annulment of a decision taken following an administrative proceeding in competition matters only in so far as it also constituted an infringement 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 comply with the principle that action must be taken within a reasonable time cannot affect the validity of the administrative procedure (see, to that effect, judgment of the General Court in *PVC II*, paragraph 25 above, paragraph 122).

110 In that regard, the applicant claims that it has been difficult for it to exercise its rights of defence because it sold its soda ash business to an independent buyer on 6 October 1991, is no longer active on the market for soda ash in the United Kingdom, and is unable to contact those members of its staff responsible for these matters at the time for the necessary assistance, as they have left the undertaking.

111 Nevertheless, it should be observed that the Commission did not carry out any measure of inquiry between the delivery of the judgment in *Commission* v *ICI*, paragraph 19 above, and the adoption of the contested decision.

112 Therefore, as compared with the first period which led to Decision 91/300 and which presented no problems with regard to exercising the rights of the defence there was no new evidence taken into account by the Commission which required the rights of the defence to be exercised.

113 In those circumstances, the applicant's rights of defence have not been infringed.

114 Fourth, as regards the judicial proceedings, it is necessary to bear 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. That 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).

115 Furthermore, in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, after having found that the General Court had misconstrued the requirements connected with respect for the principle that action must be taken within a reasonable time, the Court of Justice, for reasons of procedural economy and in order to guarantee an immediate and effective remedy against such unlawfulness in the procedure, upheld the plea alleging that the duration of the procedure was unreasonable and annulled the judgment under appeal in that case in so far as it set the amount of the fine imposed on the appellant at ECU 3 million. In the absence of any evidence that the duration of the procedure had had an impact on the outcome of the case, the Court held that that plea could not lead to the annulment of the judgment under appeal in its entirety, but that an amount of ECU 50 000 would represent just satisfaction, on account of the unreasonable duration of the procedure and thus reduced the amount of the fine imposed on the undertaking concerned.

116 Consequently, in the absence of any evidence that the duration of the procedure has had an impact on the outcome of the case, the possibility that the Court in the present case may have taken longer than a reasonable time, were that to be established, would have no effect on the lawfulness of the contested decision (that approach was upheld in paragraph 140 of the judgment of the General Court of 17 December 2009 in Case T-57/01 *Solvay* v *Commission*, not published in the ECR).

117 It should be added that, in its application, the applicant has not made a request for compensation.

118 Therefore, the second part of the first plea and, accordingly, the first plea as a whole must be rejected.

Second plea: infringement of essential procedural requirements

119 The second plea comprises, in essence, five parts: first, unlawful nature of the preparatory steps taken for Decision 91/300, second, unreasonable delay between the administrative procedure and the adoption of the contested decision, third, the requirement to take fresh procedural steps, fourth, infringement of the right of access to the file and, fifth, infringement of Article 253 EC.

First part: unlawful nature of the preparatory steps taken for Decision 91/300

— Arguments of the parties

120 The applicant submits that the procedural steps taken by the Commission prior to the adoption of a decision represent merely preparatory steps, and are not in themselves capable of forming the subject-matter of an action for annulment. It follows from the accessory nature of those procedural steps prior to the adoption of that decision that, contrary to what is stated in the judgment of the General Court in *PVC II*, paragraph 25 above, the annulment of that decision must also bring about the annulment of those procedural steps prior to the adoption of that decision. In the present case, the Commission could not therefore rely on the administrative procedure prior to Decision 91/300 as constituting the necessary procedural steps for the adoption of the contested decision.

121 Moreover, according to the applicant, the Commission initiated a single administrative procedure covering the alleged infringements of Articles 81 EC and 82 EC. The two cases were separated only at the stage of the adoption of Decisions 91/297 and 91/300. The applicant also recalls that, in *ICI I*, paragraph 17 above, the General Court held that the rights of the defence had been infringed during the administrative procedure. That finding had consequences for Decision 91/300, since the Commission followed exactly the same procedure. Thus, the General Court ought, in *ICI II*, paragraph 16 above, to have annulled Decision 91/300 on grounds of infringement of the rights of the defence.

122 In its reply, the applicant adds that, in *ICI II*, paragraph 16 above, the General Court was highly critical of the Commission's approach to analysing the relevant market, which consisted in separating out the evidence relating to the Article 81 EC allegations and the Article 82 EC allegations, and conducting separate procedures.

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

— Findings of the Court

124 As a preliminary point, it should be borne in mind that Decision 91/300 was annulled because of a procedural defect, namely the failure to authenticate, which concerned solely the definitive adoption of that decision by the Commission.

125 According to settled case-law, annulment of a Community measure does not necessarily affect the preparatory acts, since the procedure for replacing such a measure

may, in principle, be resumed at the very point at which the illegality occurred (Case C-415/96 *Commission* v *Spain* [1998] ECR I-6993, paragraphs 31 and 32, and judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 73).

126 In the present case, since the procedural defect occurred at the final stage of adoption of Decision 91/300, the annulment did not affect the validity of the measures preparatory to that decision which were taken before the stage at which the defect was found (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 75).

127 In addition, as regards the applicant's argument that in *ICI I*, paragraph 17 above, the General Court annulled Decision 91/297 on the grounds of infringement of the rights of the defence, it should be remembered that in *ICI II*, paragraph 16 above, which underlies the present case, the General Court also carried out a detailed examination of the plea alleging infringement of the rights of the defence and rejected it in its entirety (see paragraph 73 of *ICI II*). The Court of Justice subsequently dismissed the appeal brought against that judgment.

128 Moreover, even if the administrative file is common to cases COMP/33.133, Decisions 91/297 and 91/300 concern different types of infringements, on two different markets. An infringement 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 (*ICI I*, paragraph 17 above, paragraph 70, and *ICI II*, paragraph 16 above, paragraph 50; see, also, 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 127).

129 Therefore, the first part of the second plea must be rejected.

Second part: undue delay between the administrative procedure and the adoption of the contested decision

— Arguments of the parties

130 The applicant claims that a period of 10 years elapsed between the procedural steps prior to the adoption of Decisions 91/297 and 91/300, on the one hand, and the contested decision, on the other, which is a denial of protection of the rights of the defence. According to it, undertakings must be given the opportunity to express their views and defend their interests effectively. It follows that decisions, in particular decisions imposing fines, may be adopted only within a reasonable time of the opportunity given to the undertakings to comment, which did not occur in the present case.

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

— Findings of the Court

132 In the first place, as indicated in the context of the examination of the first part of the first plea, the limitation period laid down in Article 3 of Regulation No 2988/74 was suspended for the duration of the proceedings before the General Court and the Court of Justice following the lodging of an appeal against the judgment in *ICI II*, paragraph 16 above. Therefore, the Commission cannot be criticised for awaiting the rulings of the General Court and the Court of Justice before adopting the contested decision. In that regard, the fact that the Commission did not adopt the contested decision during the proceedings before the General Court and the Court of Justice is justified by respect for judicial proceedings and future judgments.

133 Second, as is apparent from the examination of the second part of the first plea, the Commission did not breach the principle that action must be taken within a reasonable time by adopting the contested decision on 13 December 2000.

134 Third, it follows from the examination of the third part of the second plea, carried out hereafter (paragraphs 151, 153 and 168), that the Commission was not required, in the present case, to take fresh procedural steps following the annulment of Decision 91/300 because of a procedural defect which concerned solely the means of definitively adopting that decision.

135 Therefore, the Commission cannot be criticised for not having given the applicant the opportunity to put forward its arguments again following the annulment of Decision 91/300.

136 Consequently, the second part of the second plea must be rejected.

Third part: requirement to take fresh procedural steps

— Arguments of the parties

137 The applicant maintains that the Commission should have taken fresh procedural steps prior to the adoption of the contested decision.

138 First, the applicant claims that the Commission should have sent it a new statement of objections. According to it, the allegations contained in the statement of objections served in 1990 were made in the context of 'the allegation that the "separation of the markets" between the United Kingdom and Continental Western Europe and the "home market" principle arose as a result of an agreement or a concerted practice between Solvay and [the applicant]'. The applicant points out that the Commission's decision on that cartel was annulled by the General Court and that it has no longer been pursued in that regard. Therefore, the applicant is of the opinion that it was entitled to receive, prior to the adoption of the contested decision, a statement of objections which did not repeat the allegation of concertation. That statement of objections should also have set out the Commission's objections in the light of the development of the law between 1990 and 2000, in particular with reference to the definition of the relevant market.

139 Second, the applicant maintains that the Commission should have arranged another hearing and given it the opportunity to set out its arguments. The applicant takes the view that, in the judgment of the General Court in *PVC II*, paragraph 25 above, the Court could not rely on the fact that no new objections were made. Undertakings must be given the opportunity to comment on any objections made against them, in particular in the light of new matters which might be relevant to their defence.

140 According to the applicant, the right to be heard concerns not only matters of fact, but also matters of law, as the General Court recognised in *ICI I*, paragraph 17 above, and the judgment of the General Court in *PVC II*, paragraph 25 above. Moreover, in Case C-261/89 *Italy* v *Commission* [1991] ECR I-4437, and Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, the Court of Justice acknowledged that the right to be heard applies before the adoption of a second decision that is substantially the same as the first decision. In the present case, a number of factors, namely the fact that the applicant left the relevant market in 1991, the annulment of Decision 91/297 and the findings in the anti-dumping decisions in the 90s, have a bearing on how the objections should be considered.

141 In addition, the right to be heard anew is evident from the Rules of Procedure of the General Court. Where the Court of Justice remits a case to the General Court for decision, Article 119(1) of the Rules of Procedure gives the parties a right to lodge further observations, notwithstanding that the written procedure would ordinarily have been considered to be complete. In the same way, Article 4 of Protocol 7 to the ECHR provides that, following a prior final decision, a new decision may only be taken where the case is reopened in accordance with the law and penal procedure of the State concerned.

142 The applicant infers therefrom that the General Court erred in law in finding that the rights of the defence had been adequately protected by the opportunities given to the applicant to be heard during the administrative procedure.

143 Third, the applicant notes the essential role of the Hearing Officer in ensuring that, before any decision is taken, the parties concerned have been able to fully exercise their rights of defence and that the essential matters of fact or law raised by them are communicated to the Director General for Competition, to the Members of the Commission and to the Advisory Committee. It also claims that, as its rights of defence imply an opportunity to be heard again prior to the adoption of the contested decision, it was equally entitled to, and was wrongly denied, the involvement of the Hearing Officer.

144 Fourth, the applicant considers that, taking account of the fact that it was entitled to be heard anew before the adoption of the contested decision, the Commission should also have consulted the Advisory Committee again. In the judgment of the General Court in *PVC II*, paragraph 25 above, the General Court was wrong to hold that consultation with the Advisory Committee was necessary only in situations where the undertakings had to be heard. In addition, it follows from Regulation No 17 that a separate consultation is required for each separate decision, regardless of whether the undertakings have also been heard, and regardless of the similarity between the decisions. Consequently, even if the contested decision had contained only editorial

amendments to Decision 91/300, the Commission should have consulted the Advisory Committee again before adopting the contested decision. Furthermore, the composition of the Advisory Committee would undoubtedly have changed substantially and the views of the Committee in 2000 would not necessarily coincide with the views expressed in 1990.

145 Fifth, the applicant claims that, in adopting the contested decision, the College of Commissioners should have had the opportunity to consider all the relevant facts, circumstances and legal matters at that time. It was denied that opportunity as a result of the failure of the Commission either to hear from the undertakings again or to consult the Advisory Committee again. The applicant infers that if the College of Commissioners had known all the facts, it might not have arrived at the same decision.

146 Sixth, the applicant points out that the Commission's spokesperson, whose words are reproduced in the Reuters' press release of 12 December 2000, indicated that the contested decision would be adopted at the College of Commissioners' meeting of 13 December 2000. It follows from those words that the contested decision had already been adopted before that meeting, in contravention of the Commission's internal Rules of Procedure and the principle of collegiality.

147 Lastly, the applicant requests the Court to order the production of the file submitted to the College of Commissioners and of the minutes of the meeting and all annexed documents.

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

— Findings of the Court

149 First, the applicant claims, in essence, that it ought to have received a new statement of objections in 2000, since the allegations contained in the statement of objections which was sent to it in 1990 were based on a 'separation of the markets', which was the result of an agreement or concerted practice between Solvay and the applicant and which was penalised in Decision 91/297, a decision which had then been annulled by *ICI I*, paragraph 17 above.

150 However, as is apparent from paragraph 126 above, the annulment of Decision 91/300 does not affect the validity of prior procedural steps and, in particular, the statement of objections.

151 The Commission was not therefore, as a result of that annulment alone, required to send a new statement of objections to the applicant.

152 Furthermore, in the context of the statement of objections which was sent to the applicant in 1990, the Commission had set out a number of objections, and the complaints which alleged infringement of Article 81 EC, on the one hand, and of Article 82 EC, on the other, were autonomous and based on different evidence. Accordingly, the fact that the General Court annulled Decision 91/297 for infringement of the right of access to the file cannot cast doubt on the complaint that the applicant abused its dominant position on the relevant market.

153 Second, as regards the applicant's argument that the Commission should have heard it again, it should be borne in mind that, where, following the annulment of a decision

imposing sanctions on undertakings which have infringed Article 82 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, judgment of the General Court in *PVC II*, paragraph 25 above, paragraphs 246 to 253, upheld by judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraphs 83 to 111).

154 As for 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 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, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 93).

155 In the present case, the Commission repeated virtually the entire content of Decision 91/300. It supplemented the contested decision solely by a passage concerning the proceedings before the General Court and the Court of Justice.

156 Therefore, it must be held that the contested decision and Decision 91/300 have substantially the same content and are based on the same grounds.

157 Consequently, in accordance with the case-law cited in paragraphs 153 and 154 above, the Commission was not required in the present case to hear the applicant again before adopting the contested decision.

158 Third, as regards the applicant's argument that it ought to have benefited from the involvement of the Hearing Officer before the adoption of the contested decision, it should be recalled that the Commission created the role of Hearing Officer, with effect from 1 September 1982, under a communication entitled 'Notice on proceedings implementing the competition rules of the EEC and ECSC Treaties (Articles [81 EC] and [82 EC]; Articles 65 and 66 ECSC)' (OJ 1982 C 251, p. 2).

159 In the notice referred to in paragraph 158 above, the Commission defined the role of the Hearing Officer as follows:

'The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. He shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

In performing his duties he shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of Justice.'

160 The duties of the Hearing Officer were set out in a Decision of 24 November 1990, Article 2 of which was drafted in terms identical to those of the initial definition, then in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of Hearing Officers in competition procedures before the Commission (OJ 1994

L 330, p. 67). That decision, which was in force at the time the contested decision was adopted, replaced and repealed the two preceding decisions. Its Article 2 was drafted in similar terms to those of the initial definition.

161 It follows from the very substance of the task entrusted to the Hearing Officer, who intervenes in the procedure prior to adoption of the contested decision, that the intervention in question was necessarily linked to the undertakings being heard in view of the possibility of a decision being adopted.

162 In those circumstances, it must be held that, as a new hearing was not necessary in the present case following the annulment of Decision 91/300, a fresh intervention of the Hearing Officer in the circumstances provided for in the Decision of 24 November 1990, which had meanwhile entered into force, was not required either (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 127).

163 Fourth, as regards the applicant's argument that the Advisory Committee ought to have been consulted prior to the adoption of the contested decision, it should be borne in mind that Article 10 of Regulation No 17, in the version in force at the material time, provides as follows:

'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.'

164 In addition, 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) 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.'

165 According to settled 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, p. 54, and judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 115).

166 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), in force at the time when the contested decision was adopted, Article 2(1) of which is drafted in terms similar to those of Article 1 of Regulation No 99/63.

167 In the present case, it must be held that, as stated in the contested decision, the Advisory Committee on Restrictive Practices and Monopolies was consulted prior to Decision 91/300. The applicant does not challenge the existence or lawfulness of that consultation.

168 Therefore, inasmuch as the contested decision does not contain substantial amendments compared with Decision 91/300, the Commission was not required to hear the applicant again before adopting the contested decision, and was not required to arrange for fresh consultation of the Advisory Committee either (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 118).

169 Furthermore, under Article 10(4) of Regulation No 17, in the version in force 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.'

170 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).

171 Moreover, there is no a general principle requiring continuity in the composition of an administrative body handling a procedure which may lead to a fine (judgment of the General Court in *PVC II*, paragraph 25 above, paragraphs 322 and 323).

172 Fifth, as regards the applicant's argument that, when adopting the contested decision, the College of Commissioners should have had the opportunity to consider all the relevant facts, circumstances and legal matters at that time, it should be recalled that the Commission did not err in law by not arranging — following the annulment of Decision 91/300 — a new hearing for the undertakings concerned before adopting the contested decision.

173 Furthermore, as has been observed in paragraphs 162 and 167 above, a fresh intervention of the Hearing Officer and a fresh consultation of the Advisory Committee were not required in the present case.

174 In those circumstances, contrary to what the applicant claims, the file submitted to the members of the College of Commissioners did not have to contain, inter alia, a new report by the Hearing Officer or a fresh report on the consultation of the Advisory Committee. Consequently, the applicant's argument concerning the composition of the file is based on a false premiss, and its argument is accordingly without legal basis (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraphs 130 to 133).

175 Sixth, as regards the applicant's argument that the contested decision had been adopted before the College of Commissioners' meeting, it must be borne in mind that, according to 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 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).

176 Compliance with the principle of collegiality, and especially the need for decisions to be deliberated upon together, are bound to 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, 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 64 above, paragraphs 64 and 65).

177 In the present case, the applicant relies on the fact that, according to a press release from the Reuters Agency on 12 December 2000, the Commission spokesperson announced that the Commission would adopt the same decision again on 13 December 2000.

178 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.

179 Accordingly, it is not necessary to order the Commission to produce all its internal documents on the adoption of the contested decision and, in particular, the minutes of the College of Commissioners' meeting and the documents annexed thereto, or all the documents submitted to the College of Commissioners at that meeting.

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

Fourth part: infringement of the right of access to the file

— Arguments of the parties

181 The applicant claims that, after receiving the contested decision, it asked for access to the file in the early part of 2001, but the Commission refused. The applicant had also been refused access to the file in 1990.

182 The applicant maintains that the Commission should have given it access to the file notwithstanding the fact that the contested decision had already been taken, for several reasons. First, the Commission had deprived it of a fresh opportunity to ask for access to the file when it took the contested decision without reopening the administrative procedure and indeed without even indicating to the applicant its intention to do so. Second, the Commission, which had refused to grant access to the file in 1990, had an opportunity to put right that error when adopting the contested decision. Third, the Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81 EC] and [82 EC], Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3; 'the Notice on access to the file') established rules which were more favourable to undertakings regarding access to the file. The applicant thus takes the

view that, like any other addressee of a decision adopted in 2000, it should have benefited from those new rules.

183 The applicant acknowledges that its arguments on access to the file were rejected in *ICI II*, paragraph 16 above. Nevertheless, it claims that that does not prevent the Court making findings in the applicant's favour in the present case.

184 According to the applicant, it is reasonably certain that the file contained correspondence and documentation from its United Kingdom customers, in particular glass manufacturers, from its competitors in the United Kingdom and from United States' importers. The written answers and documents emanating from United Kingdom glass manufacturers and customers might well have been helpful to its defence relating to the allegations of dominance and abuse. Likewise, information from the applicant's competitors could have shed light on aspects of the contested decision. Furthermore, the documents from producers in Continental Western Europe could have been helpful to the applicant on the analysis of the relevant market and, in particular, as to whether there was any appreciable effect on competition or trade between Member States. It follows that the General Court erred in law in *ICI II*, paragraph 16 above, in finding that there was no infringement of the applicant's rights of defence.

185 Furthermore, the applicant claims that it has the right to raise the issue of access to the file again. First, when the General Court examined the issue of access to the file in *ICI II*, paragraph 16 above, it did so on the basis of the numbered list produced by the Commission. But that list did not identify fully the documents on the file. Second, following the annulment of Decision 91/300, the applicant had no reason to devote time and money in cross-appealing on the issue of access to the file, all the more so since it was of the opinion that *ICI II*, paragraph 16 above, would probably be upheld on appeal. The applicant takes the view that 'if the Commission had been successful,

[the applicant] could then have appealed [on that] point after any re-hearing of the merits by the [General Court]'.

186 In its reply, the applicant adds that the issue of access to the file is not *res judicata*. According to it, that issue was not actually or necessarily settled in *ICI II*, paragraph 16 above. It argues that, even if it had the theoretical possibility to cross-appeal on the issue, it cannot be penalised for its decision not to do so where such a cross-appeal was unnecessary in view of *Commission* v *BASF and Others*, paragraph 64 above. Moreover, relying on the Opinion of Advocate General Jacobs in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, the applicant claims that it was not clear beyond doubt or obvious that a cross-appeal was necessary or that it would have served any purpose. In that regard, it states that, if the Commission's claim of *res judicata* were to be upheld, that would encourage extensive cross-appeals and would needlessly add to the burden on the Court.

187 In addition, the General Court's findings on access to the file were wrong in *ICI II*, paragraph 16 above. According to the applicant, it is sufficient to establish that some of the documents not disclosed might have had a significance which ought not to have been disregarded, as the General Court stated in *ICI I*, paragraph 17 above. Furthermore, if the Court were to be required to rule today on the issue of access to the file which was before it in the *ICI II* case, paragraph 16 above, it is by no means clear that it would come to the same conclusion as in that case on account of the evolution of the law. In that regard, the applicant relies, inter alia, on the Notice on Access to the File.

188 The applicant also maintains that, following the measures of inquiry ordered by the Court giving it access to the file, it noted important weaknesses in the Commission's handling of the documents, which had a number of consequences.

189 First, the applicant claims that the Commission could not conceivably have fulfilled its obligation to reach its conclusions based on a full and fair assessment of all the evidence available to it.

190 Second, the applicant points out that the Commission lost at least five files. According to the applicant, one and a half files must have contained correspondence concerning Article 11 of Regulation No 17 exchanged between it and the Commission and three and a half files must have contained correspondence between its customers, its competitors in the United Kingdom and the Commission. The loss of those files has resulted in the applicant being severely handicapped in advancing its defence before this Court. The applicant asserts that, had it also had access to independent information from its customers in the United Kingdom, it would have had additional evidence to support its case and it is highly likely that the Commission would have reached a different conclusion, in particular, as regards the existence of a dominant position, the abuse of a dominant position, the effect of trade between Member States and the fine.

191 Third, the applicant states that some of the existing documents which it consulted would also have supported its case and would have enabled it to cast doubt on a number of conclusions reached by the Commission in the contested decision.

192 The Commission contends that the 'right of access to the file is a matter which is *res judicata* against [the applicant]'. According to it, any request for access to the file following the adoption of a decision is devoid of purpose.

193 As regards the applicant's observations submitted following the measures of inquiry ordered by the Court, the Commission states that those measures confirm that the applicant's assertions made during the administrative procedure, and in its pleadings, in relation to breach of its rights of defence are utterly baseless. After having now seen a file comprising some 25 000 documents, the applicant has found only some 60

documents which are said to support its case. However, according to the Commission, not one of them would in fact have been of the slightest use to the applicant.

194 As regards the lost files, confirmed following the measures of inquiry ordered by the Court, the Commission considers that that fact does not of itself have any bearing on the legality of the contested decision and the importance of the fact that 5 files out of 71 are missing must not be overestimated. According to it, the applicant gives no reason for thinking that those files must have contained evidence in its favour, which it was not shown, but which would have helped it refute the allegations in the statement of objections. The Commission adds that, even if those files contained correspondence between the applicant's customers and competitors, as the applicant claims, that would not have been helpful to it, since in that case it could only be material which either was of no interest at all and therefore had not been used, or material which, at best, was similar to that which the applicant had seen and from which it had not been able to derive any arguments.

195 In relation to the discrepancies in the numbering and the poor handling of the documents relied on by the applicant, the Commission contends that the test for whether the rights of defence have been complied with is whether a party saw the document and, if it did not, whether the document would have given it an opportunity to raise an argument it had not been able to raise at the time. That depends exclusively on seeing the document, not on which file the Commission put it in, or on how the Commission numbered its files.

— Findings of the Court

196 At the outset, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration

of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38, and Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20).

197 According to settled case-law, a judgment's status as *res judicata* is such as to bar the admissibility of an action if the proceedings disposed of by the judgment in question were between the same parties, had the same purpose and the same legal basis (see, to that effect, Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9; Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; and Case T-28/89 *Maindiaux and Others* v *CES* [1990] ECR II-59, paragraph 23), those conditions necessarily being cumulative (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 37).

198 The principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14, and order of the Court of Justice in Case C-277/95 P *Lenz* v *Commission* [1996] ECR I-6109, paragraph 50).

199 In *ICI II*, paragraph 16 above, the General Court examined the plea alleging infringement of the rights of the defence arising from the Commission's refusal to grant the applicant access to the file.

200 In order to determine whether the plea was well founded, in *ICI II*, paragraph 16 above, the Court briefly examined the Commission's substantive objections contained in its statement of objections and in Decision 91/300.

201 The first part of that plea in *ICI II*, paragraph 16 above, alleged non-disclosure to the applicant of documents which may exculpate it. First, as regards the argument that the Commission's refusal to grant access to the files relating to producers could have affected its defence, the Court held that the findings made in Decision 91/300 regarding the dominant position, the abuse of the dominant position and the effect on trade between Member States would not be called into question by the documents which were not disclosed. Second, as regards the refusal to grant access to the documents emanating from the applicant itself, the Court held that the applicant was able to rely on documents coming from its own domaine. The Court concluded therefore, that in the circumstances of the case, the Commission rightly refused to grant the applicant access to those files and to provide it with a list of the documents contained in them.

202 The second part of that plea in *ICI II*, paragraph 16 above, alleged a failure to disclose certain inculpatory documents to the applicant. The Court held that, as regards the Commission's findings concerning the special rebate which one company was said to have offered in the United Kingdom, the Commission's procedure was hardly reconcilable with the rights of the defence, but that defect did not affect the applicant in the exercise of its rights of defence. In addition, the other arguments submitted by the applicant fell to be examined in the substance of the case and were unconnected with the plea alleging infringement of the rights of the defence.

203 Consequently, the Court rejected the plea alleging infringement of the rights of the defence in its entirety.

204 Next, the Court examined the plea alleging an irregular authentication of Decision 91/300 and ordered the annulment of that decision.

205 Following the dismissal of the appeal in *Commission* v *ICI*, paragraph 19 above, *ICI II*, paragraph 16 above, has become a definitive judicial decision.

206 In accordance with the case-law cited in paragraph 197 above, to determine whether the issue of access to the file is *res judicata*, it is necessary to consider whether *ICI II*, paragraph 16 above, and the present case have the same parties, have the same purpose and the same legal basis.

207 As regards the condition that the parties be the same in both actions, it must be held that that condition is met in the present instance. As in *ICI II,* paragraph 16 above, the present case opposes the applicant and the Commission. As regards the conditions that the purpose and submissions be the same, it should be noted at the outset that, formally, the Commission adopted two decisions, namely Decision 91/300 and the contested decision. However, it is clear from the explanations above (see, inter alia, paragraphs 24, 111, 112 and 156 above) that the content of the contested decision is identical to that of Decision 91/300, except for a new part entitled 'Proceedings before the Court of First Instance and the Court of Justice', and that the contested decision is based on the same grounds as Decision 91/300. The Commission was justified in adopting the contested decision in the same terms as Decision 91/300 without being required to take fresh procedural steps following the annulment of Decision 91/300, inasmuch as the procedural defect concerned only the means of definitively adopting that decision and since the annulment did not affect the validity of the preparatory measures for that decision.

208 Inasmuch as the Commission did not carry out any measure of investigation between the delivery of the judgment in *Commission* v *ICI*, paragraph 19 above, and the adoption of the contested decision, the content of the contested decision is identical to that of Decision 91/300 — except for the passage referring to the proceedings before the General Court and the Court of Justice — and the applicant is again requesting access to the file, it must be held that the action has the same purpose and legal basis.

209 As the conditions that the parties to the action, the purpose of the action and the legal basis be the same are met in the present case, in accordance with the case-law cited in paragraph 197 above, it must be held that the point of law concerning access to the file in Case COMP/33.133–D: soda ash — ICI has been ruled on by the Court and therefore is *res judicata.*

210 That status of *res judicata* prevents that point of law from being submitted to and examined by the Court again.

211 It follows that the fourth part of the second plea must be rejected as inadmissible.

212 Nevertheless, for the sake of completeness, even if the point of law concerning access to the file were not to be *res judicata*, the observations submitted by the applicant on 13 October 2005, following consultation of the file in the context of a measure of organisation of procedure, would not be such as to invalidate the General Court's findings in *ICI II*, paragraph 16 above.

213 As regards the applicant's argument that some of the documents would have supported its case and would have called into question a number of conclusions reached

by the Commission in the contested decision, the applicant has not shown that the non-disclosure of those documents and information could have influenced, to its detriment, the conduct of the administrative procedure and the Commission's decision, as the case-law demands in relation to inculpatory evidence (see, to that effect, *Hoechst* v *Commission*, paragraph 71 above, paragraph 146 and the case-law cited).

214 The applicant has not shown that, if it had been able to rely on documents contained in the file during the administrative procedure, it would have been able to rely on evidence which conflicted with the inferences made by the Commission at that stage, and could therefore have influenced, in some way, the conclusions drawn by the Commission in its decision, at least in relation to the gravity and duration of the conduct for which the applicant was criticised and, therefore, the amount of the fine.

215 As regards the existence of a dominant position, the applicant claims that, if it had had access to certain documents of which it has become aware following the consultation of the file in the context of a measure of organisation of procedure, that would have enabled it to refute the Commission's allegation that it held a dominant position on the relevant market. The applicant takes the view that it could, in particular, have relied on the documents emanating from Solvay, the German producers and its customers in the United Kingdom to show the importance of substitute products such as caustic soda, cullet and dolomite, and illustrate the competitive pressure exerted by the imports from the United States.

216 In that regard, it must first be observed that the Commission essentially relied on the applicant's historic market share of 90% to establish that the applicant occupied a dominant position on the relevant market. There are no grounds for presuming that the applicant might have discovered, in the missing files, documents casting doubt on

the finding that it held a dominant position on the market for soda ash (see, to that effect, *ICI II,* paragraph 16 above, paragraph 61). Moreover, according to the case-law, very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, paragraph 41, and Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154). The applicant has not pleaded any fact which is capable of constituting such exceptional circumstances. Lastly, even if such facts did exist and had been referred to in the documents contained in the missing files, the applicant could not fail to be aware of them in view of the circumstances of the present case, so that its rights of defence have not been infringed in that regard.

217 Next, as regards the applicant's argument relating to substitute products, the Commission has never disputed that caustic soda and cullet are to a certain degree substitutable for soda ash, as is apparent from recitals 129 to 134 of the contested decision. However, it found that that limited substitutability did not preclude the applicant having a dominant position on the relevant market. Furthermore, as the applicant was, at the material time, the only producer of soda ash in the United Kingdom, it was best placed to know the situation on the relevant market and to provide the necessary information to the Commission in relation to the issue of the substitutability of caustic soda and cullet for soda ash. Therefore, contrary to what the applicant claims, it had absolutely no need for the Continental producers' documents concerning other markets, or documents emanating from its customers in the United Kingdom, to try to show that it was not dominant on the relevant market by reason of the partial substitutability of caustic soda and cullet for soda ash. Regarding the substitutability of dolomite for soda ash, it must be held that the applicant is relying on a document emanating from a competitor, which related to a visit made to its own factory. Therefore, the applicant could not fail to be aware of the existence of such a document or, at the very least, the information which it was likely to contain. In any event, the applicant has not shown that the information relating to the substitutability of dolomite for soda ash could have influenced the Commission's assessment regarding its dominant position on the relevant market.

218 Lastly, as regards the argument that the documents of its customers in the United Kingdom or of the Continental producers would illustrate the competitive pressure exerted by American producers on the relevant market, the impact of the American competitors is analysed in detail by the Commission in the contested decision, which takes account of those imports and which explains that American competition was constrained by anti-dumping measures (recitals 51 to 54 and 128). In any event, taking account of the fact that, at the material time, the applicant was the only producer of soda ash in the United Kingdom, it necessarily had available to it details relating to the relevant market and the effect of imports coming from the United States on that market to defend itself during the administrative procedure.

219 Therefore, it must be held that, in its observations of 13 October 2005, the applicant does not submit any arguments which establish that the non-disclosure, during the administrative procedure, of documents consulted and documents allegedly contained in the missing files could have influenced to its detriment the conduct of that procedure and the content of the contested decision as regards the existence of its dominant position on the relevant market.

220 As regards abuse of the dominant position, the applicant claims that, if it had had access, during the administrative procedure, to certain documents of which it became aware after consulting the file in the context of a measure of organisation of procedure and the independent information coming from customers and competitors in the United Kingdom allegedly contained in the missing files, that would have enabled it to show that its rebates were not, by their very nature, intended to exclude competitors and they were essentially a legitimate means of competition. According to the applicant, various documents illustrate that the granting of rebates constituted usual practice for Continental producers, which would have been an important factor for showing that its rebates were perfectly compatible with accepted practice in the industry. In addition, it claims that the documents, emanating in particular from Akzo,

referring to the dual-sourcing or second supplier policy, would have been useful to it in examining the issue whether its rebates had the effect of excluding competitors as the Commission alleged.

221 In that regard, the applicant's argument that top-slice rebates are a usual practice is not such as to show that those rebates, when granted by an undertaking in a dominant position, comply with Article 82 EC. Therefore, consultation of documents illustrating the existence of such a practice would have been of no use to the applicant.

222 Next, it should be pointed out that the loyalty-inducing nature of the rebate system implemented by the applicant is apparent from specific documentary evidence. In that part of the contested decision devoted to 'the facts', the Commission cited, in recitals 61 to 82, numerous documents relating to top-slice rebates from which it is apparent that they did not reflect efficiency gains or economies of scale and that, in contrast to quantity discounts linked solely to the volume of purchases, those rebates sought to exclude competitors from the market. 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 loyalty-inducing 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.

223 Lastly, as regards the argument concerning the second supplier policy, it must be observed that the Commission had knowledge of that fact and never disputed it, as is apparent from recital 23 of the contested decision. Therefore, even if the applicant

had been aware of documents illustrating that policy, the Commission's conclusions on abuse of the dominant position would not have been different for that reason.

224 Therefore, it must be held that, in its observations of 13 October 2005, the applicant does not submit any arguments which establish that the non-disclosure, during the administrative procedure, of documents consulted and documents allegedly contained in the missing files could have influenced to its detriment the conduct of that procedure and the content of the contested decision as regards the applicant's abuse of its dominant position.

225 As regards the effect on trade between Member States, the applicant claims that, if it had had access, during the administrative procedure, to certain documents which it became aware of after consulting the file in the context of a measure of organisation of procedure and the information coming from its customers in the United Kingdom allegedly contained in the missing files, that would have enabled it to refute the Commission's analysis regarding the effect on trade between Member States. It considers that various documents would have supported its argument that the partitioning of national markets was not due to its alleged conduct seeking to exclude competitors, but to factors such as transport costs, exchange rate movements and unilateral decisions of producers not to supply certain markets in order to avoid the risk of retaliatory sales.

226 In that regard, the Commission's analysis in relation to the effect on trade between Member States is based, inter alia, on documents emanating from the applicant itself and, in particular, on the applicant's strategy document of 28 June 1985, cited in recital 66 of the contested decision, from which it is apparent that the applicant sought to prevent or eliminate all imports of dense soda ash into the United Kingdom, with the exception of those of General Chemical (recitals 66 to 70 of the contested decision). Where, as in the present case, the Commission relied in the contested decision solely

on specific documentary evidence to prove the infringement, the applicant must endeavour to prove to what extent other evidence might have cast doubt on the effect on trade between Member States or, at the very least, which different light might have been shed on the specific documentary evidence that was not disputed.

227 Furthermore, in relation to the partitioning of the national markets, during the administrative procedure the applicant was able to develop arguments based on the significance of transport costs, exchange rate movements and retaliatory sales in the light of its own experience on the market, without needing to rely on documents emanating from other producers.

228 Therefore, it must be held that in its observations of 13 October 2005 the applicant does not submit any arguments which establish that the non-disclosure, during the administrative procedure, of documents consulted and documents allegedly contained in the missing files could have influenced to its detriment the conduct of that procedure and the content of the contested decision as regards the effect of the applicant's conduct on trade between Member States.

229 As regards the amount of the fine, the applicant asserts that, even if the arguments submitted in its observations were not able to influence the Commission's assessment concerning an infringement of Article 82 EC, all those arguments could have had an influence on the Commission's assessment of the fine. It claims that, if it had had access, during the administrative procedure, to certain documents of which it became aware after consulting the file in the context of a measure of organisation of procedure and the information coming from its customers in the United Kingdom contained in the missing files, that would have enabled it, inter alia, to rely on evidence 'to

show that in practice there was no relevant foreclosure of sales opportunities to any competitor [and] that there were no … adverse effects on inter-state trade'.

230 In that regard, suffice it to note that the applicant refers to arguments which it submitted relating to the Commission's assessment, in the contested decision, of abuse by the applicant of its dominant position and of the effect on trade between Member States, in respect of which it has been pointed out, in paragraphs 218 to 226 above, that access to the file would not have enabled the applicant to rely on evidence which would cast doubt on those assessments.

231 Therefore, it must be held that in its observations of 13 October 2005 the applicant does not submit any arguments which establish that the non-disclosure, during the administrative procedure, of documents consulted and documents allegedly contained in the missing files could have influenced to its detriment the conduct of that procedure and the content of the contested decision as regards the amount of the fine.

Fifth part: infringement of Article 253 EC

— Arguments of the parties

232 The applicant claims that the Commission was under no obligation to take a new decision following the annulment of Decision 91/300. The procedure followed was

highly unusual in that the Commission did not serve a fresh statement of objections on it, and did not organise a new hearing or fresh consultation of the Advisory Committee. In those circumstances, the Commission's failure to explain the way it proceeded constitutes an infringement of Article 253 EC.

233 The Commission also acted in breach of its Rules of Procedure (OL 2000 L 308, p. 26) and contrary to the principle of sound administration by failing to give reasons in the contested decision and by 'not re-taking other decisions which had been annulled for similar reasons as those in the 1990 … case'. In that regard, the Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, which is annexed to the Commission's Rules of Procedure, provides that differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand and that any exceptions to that principle must be duly justified. Moreover, the failure to give reasons in the contested decision on important issues, in particular, in relation to the legal assessment and the fine demonstrate that the Commission has infringed Article 253 EC.

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

— Findings of the Court

235 It must be held that the claim put forward by the applicant has no basis in fact. In recitals 162 to 172 of the contested decision, the Commission gave reasons for choosing to adopt a new decision following the annulment of Decision 91/300.

236 The fact that the Commission did not serve a fresh statement of objections on the applicant, did not hear it again, and did not consult the Advisory Committee again, cannot constitute insufficient reasoning for the decision. Those arguments raised by the applicant are essentially concerned only with challenging the validity of the Commission's assessment concerning those various questions and must therefore be rejected (see, to that effect, judgment of the General Court in *PVC II*, paragraph 25 above, paragraph 389).

237 Likewise, contrary to what the applicant maintains, the Commission did not deviate from a consistent line of decisions in deciding to record the infringements found by it in a new decision following the annulment of Decision 91/300. It simply confirmed its initial decision to penalise those infringements, which did not run counter to Article 233 EC, since that provision required it only to take measures to comply with the judgment in *Commission* v *ICI*, paragraph 19 above, namely to remedy the sole illegality established in that judgment (see, to that effect, judgment of the Court of Justice in *PVC II*, paragraph 39 above, paragraph 451). In addition, the applicant refers to no other case which was similar to the present case and was treated differently by the Commission.

238 Therefore, the fifth part of the second plea must be rejected as, consequently, must the second plea in its entirety.

Third plea: incorrect assessment of the relevant market

Arguments of the parties

239 Referring to Joined Cases T-125/97 and T-127/97 *Coca Cola* v *Commission* [2000] ECR II-1733, the applicant states that, in the context of the action for annulment

of Decision 91/300, it did not dispute the Commission's finding that the United Kingdom was the relevant 'geographical market', or that the product market was the market for soda ash (dense and light). Nevertheless, the applicant contends that the Commission simply cannot reproduce, in the contested decision, findings as to the relevant product and geographical market based on an analysis made 10 years earlier. The Commission ought to have at least considered whether those findings could still be made in the light of intervening law and practice in the period between the two decisions. The contested decision is therefore vitiated by a factual error and a lack of reasoning. In addition, there is nothing in the contested decision to indicate that, in 2000, the Commission carried out any of the investigations referred to in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

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

Findings of the Court

241 First, the applicant does not dispute that, in the course of adopting Decision 91/300, the Commission analysed the structure of the market and competition. Likewise, it does not claim that, in the course of that decision, the Commission committed an error in defining the geographical market and the product market.

242 The applicant merely states that the Commission ought to have considered whether those findings could still be made in the light of intervening law and practice in the period between the adoption of Decision 91/300 and the adoption of the contested decision. It refers to *Coca-Cola* v *Commission*, paragraph 239 above, in which the Court held, inter alia, that a finding of a dominant position by the Commission is the outcome of an analysis of the structure of the relevant market and of competition prevailing at the time the Commission adopts each decision (paragraph 81).

243 However, it should be borne in mind that, according to the case-law, the institution whose measure is annulled is bound only within the limits of what is required to ensure implementation of the judgment annulling that measure and the procedure for replacing such a measure may thus be resumed at the very point at which the illegality occurred (see judgment of 29 November 2007 in Case C-417/06 P *Italy* v *Commission*, not published in the ECR, paragraph 52 and the case-law cited). In the present case, Decision 91/300 was annulled by the General Court on the ground that the authentication of that decision had been effected after it had been notified, which constituted an infringement of an essential procedural requirement within the meaning of Article 230 EC.

244 The Commission could therefore resume its assessment at the point of authentication, without having to examine whether its findings in respect of the relevant market which it made before adopting Decision 91/300 were still valid in the light of factual and legal circumstances at the time when it adopted the contested decision.

245 The applicant's argument relating to paragraph 81 of *Coca-Cola* v *Commission*, paragraph 239 above, cannot invalidate that conclusion. The statement that a finding of a dominant position is the outcome of an analysis of the structure of the market and of competition prevailing at the time the Commission adopts each decision does not imply that the Commission must, in all cases, carry out a fresh analysis of the relevant market at the time when the contested decision is adopted. In the present case, the Commission was not required to carry out such an analysis since that was not necessary to implement the judgment in *ICI II*, paragraph 16 above. Therefore, the applicant's arguments alleging a factual error and a lack of reasoning, which were set out in paragraph 239 above, are based on an inaccurate premiss and must also be rejected.

246 Accordingly, the third plea must be rejected.

Fourth plea: absence of a dominant position

Arguments of the parties

247 According to the applicant, it is accepted that an undertaking which holds over 90% of a product market will normally be dominant for the purposes of Article 82 EC. However, a high market share is not conclusive of dominance. In the contested decision, the Commission did not assess correctly certain factors which prevented the applicant from behaving to an appreciable extent independently of its competitors and customers and ultimately of consumers, within the meaning of *Hoffmann-La Roche* v *Commission*, paragraph 216 above. Thus, for many years, its customers were in a position to determine the amount of soda ash that they would purchase from it, the amount that they would purchase from importers and the amount of substitute products purchased. Its customers established relationships with suppliers in both Eastern Europe and the USA in order to secure alternative sources and to ensure that the applicant remained price and quality competitive notwithstanding its large market share. In that regard, its customers and in particular the glass manufacturers had countervailing buying power as a consequence of which it was not in a dominant position. The applicant points out that the Commission applied the principle of countervailing buying power in Decision 1999/641/EC 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). In the present case, the Commission has failed to recognise that countervailing buyer power

constituted an effective constraint on any exercise of market power by the applicant. Furthermore, the Commission failed to take account of the availability of substitute products and the fact that they are responsible for the fall in its volume of sales since 1979.

248 Similarly, the Commission failed to take account of the fact that at least one glass producer in Continental Western Europe converted from soda ash to caustic soda. The applicant also contends that the Commission was not aware of the significance of cullet as a limiting factor on its market power, or that of the other substitutes, such as dolomite, which the Commission does not even mention in the contested decision.

249 The applicant acknowledges that its customers perceived General Chemical and Brenntag as second suppliers. However, it does not accept that that perception can constitute a factor indicative of its market power. According to the applicant, for its profit to be eroded it would require only one major customer to promote a secondary supplier to a main supplier, or for several customers to increase the amount of their purchases from the secondary supplier.

250 In addition, the Commission's assertion that the applicant maintained a higher price level than in other Member States is incorrect and is not supported by any evidence. The fact that its prices tended to be slightly higher reflects, inter alia, the effect on its costs of the dramatic fall in the demand for soda ash, which did not occur to such an extent in other markets. It also reflects factors such as exchange rates and fuel costs.

251 The applicant admits that, in order to maintain the viability of its two soda ash plants, its strategy was to maintain sufficient volume of sales, which implied seeking to achieve increased sales and also meeting competitive offers from alternative

suppliers. On the other hand, it disputes seeking to reduce to a minimum the presence or effectiveness of General Chemical or Brenntag as competitors.

252 Lastly, the various anti-dumping decisions and regulations adopted by the Commission during the period in question found evidence of dumping and of material injury, for example, in Regulation (EEC) No 2253/84 of 31 July 1984 imposing a provisional anti-dumping duty on certain imports of certain sodium carbonate originating in the United States of America and accepting undertakings in respect of other imports of the same product (OJ 1984 L 206, p. 15). Such a situation is not consistent with the existence of a dominant position. According to the applicant, by proceeding to impose anti-dumping measures, the Commission presumably took the view that they were not likely significantly to reduce competition or to create a monopoly and they were in the Community interest.

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

Findings of the Court

254 According to settled 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 hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers (Case 27/76 *United Brands and United Brands Continental* v *Commission* [1978] ECR 207, paragraph 65, and Case T-201/04 *Microsoft*

v *Commission* [2007] ECR II-3601, paragraph 229). Unlike a monopoly or a 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 (*Hoffmann-La Roche* v *Commission*, paragraph 216 above, paragraph 39).

255 In general a dominant position derives from a combination of several factors which, taken separately, would not necessarily be determinative (*United Brands and United Brands Continental* v *Commission*, paragraph 254 above, paragraph 66). In order to assess whether there is a dominant position on the relevant market it is necessary to examine first of all its structure and then the competitive situation on that market (see, to that effect, *United Brands and United Brands Continental*, paragraph 254 above, paragraph 67).

256 Very large market shares are in themselves, and 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 the supply which it stands for — without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, 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 216 above, paragraph 41, and *Van den Bergh Foods* v *Commission*, paragraph 216 above, paragraph 154). Thus, according to the case-law of the Court of Justice, a market share of 50% is in itself, and 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).

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

258 In the present case, the Commission indicated in recital 127 of the contested decision that the applicant held a 'historic market share of more than 90% … over the whole of the period under consideration'. In its application, the applicant does not dispute having held that very significant market share.

259 It follows that, save for exceptional circumstances particular to the case, with such a market share the applicant held a dominant position on the relevant market.

260 In recital 128 of the contested decision, the Commission set out the different elements which supplement its assessment of the applicant's market share and were indicators that the applicant held a dominant position.

261 By definition, those elements cannot constitute exceptional circumstances from which it could be concluded that the applicant was not in a dominant position.

262 In addition, the applicant puts forward six arguments which must be assessed in order to determine whether, in the present case, such exceptional circumstances existed within the meaning of the case-law of the Court of Justice.

263 First, the applicant claims there was significant competitive pressure from other producers of soda ash.

264 In that regard, it should first be recalled that the existence of some competition is not inconsistent with the existence of a dominant position on the relevant market.

265 Moreover, it should be observed that the applicant provides no evidence which might call into question 'the absence of any competition from Solvay and the other Western European producers' found by the Commission. Quite to the contrary, the applicant accepts that there were no significant sales of soda ash to the United Kingdom by Continental producers. Likewise, it acknowledges the 'improbability of any "new" producer of synthetic soda ash entering the market and setting up manufacturing facilities in the Community' (recital 128 of the contested decision).

266 In addition, in recital 128 of the contested decision, the Commission states that 'customers [perceived] General Chemical and Brenntag as secondary suppliers only', which the applicant accepts. The applicant considers, none the less, that for its profit to be eroded it would require only one major customer to promote a secondary supplier to a main supplier, or several customers to increase the amount of their purchases from the secondary supplier. However, such an assertion is purely hypothetical, as the applicant has adduced no evidence in support of that claim. In any event, even if that assertion were well founded, the applicant's argument is ineffective, since the mere fact that customers use such a threat cannot constitute an exceptional circumstance which would preclude the existence of a dominant position on the relevant market.

267 Likewise, although the applicant challenges 'the success of [its] strategy of minimising the presence and/or effectiveness of General Chemical and Brenntag as competitors and maintaining its predominant market share in the United Kingdom', it has adduced no concrete evidence in support of that line of argument.

268 As regards the documents from Continental sources concerning American competitors, of which the applicant became aware following consultation of the file in the context of a measure of organisation of procedure, they cannot alter the Commission's assessment of whether the applicant held a dominant position on the relevant market. The applicant referred to the American imports during the administrative procedure and the Commission took that argument into account before adopting the contested decision.

269 It follows that the applicant's unsupported argument alleging the existence of competitive pressure from other producers of soda ash cannot constitute an exceptional circumstance which would preclude the applicant holding a dominant position on the relevant market.

270 Second, the applicant relies on the possibility of substituting caustic soda, cullet or dolomite for soda ash, which it claims constituted a competitive pressure in its relationships with its customers.

271 In that regard, in recitals 129 to 133 of the contested decision, the Commission carried out a detailed analysis of the substitutability of caustic soda and stated that, in practice, the possibility was very limited. In its application, the applicant provides no evidence which could undermine that analysis.

272 As regards cullet, the Commission pointed out, in recital 134 of the contested decision, that a customer's requirement of soda ash in glass container manufacture could be reduced by up to 15% or less by using cullet. That percentage was not challenged by the applicant. The Commission also acknowledged that it was possible that cullet usage lessens the dependence of customers upon the soda ash suppliers in general, without however lessening the ability of a powerful soda ash producer to exclude smaller producers of that product. Therefore, contrary to what the applicant claims, the Commission took account of the possibility of substituting cullet for soda ash. The applicant's argument therefore has no basis in fact.

273 As regards dolomite, the applicant merely mentions its existence, submits no argument and adduces no evidence which would allow its use as a substitute for soda ash to be evaluated.

274 The documents referred to by the applicant in its observations, submitted following consultation of the file in the context of a measure of organisation of procedure, establish only that soda ash and dolomite are partially substitutable and that soda ash could possibly be replaced by dolomite. But nothing in those documents casts doubt on the Commission's findings as regards the fact that the partial substitutability of other products for soda ash does not preclude the applicant having a dominant position on the relevant market. Furthermore, as the Commission has noted, the applicant does not allege that dolomite is used by glass makers, the principal purchasers of soda ash. Therefore, nothing suggests that the use of dolomite could have had an influence on the applicant's dominant position on the relevant market.

275 Therefore, the applicant has not shown that the Commission made a manifest error of assessment by finding that possible substitutes did not constitute a significant constraint with regard to the applicant's market power.

276 Third, the applicant claims that the Commission should have taken the competitive pressure exerted by its customers into account.

277 In its application, the applicant stated that its four largest customers represented about 50% of its sales. However, it gives no details regarding the respective share of each of those four customers. In addition, it merely makes the unsupported assertion that those customers, in particular glass producers, had 'countervailing purchasing power'. Accordingly, even if the Commission ought to have taken the countervailing power of customers into account, the applicant has not shown that its customers were able to counterbalance its market power.

278 Fourth, the applicant disputes the Commission's assertion that it maintained a higher price level than in other Member States. In that regard, it should be noted that the applicant did however acknowledge that its prices 'tended to be slightly higher than those in other Member States'. It is true that it refers to the fall in the demand for soda ash, which did not occur to such an extent in other markets, the exchange rate and fuel costs. However, the applicant does not support its line of argument with any concrete evidence which would allow the Court to verify that its arguments are well founded.

279 Fifth, the applicant claims that in order to maintain the viability of its two soda ash plants, its strategy was to maintain sufficient volume of sales, which implied that it would seek to achieve increased sales and meet competitive offers from alternative suppliers. Suffice it to state that such an argument cannot call into question the existence of the applicant's dominant position on the relevant market.

280 Sixth, the applicant refers to anti-dumping measures adopted by the Commission. In that regard, in the contested decision the Commission examined in detail the anti-dumping measures taken against American producers (recitals 51 to 54) and concluded, with regard to the applicant's market power, that it benefited from protection against United States and Eastern European producers afforded by the anti-dumping measures and from price constraints imposed on General Chemical by anti-dumping obligations (recital 128).

281 In response to those findings, the applicant claims, first, that the proven existence of dumping until 1984 is inconsistent with the finding that it held a dominant position at that time. However, the applicant does not explain how the existence of dumping by American producers allowed a finding that it was not in a dominant position. In any event, Regulation No 2253/84, which was adopted in a totally different legal context to Article 82 EC, does not state that the applicant did not hold a dominant position in the United Kingdom.

282 The applicant contends, second, that the adoption of anti-dumping measures implied, according to the Commission, that they would not affect the competitive situation within the Community. However, the applicant does not support that assertion, which is purely hypothetical, since Regulation No 2253/84 makes no reference to the competitive situation within the Community.

283 In conclusion, the arguments raised by the applicant do not make it possible to find that there were exceptional circumstances which would justify calling into question the finding that it was in a dominant position on the relevant market.

284 Consequently, the fourth plea must be rejected.

Fifth plea: absence of abuse of a dominant position

285 The fifth plea, in essence, can be broken down into three parts relating to, first, rebates on marginal tonnage, second, exclusive requirements clauses and restrictions on purchases from competitors and, third, other financial inducements.

First part, relating to rebates on marginal tonnage

— Arguments of the parties

286 The applicant challenges the finding that the pricing practices which it adopted at the material time amounted to abuse. Its practices were in each instance normal competitive actions in the light of commercial and economic factors. At no time did the applicant's pricing arrangements distort the competitive structure of the market or cause harm to consumers.

287 The applicant maintains that it is not abusive for a dominant supplier to negotiate a cheaper price if his customer is prepared to take such additional tonnage. Neither the object nor the effect of rebates on marginal tonnage was to exclude competitors from the market. They were introduced in response to customer requests for a lower price for any incremental tonnage they took. According to the applicant, the purpose of individually-negotiated rebates was to maintain plant occupacity and some profitability so as to avoid further plant closure. Such rebates induce customers to purchase quantities of soda ash that they might not otherwise have felt able to take. In that regard, it was particularly important to make soda ash attractive in comparison with substitute products such as caustic soda, cullet and dolomite.

288 Furthermore, the applicant claims that at no time were any of its net prices other than economic and the rebates were entirely transparent in that the customer was made aware, in writing, of the tonnage which would trigger the rebate and of precisely how much rebate was available, in contrast to the situation considered in Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461. The customer was not pressurised to take additional supplies from the applicant or discouraged from purchasing additional tonnage from third parties for fear of losing discount on the core tonnage. Moreover, the top-slice rebates only related to a small proportion of the applicant's total sales, namely 8%.

289 Save in one isolated case, rebates were not in any way dependent upon the purchaser obtaining the whole or a specified percentage of his requirements from the applicant. Those rebates were offered in respect of incremental tonnage additional to the estimated core tonnage which the customer was proposing to take from it and from one or more second suppliers, in predetermined shares. The customers were at all times free to obtain whatever amounts they chose from other suppliers. The situation was therefore different to that which gave rise to Commission Decision 88/518/EEC

of 18 July 1988 relating to a proceeding under Article [82 EC] (Case No IV/30.178 Napier Brown — British Sugar) (OJ 1988 L 284, p. 41).

290 The applicant also observes that, in the present case, the top-slice rebates were not intended to result in discrimination between its customers and did not affect their competitive position *inter se*. Given the variety of customers and substitute products, it was necessary to enter into negotiation with customers on an individual basis. In any event, the top-slice rebates that it granted had only a very insignificant effect so far as concerns any differentiation in the costs of its customers.

291 In addition, the rebate arrangements were not of indefinite duration, in contrast to those considered in *Hoffman-La Roche* v *Commission*, paragraph 216 above. Those arrangements were decided upon by separate annual negotiations. Moreover, according to the applicant, the amount or availability of rebate was not dependent upon the customer having reached any target or purchased incremental tonnage in any previous year.

292 The applicant adds that the rebates were granted in respect of additional purchases of soda ash and not by reference to a customer's purchase of a range of products. Therefore, it is of the opinion that it did not act abusively by offering its customers a lower price for incremental tonnage.

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

— Findings of the Court

294 It is settled case-law that the concept of an 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 216 above, paragraph 91, and Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 549).

295 Whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it 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 (*Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 288 above, paragraph 57, and *Microsoft* v *Commission*, paragraph 254 above, paragraph 229). Similarly, 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 Continental* v *Commission*, paragraph 254 above, paragraph 189, and Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 55).

296 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 (*Michelin* v *Commission*, paragraph 295 above, paragraph 56; see also, to that effect, 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).

297 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 infringed Article 82 EC (*Michelin* v *Commission*, paragraph 295 above, paragraph 57).

298 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 295 above, paragraph 58).

299 It follows that a rebate system in which the rate of 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 216 above, paragraph 90, and *Michelin* v *Commission*, paragraph 295 above, paragraph 59).

300 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 216 above, paragraph 90, and *Michelin* v *Commission*, paragraph 295 above, paragraph 60).

301 In the present case, in recitals 139 to 141 of the contested decision, the Commission stated as follows:

'(139) It is obvious both from the nature of the system itself and from the terms of [the applicant's] own internal documentation that the "top-slice" rebates were intended to exclude effective competition by:

— inducing customers to obtain from [the applicant] the marginal tonnage which might otherwise be obtained from a second supplier;

— minimising or neutralising the competitive impact of General Chemical by containing its presence [on] the market in terms of price, tonnage and customers within limits that [ensured] the continuance of [the applicant's] effective monopoly;

— eliminating Brenntag from the market or at least minimising its competitive effect;

— minimising the risk of the customers turning to alternative sources of supply whether from sister-producers, traders or other Community producers;

— maintaining and reinforcing [the applicant's] virtual monopoly of the [relevant] market.

(140) The substantial variations in "trigger" tonnages at which the rebate was activated [for] each customer demonstrates that the top-slice rebate system and the price advantages it conferred depended not upon differences in the cost to [the applicant] in relation to the quantities supplied but upon the customer taking its marginal tonnage from [the applicant].

(141) There is no need, in order for such practices to fall under Article 82 [EC], for a legal obligation or express stipulation requiring the customer to obtain its supplies exclusively from the dominant firm. It is sufficient if the object or result of the inducement offered is to tie customers to the dominant producer.'

302 Moreover, in recitals 61 to 82 of the contested decision, the Commission also makes reference to numerous documents, relating to the rebate on marginal tonnage, under which the applicant was seeking to exclude competitors from the market.

303 It must also be pointed out that the applicant does not challenge the existence or content of the documents relied on by the Commission in the contested decision. It is clear from those documents that the rebates granted by the applicant did not reflect gains in efficiency and economies of scale. In contrast to a quantity rebate linked

solely to the volume of purchases, those rebates sought to prevent customers from obtaining their supplies from competitors.

304 In addition, none of the applicant's arguments attempting to show that the rebates on marginal tonnage were not contrary to Article 82 EC is such as to invalidate the Commission's findings.

305 First, the applicant states that the rebates on marginal tonnage were introduced in response to customer requests. However, that argument is irrelevant. It is clear from settled case-law that 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 (*Hoffmann-Laroche* v *Commission*, paragraph 216 above, paragraph 89).

306 Second, the applicant contends that its purpose was to maintain plant occupacity so as to avoid further plant closure. In that regard, suffice it to state that the desire to maintain or increase production capacity is not an objective justification to allow an undertaking to act independently of Article 82 EC.

307 Third, the applicant alleges that its system was transparent, in contrast to the situation examined in *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 288 above. However, the Commission does not complain about the opaque nature of the applicant's rebates on marginal tonnage. In any event, according to

case-law, a loyalty-inducing rebate system is contrary to Article 82 EC, whether it is transparent or not (*Michelin* v *Commission*, paragraph 295 above, paragraph 111).

308 Fourth, the applicant claims that its rebates on marginal tonnage only related to 8% of its total sales of soda ash. It should be recalled, in that regard, that the effect to which the case-law cited in paragraph 295 above refers is not necessarily the actual effect of the abusive conduct complained of. 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 such as to have, or is capable of having, that effect (*Michelin* v *Commission*, paragraph 295 above, paragraph 239). It should be added that, in any event, 8% of the applicant's total sales of soda ash cannot be regarded as a negligible quantity of those sales.

309 Fifth, the applicant asserts that the rebates on marginal tonnage were not discriminatory. That argument must also be rejected. The Commission does not criticise the applicant on account of the discriminatory nature of its rebates on marginal tonnage and, moreover, even if those rebates were not discriminatory, the applicant does not dispute the existence and content of the documents relied on by the Commission in the contested decision from which it is clear that those rebates were not based on an economically justified consideration and sought to prevent customers from obtaining their supplies from competing producers. Since such rebates have a foreclosure effect, they are contrary to Article 82 EC if they are applied by an undertaking in a dominant position (see paragraph 297 above).

310 Sixth, the applicant points out that its rebate arrangements were not of indefinite duration. However, even if those arrangements were concluded for a short duration,

that would not establish that those arrangements did not have the effect of excluding competition.

311 In conclusion, it must be held that the applicant has not shown that the Commission erred in concluding that the rebate system which it applied had the aim of excluding effective competition.

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

Second part, relating to exclusive requirements clauses and restrictions on purchasers from competitors

— Arguments of the parties

313 The applicant disputes that its pricing arrangements were tantamount to an exclusivity clause. It claims that the Commission comes close to a contention that it represents abusive conduct for a dominant supplier to seek to obtain all or a substantial part of a customer's business, or, to supply all or a substantial part of his requirements. Such an assertion is tantamount to suggesting that in view of its market share the applicant was not entitled to compete in the market for the business available. There is no authority for such propositions and that assertion would exclude effective competition which is inconsistent with 'the philosophy of the competition rules'.

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

— Findings of the Court

315 It is clear from settled case-law that 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 the 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, 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 216 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 its possible choices of sources of supply and to deny other producers access to the market (*Hoffmann-Laroche* v *Commission*, paragraph 216 above, paragraph 90).

316 In the present case, in the contested decision, in respect of the exclusive requirement clause, the Commission stated, inter alia, as follows:

'(144) The possible anti-competitive effects of the stipulations on quantities in [the applicant's] supply agreements have to be assessed in the light of [its] stated policy towards General Chemical and Brenntag. As the documents discovered at [the applicant's premises] show, [it] was concerned not to exclude all competitors entirely. It was in [the applicant's] interest to ensure that General Chemical at least remained in the United Kingdom market as a "presence" — strictly controlled as to both price and tonnage — which met the need of most large customers for a secondary supplier while in fact presenting no real competitive threat to [the applicant's] near-monopoly position.

(145) By making it its business to ascertain the total requirements of each major customer, [the applicant] was able to structure its "top-slice" rebate system in such a way as to exclude or minimise the presence of competitors. In many cases an assurance was obtained from the customer to reduce its competitive purchases or restrict them to a specified tonnage. In the case of Beatson Clarke it was expressly stipulated that the customer obtain its total requirements from [the applicant].

(146) Such arrangements substantially restrict the contractual freedom of the customer, prevent competitive entry, and are tantamount to an exclusivity clause.

(147) The agreements with these major customers meant that they were tied to [the applicant] for substantially the whole of their requirements (and in one case at least, their total requirements) while the competitive effect of other suppliers was minimised.'

317 In recitals 83 to 114 of the contested decision, the Commission also relies on numerous documents concerning Pilkington, Rockware, CWS, Redfearn and Beatson Clarke.

318 Those documents show that the applicant wanted to restrict its customers' purchases from competitors.

319 In respect of Beatson Clarke, the Commission set out specific evidence which establishes that that company had entered into an agreement with the applicant to exclude effective competition, under which it was required to purchase the entirety of its supplies from the applicant.

320 In its application, the applicant does not challenge the existence of that agreement. It even admits that 'as expressed in its letters such a provision might arguably be characterised as a loyalty rebate'. According to the applicant, the agreement with Beatson Clarke was aimed at supporting unprofitable exports. However, such an argument cannot cast doubt on the Commission's finding that there was an exclusive requirements commitment.

321 Likewise, in respect of Redfearn, the Commission stated, inter alia, that 'the arrangement for 1987 provided that Redfearn would purchase from [the applicant] at least 45 000 tonnes out of its total expected usage of 47 500 tonnes, (i.e. some 95% of its

requirement)' and that the applicant gave 'an added inducement to purchase any marginal tonnage from [it] in the form of a 10 [pound sterling (GBP)] rebate'. The applicant does not dispute the existence of that obligation on Redfearn to purchase most of its requirements from it.

322 Therefore, without needing to examine all of the documents on which the Commission relied in the contested decision, the Court concludes that the Commission was right to find that the applicant had entered into requirements agreements which were contrary to Article 82 EC.

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

Third part, relating to other financial inducements

— Arguments of the parties

324 The applicant submits that other financial inducements were usually made available at the customer's request and were offered in order to enable customers to achieve some growth through exports which might otherwise be uneconomic, or to assist them in maintaining their market share and indeed survival in the face of cheap imported goods. Such arrangements did not have the object or effect of tying the customers.

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

— Findings of the Court

326 In recitals 148 to 150 of the contested decision, the Commission states as follows:

'(148) In its dealings with Beatson Clarke, [the applicant] also made it clear that the "support package", additional to the "top-slice" rebate, was dependent upon its agreeing to take 100% of its requirements from [the applicant], a condition which was confirmed in writing. This special "inducement" had the object and effect of reinforcing [the applicant's] position [vis-à-vis] the customer and excluding competition.

(149) All the above measures described in recitals 139 to 147 were intended to remove or restrict the opportunities of other producers or suppliers of soda ash to compete with [the applicant]. They have to be seen in the light of [the applicant's] clearly expressed strategy of retaining a virtual (but not 100% complete) monopoly of the [relevant] market. They thus consolidated the dominant position of [the applicant] in a manner which was incompatible with the concept of competition inherent in Article 82 [EC].

(150) The rebates did not reflect possible differences in costs based on the tonnage supplied but were referable to securing the whole or the largest possible

percentage of the customer's requirements. The "top-slice" rebate system thus involved considerable variations from customer to customer as to the "trigger" tonnage at which it was activated. There were also differences in the amount per tonne of the rebate itself, varying from GBP 6 per tonne to GBP 30 or more.'

327 In that regard, the applicant does not dispute the existence of the financial inducements offered to its customers.

328 As has been indicated in paragraph 305 above, the fact that the financial inducements were offered to customers at their request, that they sought to assist customers with exports and to maintain the market share which they held or even to help them survive in the face of cheap imported goods, and that they were transparent, are not relevant factors for assessing their lawfulness with regard to Article 82 EC. The argument that the arrangements did not have the object or effect of tying the customers cannot be accepted, since it is clear, inter alia, from the recitals in the contested decision referred to above, that the applicant specified, for at least one customer, that the support packages, which were additional to the top-slice rebate, were conditional upon its commitment to purchase 100% of its requirements from the applicant. In the same way as the rebates on marginal tonnage, those arrangements thus sought, in respect of at least some customers, to prevent those customers from purchasing their supplies from competitor producers.

329 Therefore, the third part of the fifth plea must be rejected as, accordingly, must the fifth plea in its entirety.

Sixth plea: lack of effect on trade between Member States

Arguments of the parties

330 The applicant submits that the Commission's difficulties in establishing the necessary effect on trade between Member States are evident from its brief and contradictory analysis of the issue. It submits that that analysis has already been criticised by the General Court in paragraph 63 of the judgment in *ICI II*, paragraph 16 above. Furthermore, the Commission has abandoned an important element which appeared in the statement of objections, that the applicant's pricing had an effect on intra-Community trade.

331 Likewise, the Commission does not explain the phenomenon of 'strict separation of national markets in the Community' referred to in recital 152 of the contested decision, and does not link that separation to the abuse alleged. After having considered, when adopting Decision 91/300, that the separation of the markets was attributable to the concerted practice between the applicant and Solvay, the Commission did not repeat its allegation of 'strict separation' in the contested decision. Moreover, the applicant points out that the Commission does not rebut the explanation of market separation which was advanced by the applicant on the basis of its detailed and uncontradicted economic analysis. According to the applicant, the explanation advanced is supported by the Commission's own findings in the anti-dumping proceedings.

332 In addition, the Commission's allegation that the applicant wanted General Chemical to remain on the relevant market is 'illogical' and 'not supported by evidence'.

The Commission puts forward no economic analysis in support of that allegation. Furthermore, the allegation conflicts with the Commission's own findings in Commission Decision 91/301/EEC of 19 December 1990 relating to a proceeding under Article [81(1) EC] (IV/33.016 — ANSAC) (OJ 1991 L 152, p. 54; 'the ANSAC decision'). The Commission does not seek to further corroborate its assertion that in General Chemical's absence, purchasers might have been encouraged to look for alternative and possibly cheaper sources of supply in Continental Western Europe. In that regard, 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) under which, for a period of at least three and a half years after the end of the alleged abuses, there was practically no change to trade between the United Kingdom and Continental Europe.

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

Findings of the Court

334 According to settled case-law, the interpretation and application of the condition relating to effect on trade between Member States contained in Articles 81 EC and 82 EC must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas covered by Community law and the law of the Member States. Thus, Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the common

market (Case 22/78 *Hugin Kassaregister and Hugin Cash Registers* v *Commission* [1979] ECR 1869, paragraph 17, and Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 89).

335 If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of facts and points of law, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16; Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 47; and *Dalmine* v *Commission,* paragraph 334 above, paragraph 90). In that regard, as has been pointed out in paragraph 308 above, 8% of the applicant's total sales cannot be regarded as a negligible quantity of its sales.

336 In the present case, it must be held that the Commission found, to the requisite legal standard, that the practices in which the applicant was found to have engaged were capable of affecting trade between Member States.

337 First, the rebates on marginal tonnage have an exclusionary effect in 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 designed, through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers (*Michelin* v *Commission*, paragraph 295 above, paragraph 56; see also, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 296 above, paragraph 518). By obstructing access to the market by competitors, the applicant's conduct was likely to affect patterns of trade and competition on

the common market (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 288 above, paragraph 103).

338 Second, the Commission relies on a strategy document from the applicant dated 28 June 1985, according to which the applicant was seeking to prevent or eliminate all imports of dense soda ash into the United Kingdom, with the exception of those of General Chemical [formerly known as Allied] (Recitals 66 to 70 of the contested decision). According to that document from the applicant, cited in recital 70 of the contested decision:

'The strategy remains one of being price competitive at every account on a delivered basis in order to achieve the [applicant's] core tonnage, and to offer top-slice deals of up to GBP 15/tonnes to obtain incremental tonnage from Allied. The objective is to maintain Allied's position at less than 30 000 tonnes annually. Our intention is not to force Allied from the marketplace since this would force the glass industry to seek supplies from either Continental Western Europe or Eastern Europe.'

339 In its pleadings, the applicant does not dispute the existence or content of that strategy document. Therefore, the applicant itself accepts that its practices resulted, at least potentially, in trade patterns which were different than those which would have resulted from a market open to competition. On that point, the criterion referred to in paragraph 335 above, that the influence on the pattern of trade between Member States should not be insignificant, is certainly met in the present case.

340 None of the applicant's arguments call into question the finding that the practices in which it was found to have engaged were capable of affecting trade between Member States.

341 First, the applicant submits that, in *ICI II*, paragraph 16 above, the General Court criticised the Commission's analysis of the effect on trade between Member States. However, it is clear from paragraph 63 of that judgment that the ambiguity noted by the Court related solely to the Commission's finding that the measures taken by the applicant affect inter-state trade, instead of finding that they may affect it. Further, the Court did not question the fact that, in that case, the measures taken by the applicant were capable of affecting trade between Member States.

342 Second, the applicant claims that in the contested decision the Commission did not repeat an important element which appeared in the statement of objections, namely that its price-fixing affected intra-Community trade. However, the Court's review does not concern a part of the statement of objections which was not repeated in the contested decision. The Court must examine only whether the contested decision, in that part devoted to the effect on trade, complies with Article 82 EC, as interpreted through the case-law.

343 Third, the applicant criticises the Commission for not explaining the phenomenon of 'strict separation of national markets in the Community', and the link between that separation and the alleged abuse. According to the applicant, Decision 91/300 was based on the Commission's finding of a partitioning of markets resulting from concerted practices between the applicant and Solvay which were the subject of Decision 91/297, which was subsequently annulled by the Court. However, irrespective of whether the Commission was required to state the causes of the separation of the markets in the contested decision, first, the applicant does not dispute that that separation existed and, second, the evidence contained in the contested decision justifies the finding that rebates on marginal tonnage applied by the applicant were capable, by their exclusionary effect, of affecting trade between Member States.

344 Fourth, the applicant challenges the Commission's allegation that it wanted General Chemical to remain on the relevant market. In that regard, it refers to the ANSAC Decision, adopted on the same day as Decision 91/300. However, the applicant does not establish that the ANSAC Decision contradicted Decision 91/300. The passage from the ANSAC Decision quoted by the applicant in its application forms part of ANSAC's submissions and not part of the Commission's assessment, which, moreover, did not accept those submissions.

345 Fifth, the applicant relies on Regulation No 823/95, recital 45 in the preamble to which states:

'Between 1990 and the investigation period, trade between Member States in Community-produced soda ash increased only at a very moderate rate. The position of the different Community operators on the national markets barely changed in relation to each other. In particular, there was practically no change in the pattern of trade between the United Kingdom and Continental Europe.'

346 However, the fact that trade between the United Kingdom and Continental Europe did not change after the date on which it is accepted that the infringements ceased does not suffice to hold that the practices in which the applicant was found to have engaged were not capable of affecting trade between Member States.

347 It follows from all of the foregoing that the sixth plea and, consequently, the claim seeking the annulment of the contested decision must be rejected.

2. *The claim seeking the cancellation or reduction of the fine*

348 As a preliminary point, the applicant emphasises that any submissions relating to the cancellation or reduction of the fine should not be interpreted as an admission of an infringement of Article 82 EC and are submitted in the alternative.

349 The applicant raises, in essence, four pleas in support of its claim for cancellation or reduction of the fine. They are based on, first, the passage of time, second, the incorrect assessment of the gravity of the infringement, third, the incorrect determination of the duration of the infringement and, fourth, the existence of mitigating circumstances.

First plea: the passage of time

Arguments of the parties

350 The applicant argues that, even if the Commission was competent to impose the fine on it, the Court, in exercise of its unlimited jurisdiction, should cancel the fine.

351 The applicant relies on, first, the lapse of time between the adoption of Decision 91/300 and the adoption of the contested decision.

352 The applicant then points out that the Commission did not properly articulate the reasons for imposing a fine and did not take account of the change in relevant circumstances which had taken place since the adoption of Decision 91/300. According to the applicant, it is not clear that the College of Commissioners was aware of the changed circumstances at the meeting at which the contested decision was allegedly taken.

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

Findings of the Court

354 It is clear from an examination of the arguments submitted by the applicant under the first and second pleas relied on in support of the claim seeking annulment of the contested decision in its entirety that the Commission adopted the contested decision in compliance with Regulation No 2988/74 and the principle that action must be taken within a reasonable time. Therefore, there can be no complaint that the Commission delayed in adopting the contested decision. Furthermore, it is clear 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).

355 Consequently, the fine imposed on the applicant should not be cancelled on account of the time which passed between the adoption of Decision 91/300 and the adoption of contested decision.

356 The first plea must therefore be rejected.

Second plea: incorrect assessment of the gravity of the infringement

Arguments of the parties

357 The applicant claims that the fine imposed by Decision 91/300 was grossly excessive. Moreover, no pricing system of the type operated by the applicant had previously been the subject of any relevant decision of the Commission or the Community Courts. The Commission therefore committed an error of principle in 1990 by finding that the alleged infringement was of 'particular gravity'. The applicant also argues that, to determine the amount of the fine the Commission, in 1990, ought also to have taken into account the fine imposed by reason of the alleged infringement of Article 81 EC. According to the applicant, the Commission treated the infringements as being entirely separate although there were overlapping effects on competition and trade within the Community, which led to duplication and fines which were excessive.

358 In addition, the Commission makes no reference in the contested decision to the Guidelines on the methods 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'). In the contested decision, there are findings which are inconsistent with the Guidelines, in particular with regard to the fact that only repeated infringements of the same type should be regarded as aggravating circumstances.

359 The Commission also failed to take account, in the contested decision, of the fact that in the period following the adoption of Decision 91/300, the applicant has not been the subject of any decision finding an infringement of either Article 81 EC or Article 82 EC.

360 Lastly, the applicant asserts that it spent GBP 171 729,93, in providing guarantees for the fine imposed in Decision 91/300, and GBP 120 200 in respect of the fine imposed in Decision 91/297, both of which were annulled by the General Court. According to it, the Commission should have taken those amounts into account when setting the fine in the present case. Moreover, the applicant claims to have suffered irrecoverable internal costs as a result of the actions that it had to take to establish that Decision 91/300 was unlawful, and by reason of the Commission's pointless and unnecessary appeal. In any event, the fine should be reduced in accordance with *Baustahlgewebe* v *Commission*, paragraph 115 above, on account of the extraordinary lapse of time between the start of the investigation in April 1989 and the adoption of the contested decision.

361 The Commission contends that Decision 91/297 is quite irrelevant as it has been annulled and the Commission has not taken a new decision in that regard. Furthermore, even if the fine imposed in Decision 91/300 equated to a certain percentage of the applicant's soda ash turnover for a particular year, that is not relevant when the fine was set in relation to an infringement of several years' duration. The Commission

recalls that the turnover referred to in Regulation No 17 is world-wide turnover for all products and ECU 10 million was undoubtedly an extremely low percentage of the applicant's total turnover.

362 In addition, as regards the applicant's argument that the Commission did not follow the Guidelines, the Commission points out that the applicant does not claim that those guidelines should have been applied. In that regard, the Commission makes clear that had the indicative level of fines in the Guidelines been applied, they would have led to a higher fine for such a serious infringement as that committed by the applicant. In any event, there is no inconsistency between the contested decision and the Guidelines. It is clear that the list contained in section 2 of the Guidelines is 'illustrative only'.

363 The fact that no new allegation of infringement has been made against the applicant since 1990 can hardly be relevant for determining the level of the fine for an infringement committed before then. Likewise, the costs of guarantees provided following the adoption of Decision 91/300 cannot be relevant to the determination of the amount of the fine in the contested decision.

Findings of the Court

364 First, the applicant criticises the Commission's assessment of the amount of the fine to be imposed on it in Decision 91/300. However, as that decision has been annulled

by the Court and the present action concerns only an application for annulment of the contested decision and, in the alternative, an application for the cancellation or reduction of the fine imposed in the contested decision, the applicant's arguments concerning the fine imposed in Decision 91/300, referred to in particular in paragraph 357 above, need not be examined.

365 Second, it should be borne in mind that, according to settled case-law, although the Commission has a discretion when determining the amount of each fine, and is not required to apply a precise mathematical formula, the Court none the less has, pursuant to Article 17 of Regulation No 17, unlimited jurisdiction within the meaning of Article 229 EC in actions brought against the decisions whereby the Commission has fixed a fine, and may therefore 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).

366 As regards the application of the Guidelines, since Decision 91/300 was annulled because of a procedural defect, the Commission was fully entitled to adopt a new decision, without having to initiate a fresh administrative proceeding.

367 Since the content of the contested decision is practically identical to that of Decision 91/300, and since those two decisions are based on the same grounds, the contested decision is subject, in the context of setting the amount of the fine, to the rules in force at the time when Decision 91/300 was adopted.

368 The Commission recommenced the proceeding from the point where the procedural error was committed and did not carry out a fresh assessment of the case in the light of rules which were not in existence at the time when the first decision was adopted. The adoption of a new decision precludes, by definition, the application of the Guidelines, which post-date the adoption of the first decision.

369 Accordingly, the Guidelines are not applicable in the present case.

370 Third, the Commission considered that the infringements which the applicant was found to have committed were of 'particular gravity' (recital 156 of the contested decision).

371 In that regard, according to settled 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 Euorpay* v *Commission* [1994] ECR II-49, paragraph 143 and the case-law cited).

372 Thus, in assessing the gravity of the infringement of competition rules for which an undertaking is liable, in order to determine a fine which is proportionate, 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 undertaking's products and some of which affected all the Member States; the particular gravity of the infringements which formed 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 dominant position of the undertaking in question on markets where competition was already limited; particularly harmful effects of the abuses in terms of competition and the benefit gained

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

373 In the present case, the practices in which the applicant was found to have engaged justify the Commission's categorisation of them.

374 By granting rebates on marginal tonnage to its customers and by entering into loyalty-inducing agreements with them, the applicant seriously undermined competition. As the Commission correctly states:

'[The infringements committed by the applicant] were part of a deliberate policy aimed at consolidating [its] control over the [relevant] market in a manner which was in fundamental conflict with the basic objectives of the Treaty. Further, they were specifically directed at restricting or damaging the business of particular competitors. By foreclosing for a long time sales opportunities for all competitors, [the applicant] caused lasting damage to the structure of the market concerned, to the detriment of consumers.'

375 Purely as a matter of interest, it may be observed that the Guidelines, although not applicable in the present case, state that loyalty-inducing rebates granted by an undertaking in a dominant position aimed at excluding its competitors from the market constitute a 'serious' infringement, for which the likely starting amounts for the calculation of the fine are between EUR 1 million and EUR 20 million.

376 Fourth, as regards repeated infringement, it must be noted that, in response to a written question from the Court, the Commission confirmed that the objection set out in recital 159 of 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.

377 In that regard, 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 128 above, paragraph 91, and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 348).

378 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* [1991] ECR II-347, paragraph 617).

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

380 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, it was referring to its Decision 69/243/EEC of 24 July 1969 relating to a proceeding under Article [81 EC] (IV/26.267 — Dyestuffs) (OJ 1969 L 195, p. 11), its 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 its 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 those decisions mentioned above are very different from the practices at issue in the present case.

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

382 Fifth, the applicant's argument that it has not been the subject of any decision finding an infringement of either Article 81 EC or Article 82 EC since the adoption of Decision 91/300 cannot succeed, since the contested decision concerns only facts prior to 1990.

383 Sixth, the Court must reject the applicant's arguments that the Commission ought to have taken account, first, of the costs involved in providing guarantees for the fine imposed in Decision 91/300 and the fine imposed in Decision 91/297 when setting the amount of the fine in the present case and, second, the irrecoverable internal costs as a result of the actions taken to establish that Decision 91/300 was unlawful and by reason of the Commission's pointless and unnecessary appeal. It is clear from the case-law that, in determining the amount of fines, the Commission must take into account not only the gravity of the infringement and the particular circumstances of the case but also the context in which the infringement was committed and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique diffusion française and Others* v *Commission*, paragraph 354 above, paragraph 106, and *Degussa* v *Commission*, paragraph 354 above, paragraph 272). In the present case, even if costs were incurred by the applicant in providing the guarantees for payment of the fines imposed in decisions which were subsequently annulled, and in establishing that one of those decisions was unlawful, the Commission cannot be criticised for not taking that into account, since the applicant was able to seek their reimbursement in the context of an action for damages.

384 Seventh, when examining the first plea relied on by the applicant, this Court rejected the claim alleging infringement by the Commission of the principle that action must be taken within a reasonable time. Therefore, the case-law deriving from *Baustahlgewebe* v *Commission*, paragraph 115 above, which pre-supposes a finding that the principle that action must be taken within a reasonable time has been infringed, cannot be relied on in the present case.

385 In conclusion, as the Commission was wrong to find that an aggravating circumstance existed in the applicant's case, it is appropriate to vary the contested decision by reducing the amount of the fine imposed on the applicant by 5%, that is to say, by EUR 500 000.

Third plea: the incorrect assessment of the duration of the infringement

Arguments of the parties

386 As regards the end of the infringement, the applicant claims that the Commission's findings are contradictory and are not corroborated by the evidence.

387 It is indicated in recital 2 of the contested decision that the infringement occurred until 'about the end of 1990'. By contrast, it is stated in recitals 160 and 161 of the

contested decision that the infringement occurred 'until at least the end of 1989' and that the applicant abandoned its top-slice rebates from '1 January 1990'. Likewise, in Article 1 of the contested decision, the Commission refers to 'at least the end of 1989' as the time when the infringement came to an end. The applicant also asserts that the Commission has adduced no evidence of unlawful conduct after 1989.

388 In relation to the commencement of the infringement, the applicant claims that there is no evidence to support the Commission's finding that it commenced in 1983, nor establishing the identity of customers for whom the top-slice rebates were intended. Thus, in the statement of objections, the Commission stated that the infringement began in 1984. In any event, none of the documents relied on by the Commission date from before 1 January 1985.

389 According to the applicant, since it is apparent that the amount of the fine was set on the basis of eight years, namely 1983 to 1990, although the Commission provides evidence of duration of only five years, namely 1985 to 1989, the amount of the fine should be reduced by 35% to 40%, leaving aside the other considerations set out.

390 As regards the end of the infringement, the Commission points out that the inconsistency noted by the applicant is limited to recital 2 of the contested decision, in which it is stated that the 'top-slice' rebates offered by the applicant ceased at the end of 1990, whereas it is plain from the rest of the contested decision that the duration was in fact until the end of 1989. According to the Commission, the College of Commissioners approved the contested decision as a whole, and that taken as a whole there can be no confusion.

391 As regards the date when the infringement commenced, the Commission accepts that it is not absolutely clear when in 1983 or 1984 the top-slice rebate deals were introduced, but, that it is incontestable that the practice went on for longer than five years, that they started before 1985 and were abandoned only at the end of 1989.

Therefore, the fine which it imposed on the applicant is not excessive for an infringement of that duration.

Findings of the Court

392 As a preliminary point, although this plea strictly seeks the cancellation or reduction of the fine, it must also be understood as an application for the partial annulment of the contested decision in so far as it states in Article 1 that the applicant infringed Article 82 EC in 1983.

393 Regarding the duration of the infringement, the contested decision states:

'(2) From about 1983 until about the end of 1990 [the applicant] abused the dominant position which it held in the market for soda ash in the United Kingdom by applying to its major customers a system of loyalty rebates and discounts by reference to marginal tonnage ("top-slice" rebates), contractual arrangements tending to ensure an effective exclusivity of supply for [the applicant] and other devices which had the object and effect of tying the said customers to [the applicant] for the whole of their requirements and of excluding competitors.

...

(160) The infringement began in about 1983 — very shortly after the negotiations with the Commission and the closure of the Commission's file — and continued at least up to the end of 1989.

(161) The Commission takes into account the fact that [the applicant] abandoned the system of top-slice rebates with effect from 1 January 1990.'

394 Article 1 of the contested decision then states:

'… [the applicant] 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.'

395 Therefore, as regards the date on which the infringement ended, there is a contradiction in the provisions of the contested decision, one of which refers to 'about the end of 1990' and the others stating the end of 1989.

396 In that regard, as Article 1 of the contested decision indicates, the infringement did not end until 'at least the end of 1989', which is also referred to in recital 160 on the duration of the infringement, and the reference to 'the end of 1990' which appears in recital 2 of the contested decision, which is merely a summary of the infringement committed by the applicant, seems therefore to be a typographical error.

397 In relation to the date on which the infringement commenced, the applicant claims that the Commission has provided no evidence regarding 1983 and 1984, whereas the Commission claims that the applicant entered into agreements concerning rebates on marginal tonnage agreements in 1985, even though it accepts that it does not know the exact date on which such agreements were entered into in 1983 or 1984.

398 In response to a written question from the Court, the Commission referred to certain documents contained in the file which, according to it, indicate that the practices in which the applicant was found to have engaged were implemented in 1983 and 1984.

399 In that regard, it should be noted that in its reply to the statement of objections the applicant itself refers to 1984 and recital 60 of the contested decision indicates that, according to the applicant, from 1984 onwards rebates were for the most part the subject of individual negotiation.

400 It should also be observed that the documents relied on by the Commission in response to the written question from the Court do not allow the finding that the infringement which the applicant was found to have committed had already occurred in 1983. In addition, the Commission acknowledges that it does not know exactly when the top-slice rebate agreements were entered into (see paragraph 391 above).

401 Therefore, the contested decision must be annulled in so far as it states that the applicant infringed Article 82 EC in 1983.

402 Accordingly, on that basis the amount of the fine imposed on the applicant should be reduced by 15%, that is to say EUR 1 500 000.

Fourth plea: the existence of mitigating circumstances

403 The applicant claims that the Commission ought to have found that there were nine mitigating circumstances when assessing the gravity of the infringement.

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

404 The applicant submits that it cooperated by assisting the Commission fully at all stages of the investigation and attended the hearing with the witnesses who had most to contribute to the true understanding of the facts in dispute. It points out that in Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, the Court granted an additional reduction of ECU 1 000 000 from the amount of the fine on that basis.

405 Under 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.'

406 It is settled case-law that cooperation in the investigation which does not go beyond that which 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). However, a reduction in the fine is justified where an undertaking provides the Commission with 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).

407 In the judgment of 10 March 1992 in *ICI* v *Commission*, paragraph 404 above, (paragraph 393) the Court noted the very detailed nature of the applicant's reply to the request for information, which concerned not only its own activities, but also those of all the undertakings concerned, without which it would have been much more difficult for the Commission to establish and bring an end to the infringement which was the subject-matter of Decision 91/300.

408 However, in the present case, the applicant merely asserts, without adducing any evidence, that it fully assisted the Commission at all stages of its investigation and that it attended the hearing with the witnesses who contributed most to a true understanding of the facts.

409 In any event, the applicant's conduct cannot be categorised as cooperation with the investigation which goes beyond that which undertakings are obliged to provide under Article 11(4) and (5) of Regulation No 17. Nor can it be held that the applicant provided information well in excess of that which the Commission may demand pursuant to that article.

410 As the applicant's conduct is not capable of being a mitigating circumstance, the first part of the fourth plea must be rejected.

Second part, relating to the non-deliberate nature of the price-fixing arrangements

411 According to the applicant, the price-fixing arrangements within the soda ash sector did not represent a deliberate policy on the part of the parties involved to infringe competition rules. In that regard, it relies on an internal note of 29 November 1988, drafted by the applicant's sales manager in the 'soda ash' division, which was submitted to the Commission during the administrative procedure, according to which 'in the light of meetings between soda ash producers and the [Directorate General for Competition] a number of years ago, [he did] not believe that [they had] a major problem regarding the nature of [their] contracts'. In that note, it is also indicated that there is often a very fine dividing line between, for example, maximising a market position and abusing one of dominance. In any event, the applicant maintains that its conduct has not been found to be abusive in a prior judgment of the Court of Justice or the General Court. Therefore, if there has been an infringement, it should be treated as a 'technical infringement'.

412 It is clear from settled case-law that, for an infringement to be regarded as having been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing the prohibition laid down by the competition rules in the Treaty applicable to undertakings; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the distortion of competition in the common market (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 165, and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraph 155).

413 As the Commission correctly states in recital 137 of the contested decision, the Court has already delivered a number of judgments condemning practices designed to block the access of competitors to customers by tying the latter to the dominant supplier. In that regard, *Hoffman-Laroche* v *Commission*, paragraph 216 above, in particular

establishes that 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 the said 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.

414 Moreover, it is apparent from recital 108 of the contested decision that the applicant drafted 'a note headed "1989 Issues and Objectives[:] consider legality of top-slicing and alternatives"'.

415 In addition, as the Commission states in recital 158 of the contested decision:

'[The applicant] was well aware from its extensive negotiations with the Commission between 1980 and 1982 of the requirements of Article 82 [EC]. The introduction of the top-slice rebates in about 1983 followed not long after specific assurances had been given to the Commission by [the applicant] that it offered no special inducements to customers to take the whole or a quantity close to the whole of their requirements of soda ash from [the applicant].'

416 Therefore, the applicant could not fail to be aware that the practices referred to in the contested decision had as their object or effect the distortion of competition in the common market.

417 The internal note from the applicant's sales manager in the 'soda ash' division of 29 November 1988 is not such as to cast doubt on that finding, since the case-law

had already established the unlawfulness of similar practices to those in which the applicant was found to have engaged by the Commission.

418 Accordingly, the second part of the fourth plea must be rejected.

Third part, relating to the existence of preventive measures

419 The applicant alleges it took significant measures to ensure compliance with competition rules. Those measures included a comprehensive and continuing training programme implemented by in-house and external lawyers, a professionally produced video which has been sold to over 170 other companies and an explanatory booklet. According to the applicant, those measures were effective, as can be seen from the absence of any complaint regarding competition law breaches in the 10-year period since Decision 91/300 was adopted.

420 In that regard, whilst it is indeed important that an undertaking has taken measures to prevent further infringements of competition law from being committed in the future by its staff, that does not alter the fact that the infringement was committed. Merely because in certain previous decisions the Commission took account of a compliance programme as a mitigating circumstance does not mean that it is under a duty

to do so in each case which comes before it (see Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 266 and the case-law cited).

421 It follows that, in the present case, the Commission cannot be criticised for not taking into account, when examining the existence of mitigating circumstances, the preventive measures which the applicant alleges that it has adopted.

422 Therefore, the third part of the fourth plea must be rejected.

Fourth part, relating to the abandonment of the top-slice rebates

423 The applicant claims that, a considerable time before the statement of objections was issued, its pricing arrangements for soda ash sales were voluntarily renegotiated, so as to avoid top-slice rebates, by adopting a single negotiated price without any discounts or rebates. It relies on the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4). According to the applicant, that notice states that the voluntary abandonment of practices at an early stage is a factor leading to a substantial reduction in the level of the fine. Likewise, under point 3 of the Guidelines, it is a factor justifying a very substantial reduction in the amount of the fine.

424 In that regard, according to point 3 of the Guidelines, 'termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks)' constitutes a mitigating circumstance.

425 However, as is apparent from paragraphs 366 to 369 above, the Guidelines are not applicable in the present case.

426 In any event, even if the Guidelines were applicable in the present case, the conditions laid down in Article 3 of the Guidelines are not met in this instance. It cannot be held that the applicant ceased to commit further infringements as soon as the Commission intervened, as is required by the Guidelines for termination of an infringement to constitute a mitigating circumstance. In that regard, it is apparent from paragraph 3 above that the Commission carried out its first checks in April 1989, whereas the applicant abandoned the rebate on marginal tonnage system from 1 January 1990, as is apparent from recital 161 of the contested decision.

427 Moreover, Article 3 of the Guidelines cannot be interpreted as meaning that the mere fact that an offender terminates an infringement as soon as the Commission intervenes constitutes, generally and without reserve, a mitigating circumstance. Such an interpretation of Article 3 of the Guidelines would reduce the effectiveness of the provisions for maintaining effective competition, as it would weaken both the penalty which could be imposed for an infringement of Article 82 EC and the deterrent effect of such a penalty. Consequently, that provision must be interpreted as meaning that solely the particular circumstances of the specific case in which an infringement is actually terminated as soon as the Commission intervenes can warrant that termination being taken into account as a mitigating circumstance (Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraphs 335 and 338).

428 In the present case, the Commission criticises the applicant for having abused its dominant position on the market for soda ash in the United Kingdom by implementing in respect of its main customers a system of fidelity rebates and rebates relating to marginal tonnage; contractual conditions which sought to ensure that it had effectively exclusive supply, and other measures the object and effect of which was to tie those customers to it for the whole, or practically the whole, of their requirements and to exclude competitors. In that regard, it should be observed, in particular, that the applicant does not dispute the existence and content of the documents relied on by the Commission in the contested decision, from which it is apparent that top-slice rebates were not based on economically justified considerations and that they sought to prevent customers being supplied by competitors. As was pointed out in paragraphs 370, 373 and 374 above, the infringements which the applicant was found to have committed were of particular gravity.

429 Therefore, even if the Guidelines were applicable and the applicant had ceased to offer top-slice rebates to its customers from the moment the Commission intervened, that termination could not be regarded as a mitigating circumstance.

430 Consequently, the fourth part of the fourth plea must be rejected.

Fifth part, relating to the limited extent of the rebates

431 According to the applicant, the tonnages affected by top-slice rebates represent only 8% of its total sales of soda ash.

432 In that regard, in assessing the gravity of an infringement, the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (*Musique Diffusion française and Others* v *Commission*, paragraph 354 above, paragraph 120).

433 In the present case, as regards the gravity of the infringement in question, the Commission stated:

> '(156) In the present case the Commission considers that the infringements of Article 82 [EC] were of particular gravity. They were part of a deliberate policy aimed at consolidating [the applicant's] control over the [relevant] market in a manner which was in fundamental conflict with the basic objectives of the Treaty. Further, they were specifically directed at restricting or damaging the business of particular competitors.
>
> (157) By foreclosing for a long time sales opportunities for all competitors, [the applicant] caused lasting damage to the structure of the market concerned, to the detriment of consumers.'

434 Consequently, the Commission did take account of the influence which the infringement could have had on the market, which, in the circumstances of the present case, cannot be limited to the quantities of soda ash affected by rebates on marginal tonnage.

435 In any event, it is apparent from settled case-law that factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects (*Thyssen Stahl* v *Commission*, paragraph 378 above, paragraph 636, and *Michelin* v *Commission*, paragraph 295 above, paragraph 259).

436 Therefore, the fifth part of the fourth plea must be rejected.

Sixth part, relating to the failure to examine other aspects of the sales contracts

437 The applicant maintains that the Commission makes no criticism of the duration of the applicant's soda ash sales contracts; the presence of competition clauses; extensive total requirements contracts; or rebates on core tonnage, or on any discounts on the remaining 92% of its production.

438 In that regard, suffice it to state that those practices are not targeted by the contested decision.

439 The fact that the Commission makes no criticism of other aspects of the sales contracts cannot constitute a mitigating circumstance in relation to the infringement which is the subject-matter of the contested decision.

440 The sixth part of the fourth plea must, accordingly, be rejected.

Seventh part, relating to the absence of profit resulting from the infringement

441 According to the applicant, the Commission adduces no evidence that the applicant itself profited from any of the practices in which it was found to have engaged. It asserts that its sales had fallen dramatically in the early part of the 1980s and it had to rationalise its production capacity by closing down its plant at Wallerscote (United Kingdom). Thereafter matters improved, but profits throughout the 80s, taken as a whole, were only moderate.

442 However, the applicant has adduced no evidence to support its allegation that it made no profit.

443 Moreover, even if the applicant did not profit from the practices which it was found to have committed, it must be borne in mind that although the amount of the fine imposed must be proportionate to the duration of the infringement and the other factors capable of affecting the assessment of the gravity of the infringement, such as the profit that the undertaking was able to derive from its practices, the fact that an undertaking did not benefit from the infringement cannot preclude the imposition of a fine, since otherwise it would cease to have a deterrent effect. It follows that the Commission is not required, in order to set fines, to take into consideration any lack of benefit from the infringement at issue. Furthermore, the absence of such a benefit cannot be regarded as a mitigating circumstance (see, to that effect, Case T-64/02

Heubach v *Commission* [2005] ECR II-5137, paragraphs 184 to 186 and the case-law cited).

444 Consequently, the seventh part of the fourth plea must be rejected.

Eighth part, relating to the absence of secrecy regarding the infringement

445 The applicant claims that, in the present case, there is no aggravating feature of secrecy regarding the top-slice rebates. It is clear from the antidumping measures adopted by the Commission that the soda ash market was transparent and price sensitive, and consumers operated on a Community wide and worldwide basis for their annual contracts.

446 In that regard, the Court observes that the Commission is fully entitled to hold secrecy to be an aggravating circumstance when assessing the gravity of the infringement (see, to that effect, for a cartel, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 213).

447 However, it cannot be inferred therefrom that the absence of secrecy constitutes a mitigating circumstance.

448 In those circumstances, the eighth part of the fourth plea must be rejected.

Ninth part, relating to the nature of the competitors

449 According the applicant, top-slice rebates would have affected only its competitors from outside the Community which had themselves engaged in established unfair pricing policies throughout the whole of the 80s.

450 In that regard, suffice it to note that, even if top-slice rebates affected only its competitors established outside the Community, the applicant does not explain how the fact that they are undertakings established outside the Community should constitute a mitigating circumstance in the present case.

451 Therefore, the ninth part of the fourth plea must be rejected.

452 In conclusion, the contested decision must be annulled in so far as it states that the infringements occurred between about 1983 and the end of 1989, and not between 1984 and the end of 1989, and must be amended in so far as it wrongly finds that repeated infringements committed by the applicant constituted an aggravating circumstance.

453 Consequently, the amount of the fine imposed on the applicant is set at EUR 8 million.

Costs

454 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.

455 In the present case, the applicant's claims have been upheld in part. The Court considers that under a fair assessment of the circumstances of the present case, the applicant must pay four-fifths of its own costs and four-fifths of those incurred by the Commission. The Commission shall bear one-fifth of its own costs and one-fifth of those incurred by the applicant.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Annuls Article 1 of Commission Decision 2003/7/EC of 13 December 2000 relating to a proceeding under Article 82 [EC] (Case COMP/33.133-D: Soda ash — ICI) in so far as it states that Imperial Chemical Industries Ltd infringed Article 82 EC in 1983;

2. Sets the amount of the fine imposed on Imperial Chemical Industries in Article 2 of Decision 2003/7 at EUR 8 million;

3. Dismisses the action as to the remainder;

4. Orders Imperial Chemical Industries to pay four-fifths of its own costs and four-fifths of those incurred by the European Commission;

5. Orders the European Commission to pay one-fifth of its own costs and one-fifth of those incurred by Imperial Chemical Industries.

Meij Vadapalas Dittrich

Delivered in open court in Luxembourg on 25 June 2010.

[Signatures]

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