COMMISSION DECISION

of 13 December 2000

relating to a proceeding pursuant to Article 82 of the EC Treaty

(COMP/33.133-C: Soda ash — Solvay)

(notified under document number C(2000) 3795)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/6/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

relating to a proceeding pursuant to Article 82 of the EC Treaty

Having regard to Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by Regulation (EC) No 1216/1999 [2], and in particular Articles 3 and 15 thereof,

Having regard to the Commission Decision of 19 February 1990 to open a proceeding on its own initiative pursuant to Article 3 of Regulation No 17,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission, pursuant to Article 19(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 [3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

PART I

THE FACTS

A. *SUMMARY OF THE INFRINGEMENT*

1. THE INVESTIGATIONS

(1) The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14(3) of Regulation No 17 at the premises of Community producers of soda ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing that an infringement of Article 86 of the EEC Treaty (now Article 82 of the EC Treaty) had been committed by Solvay et Cie SA (now Solvay SA), Brussels (Solvay).

2. THE INFRINGEMENT OF ARTICLE 82 BY SOLVAY

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

B. *THE SODA ASH MARKET*

1. THE PRODUCT

(3) The present procedure concerns soda ash (sodium carbonate), an alkaline chemical commodity which is mainly used as a raw material in the manufacture of glass. Soda ash is the primary source of sodium oxide, which acts as a flux in the glass-melting process. Soda ash is also used in the chemical industry for making detergents and in metallurgy.

(4) In Europe, soda ash is manufactured from common salt and limestone by the 'ammonia-soda' process invented by Solvay in 1865. The Solvay process initially produces light ash which requires a further stage of densification to produce the dense form. The two forms are

[1] OJ 13, 21.2.1962, p. 204/62.
[2] OJ L 148, 15.6.1999, p. 5.
[3] OJ 127, 20.8.1963, p. 2268/63.

chemically identical but dense ash is the preferred form for glass manufacture.

(5) In the United States of America, 'natural' soda ash is mined from trona ore deposits found mainly in Wyoming. After mining, the trona ore is purified and roasted in refineries. Natural soda ash is produced only in dense form. Natural ash is also found in Africa and Australia.

(6) All soda ash produced in the United States of America is now obtained naturally (the last synthetic production plant was closed by 1986) while in Europe the entire production is of synthetic material. By reason of its lower salt content, natural soda ash from the United States of America is particularly suitable for the manufacture of glass, and some glass producers who purchase mainly synthetic ash may seek to mix it with American natural ash in order to achieve the required concentration.

2. THE PRODUCERS

(7) During the period under consideration there were six producers of synthetic soda ash in the Community:

— Solvay,

— Imperial Chemical Industries (ICI),

— Rhône-Poulenc,

— Akzo,

— Matthes & Weber (M & W),

— Chemische Fabrik Kalk, Cologne (CFK).

(8) Solvay was the largest single producer of synthetic soda ash both worldwide and in the Community: it operated plants in Austria, Belgium, France, Germany, Italy, Spain and Portugal, and with some 60 % of the west European market was the undisputed market leader.

(9) Solvay had an established 'direction nationale' ('DN') for each of Austria, Belgium and Luxembourg, France, Germany, Italy, the Netherlands, Portugal, Spain and Switzerland to handle its commercial activities, with the headquarters in Brussels exercising a supervisory and coordinating role.

(10) ICI Soda Ash Products had since 1987 been operated as a separate business within ICI's Chemicals and Polymers Division. Formerly it was part of ICI's Mond Division.

(11) ICI was the second largest Community producer of soda ash, with two manufacturing sites in Northwich, Cheshire, but it confined its sales in the Community almost exclusively to the United Kingdom and Ireland and held over 90 % of the British market.

3. THE MARKET WORLDWIDE

(12) Worldwide demand for soda ash during the 1980s grew at around 1 % per annum, although there were substantial regional divergences. In the developed countries demand was static from 1980 until 1987, after which there was a considerable upturn in the market. Over half the soda ash produced worldwide was consumed by the glass industry.

(13) World soda ash capacity (natural and synthetic) in 1989 was around 36 million tonnes (nominal) per annum, of which the Community accounted for some 7,2 million tonnes, with Solvay having capacity of some 4,3 million tonnes and ICI 1 million tonnes. (Practical or effective capacity was some 85 % to 90 % of 'nameplate' capacity.) Soda ash consumption in the Community in 1989 was around 5,5 million tonnes annually, worth some ECU 900 million.

(14) The six American natural ash producers had total nominal capacity of 9,5 million tonnes per year and a domestic market demand in 1989 of some 6,5 million. Natural ash production in the United States of America in 1989 was almost 9 million tonnes. The American producers supplied the whole of their home market and exported the balance of production. Costs of production of natural ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

(15) The American producers of dense ash were viewed by the European manufacturers as the major competitive threat in their home markets. At the exchange rates prevailing in the late 1980s it was possible for those producers to sell in Europe at prices substantially below the local market price without dumping.

(16) The east European producers accounted for some 30 % of world soda ash capacity, producing around 9 million tonnes annually. The Soviet Union consumed over half the production and was a net importer. Almost all of the excess production exported by the east European countries was in the form of light ash. Despite the existence of anti-dumping duties, there were still substantial imports into the Community of light soda ash from Comecon countries.

(17) During the 1980s there was a marked increase in demand and soda ash was fully sold worldwide. Plants were running at maximum output in 1990. Chinese manufacture was to increase by some 500 000 tonnes

per annum and production in Botswana (for South Africa) was to produce another 300 000 tonnes, developments which were to result in the displacement of imports from other production areas.

4. THE COMMUNITY

(18) Solvay was the market leader with almost 60 % of the total Community market and sales in all Member States except for the United Kingdom and Ireland. After three years of stagnant demand in the mid-1980s, sales of soda ash in western Europe began to increase substantially in 1987. In 1988 and 1989 producers worked at full capacity.

(19) The west European market for soda ash in the late 1980s was still characterised by separation along national lines. The producers tended to concentrate their sales on those Member States where they possessed production facilities, although from 1981 or 1982 onwards the smaller producers — CFK, M & W and Akzo — increased their sales outside their 'home' markets.

(20) There was no competition between Solvay and ICI, each limiting its Community sales to its traditional 'spheres of influence' in continental western Europe and the British Isles respectively. Both ICI and Solvay had substantial export business to non-European overseas markets which were supplied from the Community. A large part of ICI's exports in fact consisted of material supplied by Solvay on ICI's behalf.

(21) In the Member States where Solvay was the sole locally established producer (Italy, Portugal and Spain) it had a virtually complete monopoly.

(22) Solvay's market share was in excess of 80 % in Belgium, 55 % in France and 52 % in Germany. ICI had over 90 % of the British market, the only alternative sources of supply being the United States of America and Poland.

(23) On the demand side, the main customers in the Community were the glass manufacturers. Some 65 % to 70 % of the output of the west European manufacturers was used in the manufacture of flat and hollow (container) glass. Soda ash was one of the major cost components in glass production, accounting for some 60 % of raw material batch costs. Most glass producers operate continuous process plants and require an assured supply of ash. In most cases they had a relatively long-term contract with one major supplier for the larger part of their requirements, with another supplier as a secondary source. During the 1980s the glass industry was the subject of a Europe-wide consolidation with large manufacturers operating on a pan-European basis and manufacturing in several Member States. The chemical industry took some 20 % of soda ash consumption and metallurgical applications around 5 %.

5. UNITED STATES NATURAL ASH

(24) Since the development of natural ash mining in the 1960s the American market had shown a substantial excess of capacity over domestic demand, and in the late 1980s a surplus of some 2,5 million tonnes was available annually for export.

(25) Given the oversupply and the presence of a number of producers with similar costs, the American domestic market was marked by strong price competition. The product was sold in the United States of America at a substantial discount off 'list' price (USD 93/short ton fob Wyoming) the net ex-works price at the end of 1989 being around USD 73/short ton, to which must be added transport costs to the East Coast industrial centres. List prices were raised by most producers to USD 98/short ton with effect from 1 July 1990 and the effective price went up to around USD 85.

(26) The pressure to export led to the United States producers attempting to penetrate the European and other markets. Natural soda ash began to appear in the Community in the late 1970s, principally in the United Kingdom. In 1982 American imports into the Community amounted to some 100 000 tonnes, almost 80 000 tonnes of this in the United Kingdom. The European industry successfully applied for anti-dumping protection against American dense soda ash imports in 1982. (Anti-dumping measures had also been in force against east European imports of light, but not dense, ash since October 1982.)

(27) The measures in force in the late 1980s granting anti-dumping protection against American dense ash involved:

(a) for the two producers then in the market, Allied (now General Chemical) and Texas Gulf, minimum price undertakings of GBP 112,26/tonne ex-store (Commission Regulation (EEC) No 2253/84) ([4]);

([4]) OJ L 206, 2.8.1984, p. 15.

(b) for those producers not in the market, Tenneco, KMG, FMC and Stauffer, a definitive anti-dumping duty of ECU 67,49/tonne (Council Regulation (EEC) No 3337/84) ([5]).

(28) The price undertakings as negotiated provided for conversion into other currencies at the exchange rates then prevailing, and with the changes in parities since 1984 the undertaking price for Germany, France and other markets was substantially above the market price so no sales were commercially feasible under the undertaking outside the United Kingdom.

(29) Texas Gulf suffered a loss in volume following the introduction of anti-dumping measures and withdrew from the United Kingdom market in 1985 so that in 1990, of the American producers, only General Chemical was still supplying in the United Kingdom, although at a rate of only around 30 000 tonnes per year.

(30) From 1987 onwards General Chemical also targeted France, thereby affecting mainly Solvay and Rhone-Poulenc, which shared that market. Texas Gulf also sold some tonnage in Belgium. In both cases the imports were made free of anti-dumping duties under special rules relating to inward processing.

(31) A number of large Community customers in the glass sector had indicated their intention to take a substantial part of their business away from the Community producers and to buy from the United States of America. Until 1990 however a total of only about 40 000 tonnes was supplied in continental western Europe (as opposed to the United Kingdom and Ireland) by the American producers, almost all of it under the inward processing rules.

(32) The anti-dumping measures provided for by Regulation (EEC) No 3337/84 expired in November 1989. A review of the measures had been requested by certain American producers and by representatives of the Community glassmaking industry in 1988. On 7 September 1990 the review was terminated without protective measures being imposed (Commission Decision 90/507/EEC) ([6]).

(33) In 1982, some of the American producers formed an Export Association under the Webb-Pommerene Act of 1918 with the approval of the American Department of Commerce: initially its activities were restricted to Japan and only three producers took part. In December 1983 all six natural ash producers joined to form the American Natural Soda Ash Corporation (Ansac).

(34) The function of Ansac was to act as a joint sales agency for the marketing and distribution of American soda ash exports outside America. Its sales were around USD 250 million annually. With the objective of extending its activities to the west European market (to replace sales by individual producers), Ansac notified its arrangements to the Commission with a request for negative clearance or exemption under Article 81(3).

(35) Ansac's application was the subject of Commission Decision 91/301/EEC ([7]), under which an exemption was refused.

C. *BACKGROUND*

1. SOLVAY'S POSITION IN THE COMMUNITY SODA ASH MARKET DURING THE PERIOD UNDER CONSIDERATION

(36) In the nine west European national markets in which Solvay had its own sales organisation (the nine ‘directions nationales’ or ‘DNs’, which included Austria and Switzerland) it had a stable market share of around 70 %. Its four competitors in the Community together had only 26 %. In the Community excluding the British Isles (where ICI had a near-monopoly), Solvay's market share was historically around 70 %. With the sole exception of the Netherlands (left largely to NSI and then Akzo as a result of a market-sharing agreement made in 1955 which is not the subject of proceedings) Solvay was the largest, or in some cases the exclusive, supplier of soda ash in each of the Member States in which it sold.

(37) Solvay as the largest producer of salt in the Community was very favourably placed as regards the supply of the principal raw material for soda ash.

2. SOLVAY'S COMPETITORS

(38) The only other producer in Europe comparable in strength to Solvay was ICI, which did not compete in any of Solvay's markets. With the possible exception of Akzo, which by virtue of its location on the North Dutch coast claimed as its ‘natural backyard’ not only the Netherlands but also north Germany and Denmark, the other producers tended to concentrate their

([5]) OJ L 311, 29.11.1984, p. 26.
([6]) OJ L 283, 16.10.1990, p. 38.
([7]) OJ L 152, 15.6.1991, p. 54.

Community sales on their respective national markets. Thus Rhone-Poulenc conducted 95 % of its Community soda ash business in France; CFK and Matthes & Weber sent some exports to the Netherlands, France and Luxembourg but again their main effort was on their local market. Compared with Solvay's 70 %, the other producers' market shares in the continental Community Member States ranged from 4 % to 11 %.

(39) The main danger seen by Solvay to its position in its European market came not from other Community producers but from American natural ash. The east European producers supplied mainly light ash, which is not normally used by the glass industry. The anti-dumping measures introduced in 1983 had provided Solvay with a substantial degree of protection against such imports (see recital 49).

3. SOLVAY'S CUSTOMERS

(40) Solvay's principal customer base was in the glass sector, which accounted for 66 % to 68 % of soda ash consumption in western Europe. The glass sector itself was divided between container glass and flat glass in the proportion 2:1.

(41) Solvay was the principal or the sole supplier of virtually all the glass producers in continental western Europe. There were only very few customers where one of the other soda ash producers was the 'first' supplier. Thus in 1988, Solvay had 82 % of the soda ash business for flat glass in the market formed by its nine 'DNs'; in the container glass sector, it had 74 % of the total available business.

(42) Solvay's largest customer was the Saint-Gobain Group, with 'evergreen' contracts in the different Member States terminable on 24 months notice, covering an offtake in western Europe of over 500 000 tonnes per year. There was also a secret 'protocol' providing for a 'group rebate' of 1,5 % per year on all sales in Europe. Prices and other contractual terms were however negotiated on a national basis between the appropriate Solvay 'DN' and the Saint-Gobain company in the Member State in question. Many other customers also had an 'evergreen' contract providing for a 24-month notice period.

4. SOLVAY'S SALES ORGANISATION

(43) Solvay's production and marketing operations for soda ash in western Europe were organised on a national basis with a separate 'DN' serving each of the different markets. There were considerable price variations between the different Member States, with ex-works prices in France some 10 % below the levels in Belgium. In the glass sector in particular there was however during the 1980s a marked tendency towards the formation of Europe-wide groups. While Solvay insists that price negotiations took place at a national level (i.e. between the Solvay 'DN' and the local glass-making subsidiary company of the group concerned), customers were increasingly aware of the price differences between the different Member States and sought to minimise them. In some cases customers succeeded in negotiating a formula with Solvay which reduced the price variation (e.g. the Belgian glassmakers Saint-Roch and Glaverbel).

5. SOLVAY'S TOTAL REQUIREMENTS CONTRACTS UP TO 1981

(44) Up to 1980, Solvay's supply agreements for soda ash in the different Member States were of long duration and generally required the customer to obtain its total requirements from Solvay.

(45) After Solvay's supply agreements had been brought to the attention of the Commission, extensive discussions took place and Solvay eventually agreed to modify its contractual arrangements by replacing the 'total requirements' clause with a clause which stipulated a particular tonnage and reducing the period of notice for terminating the agreement (in many cases five years) to two years.

(46) The Commission however informed Solvay by letter that the tonnages which the customer was required to purchase each year should not correspond or be close to the customer's total requirements of soda ash. Further, while confirming that it was permissible for Solvay to grant rebates and discounts off list price, the Commission insisted that any rebates allowed by Solvay should neither constitute a disguised method of ensuring the continuance of the abandoned 'total requirements' contracts nor operate as loyalty rebates.

(47) Solvay informed the Commission at the end of 1980 that it was instructing its various 'DNs' to amend their supply agreements and attached a copy of a draft circular letter to be sent to its various national sales offices in which it stressed, in two places, that under no circumstances should any price arrangement constitute an inducement to ensure the 'loyalty' of the customer. The customer was also to be free to choose the tonnages it wished to purchase, and the sales offices

were expressly prohibited from attempting to discover from the customer the proportion of its total requirements which the nominated tonnage represented.

(48) On the basis of Solvay's letter, the file was closed in 1982 and no further action was taken by the Commission until the investigations in the present proceedings.

6. ANTI-DUMPING PROTECTION

(49) A major plank of Solvay's commercial policy in the soda ash sector was to ensure the maintenance of the anti-dumping measures in place against the American producers of dense ash as well as the east European light ash suppliers. With the changes in exchange parities since 1984, Solvay was well aware that the American producers could sell in Europe at prices substantially below the average Community prices without being guilty of dumping: i.e. their ex-works price for exports was not below their domestic price.

(50) A number of glass producers had been taking advantage of a provision in the anti-dumping legislation which permitted the glassmakers to avoid anti-dumping duties on imported soda ash used in producing glass for export outside the Community (inward processing).

(51) The anti-dumping duties on American imports were under review at the time of the present proceedings and Solvay was pressing hard for their renewal, as well as the extension of anti-dumping duties to material imported under inward processing arrangements. One of the American producers, in particular General Chemical (formerly known as Allied), was according to European producers targeting France, a strategy that affected only Solvay and Rhône-Poulenc. There are, however, indications in the records of a meeting of the producers association, the European Chemical Industry Council (CEFIC), that those two firms were to 'examine the possibility of an arrangement with General Chemical'.

(52) It is significant that in the anti-dumping procedure Solvay pressed for a new minimum price cleared at Community border of ECU 163 per tonne to be imposed on dense ash from eastern Europe and the United States of America (approximately ECU 170 to 180 delivered) while (as it well knew) in several countries its own average delivered price was under DEM 300 (ECU 150).

D. *EXCLUSIONARY CONDUCT BY SOLVAY*

1. SOLVAY'S COMMERCIAL STRATEGY SINCE 1982

(53) In spite of the express terms of the Commission's letter and of Solvay's internal circular, from 1983 onwards Solvay made increasing use both of progressive rebates and of supply contracts which effectively tied the major customers to Solvay for the whole or virtually the whole of their soda ash requirements. In the face of a fall-off in demand (up to 1987), the main concern of Solvay appears to have been to preserve its dominant position in the European market against 'unrest' from smaller producers, as well as the perceived threat of imports from eastern Europe and the United States. The main measures taken by Solvay included:

> 'improving relations with major customers (glassmakers, chemicals industry) by bringing into general use and strengthening our contracts policy, with the aim of "tying in" customers (especially Saint-Gobain which gets a group super-rebate of 1,5 % under a "master" contract)… but these contracts are still relatively "open" owing to EEC rules (maximum two years' notice, contract tonnage limited to around 85 % of customer's needs to allow customer the possibility of a second supplier).'

(54) A strategy presentation (undated but probably originating in about April 1988) sets out Solvay's commercial and pricing policy:

> 'Solvay's primary concern is to defend its major commercial positions particularly in Europe (it is this market which pays well and is profitable).
>
> This entails:
>
> — a policy of being present for every customer plus good market coverage …,
>
> — a policy favouring customers prepared to agree to long-term commitments = contracts which provide for significant discounts.'

(55) Another strategy paper dated April 1988 sets out Solvay's policy alternatives:

> 'Defensive strategy consists, and will continue to consist, in:
>
> — continuing to "tie in" customers with bigger and bigger contractual discounts.'

2. SOLVAY'S REBATE SYSTEM IN GERMANY

(56) Solvay's declared policy on the important German market was to preserve its overall market share at over 50 % by:

— excluding all imports from the United States of America and preventing any further growth in imports from Akzo and Eastern European producers,

— maintaining its 'dominant position' as soda ash supplier to the flat glass and container glass industry.

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

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

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

(58) The cheque refund was already being given in late 1982 and the 'top-slice' percentage was introduced in early 1983. The system was extended and refined after 1983 and formed the basis of Solvay's price structure in Germany. At the time of the Commission's investigations in March 1989 virtually all the major customers of Solvay in Germany were receiving both forms of inducement. The customers in question were enjoined by Solvay to keep the rebates strictly secret from third parties.

(59) Under the rebate system as applied to major customers, the 'core' tonnage, usually corresponding to about 80 % of the customer's total annual requirement, was invoiced at list price with the usual quantity rebate (say 10 %). For the marginal tonnage over and above the customer's basic requirement, a rebate of 20 % was given, and in addition, a substantial cheque payment was made.

(60) Thus for Vegla, a member of the Saint-Gobain group and Solvay's largest customer in Germany, the rebate system operated as follows for 1989:

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

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

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

(61) Solvay's ex-works price for Germany was DEM 403 per tonne. The average net price per tonne paid by large customers in Germany in the late 1980s was around DEM 340 to DEM 360 per tonne. What is not apparent is that on the marginal tonnage the price per tonne could go down to DEM 250 per tonne or even lower.

(62) To take again the example of Vegla in 1989:

— ex-works list price per tonne: DEM 403,

— basic tonnage (10 % rebate): 85 000 tonnes,

— marginal tonnage (20 % rebate): 43 400 tonnes,

— discount price of last tranche (list price — 20 %): DEM 322,40,

— special cheque payment: DEM 3 349 000 = DEM 77,16 per tonne,

— net price per tonne for marginal tonnage: DEM 245,24.

(63) In each case where the special top-slice/cheque rebates were given, Solvay was the sole or the principal supplier of the customer. It is apparent from the documents that in each case Solvay had an accurate idea of each customer's total requirements and was able to calculate its price offer accordingly. The marginal tonnage to which the financial inducements were referable corresponded to the tonnage which the customer might otherwise have considered obtaining from a competing supplier.

(64) The effect of the rebate system was that a competitor attempting to enter as second supplier by taking away from Solvay part of the customer's business (i.e. the marginal tonnage) had to offer the customer a price for that tonnage which was at least equal to, if not better than, Solvay's: in the example given above, DEM 245. While the competitor had to offer this unprofitably low price on all the tonnage offered, Solvay only had to do so on the last tranche. Thus although the marginal quantity was being supplied at only DEM 245 per tonne, the average price per tonne for Solvay across the whole tonnage supplied was DEM 320.

(65) To put it another way, if the competing supplier was to hope to take marginal business from Solvay, he would have to compensate the customer for the loss of the financial advantage which was foregone by not purchasing it from Solvay. In the example given the value of this benefit is some DEM 6 850 000. The second supplier would have to absorb the cost of

granting this rebate on just over 43 000 tonnes while Solvay could average the rebate over three times that quantity.

(66) The customer thus had little incentive to seek a second supplier given the favourable price offered by Solvay for marginal tonnage, and the second supplier had no incentive to quote for the customer's marginal requirements given the unprofitable price he would have to offer.

(67) In most cases, such as that of Vegla, the rebate system ensured that Solvay was secure in the position of exclusive supplier. The rebate system also operated however to ensure that where customers did have a policy of splitting their business between two suppliers the dominant share of Solvay was maintained. Flachglas, Solvay's second largest customer in Germany, divided its business roughly 70:30 between Solvay and M & W. From 1983 onwards, Solvay's pricing conditions to Flachglas involved an 8.5 % quantity rebate for tonnage up to 70 000 tonnes, 20 % on any marginal tonnage, and a cheque for DEM 500 000 to DEM 750 000. The additional cheque rebate meant that the real price for any marginal tonnage taken over 70 000 tonnes was (depending on the quantity) as low as DEM 250 or DEM 260 per tonne. It was extremely difficult for the second supplier to break into Solvay's 'core' share of the business, which (as Solvay's own documents show) was protected by the rebate 'barrier'. While the second supplier might be able to match the invoiced price of DEM 322,40 (list price — 20 %) it was highly unlikely that the customer would risk losing the substantial cheque payment, which was clearly dependent upon its purchasing an appropriate tonnage from Solvay in addition to the basic contractual tonnage. Documentation obtained from Matthes & Weber confirms that it was impossible for that company to make any inroads into Solvay's share of the Flachglas business.

(68) Internal Solvay documents make it abundantly clear that the objective of the rebate system in Germany was to secure the loyalty of the customers to Solvay.

(69) The particular case of Vegla is again instructive in this connection. Vegla had an understanding of long duration with Deutsche Solvay Werke (DSW) to purchase its total requirements from Solvay. In late 1987, however, apparently under pressure from the Saint-Gobain headquarters in Paris, Vegla requested Solvay to agree to its purchasing 15 000 tonnes from the United States of America. DSW strongly opposed the suggestion and made it clear to Solvay in Brussels that the rebate system was intended to reinforce DSW's position as sole supplier to Vegla. If Vegla were permitted to buy from the United States of America this would constitute an 'unnecessary abandonment of our strong defensive position (Vegla's total requirements), secured by a "watertight" rebate system'.

(70) Other DSW documents dating from early 1988 emphasise that Vegla had to be made aware that the 'preferential treatment' accorded it by Solvay depended upon its taking the whole of its requirements from DSW. In the event that Vegla did not do so, the cheque rebate would be withdrawn. The documents also stress the fact that Solvay's two-step price system involved a significant subsidy for marginal tonnages in order to exclude competition. One note of 1 February 1988 makes the point particularly clear:

> '2. That the price policy to date, which was based on the principle of a two-tier pricing structure, gave a special subsidy to marginal tonnage and thereby provided protection against competitors' taking a corresponding part of the customer's requirements.
>
> 3. That in consequence DSW must during the further price negotiations for 1988 concentrate all its efforts on securing the marginal tonnage (perhaps by increasing the amount of the cheque), and in any case to be fully prepared to cut off completely the benefits they currently enjoy in the form of cheques if they do not buy the marginal tonnage from us.'

(71) In the event it was agreed that DSW would supply Vegla with its total requirements for 1988 and 1989 (except for minor tonnages at one factory) with a rebate of 20 % on purchases over 85 000 tonnes and a cheque including an express 'fidelity' element of DEM 1 500 000 as well as other discounts.

3. SOLVAY'S REBATE SYSTEM IN FRANCE

(72) In France Solvay applied a system of rebates on marginal tonnage similar to that operated in Germany.

(73) The BSN group was Solvay's largest customer in France with an annual consumption of around 300 000 tonnes per annum. Solvay was to all intents and purposes the sole supplier of BSN in France. As with Saint-Gobain, Solvay was particularly anxious to prevent BSN from finding a second source of supply from among the United States natural ash producers.

(74) At the end of 1987 an arrangement was made with BSN for 1988 under which Solvay gave not only the normal tonnage rebate of 8,5 % but also an extra rebate on marginal tonnage. A case rebate of FRF 135 per tonne was to be paid quarterly on offtake over 210 000 tonnes. The arrangement with BSN was extended for one year on 11 January 1989.

(75) Durand (Cristalleries d'Arques) had an annual offtake of 50 000 tonnes to 60 000 tonnes. Up to 1987, Durand received a rebate of 5 % for tonnage over 50 000 tonnes. For 1988, the arrangement included not only the 5 % rebate but also a supplementary rebate of FRF 100 per tonne on purchases over 48 000 tonnes. For 1989, having ascertained that Durand's total requirements of soda ash would be 68 000 tonnes to 70 000 tonnes, Solvay increased the rebate on tonnages from 48 000 tonnes to 58 000 tonnes to FRF 140 per tonne with FRF 175 on the top slice, i.e. anything over 58 000 tonnes.

(76) Perrier consumed around 50 000 tonnes to 60 000 tonnes of soda ash per year, all purchased from Solvay. Under its 'evergreen' supply contract dating from 1981, it was required to take 50 000 tonnes ± 10 % from Solvay. From 1987 onwards, Perrier received a basic 4 % tonnage rebate but if its offtake exceeded 55 000 tonnes, the rebate was increased to 4,75 % on the whole of the tonnage purchased. Thus if Perrier went to another supplier for marginal tonnage i.e. anything over 55 000 tonnes, the second supplier would have to compensate it for the loss of the additional 0,75 % rebate on the whole of the 55 000 tonnes already purchased from Solvay.

(77) The Perrier arrangement is the only example found of a fidelity rebate where the customer actually lost a benefit referable to the basic tonnage unless it also took the marginal tonnage. The other top-slice rebates however had a similar exclusionary effect as can be demonstrated by the case of Durand.

(78) In the face of Solvay's additional rebate of FRF 175 per tonne for tonnage above 58 000 tonnes, any second supplier aiming to obtain the last 10 000 tonnes of the Durand business would have to equal or better the inducements offered by Solvay, i.e. the 5 % contractual discount plus the extra FRF 175 rebate.

(79) The effective price per tonne of the last 10 000-tonne tranche from Solvay was as follows:

— ex-works list price per tonne		FRF 1 125
— delivered price per tonne		FRF 1 223
— less: 5 %	FRF 56,25	
— additional rebate	FRF 175,00	FRF 231,25
— delivered price per tonne		FRF 991,75
		(= FRF 893,75 ex-works)

(80) Solvay's average delivered price per tonne if it supplied the whole 58 000 tonnes was much higher: FRF 1 136. A competitor wishing to supply the marginal 10 000 tonnes would however have had to offer a delivered price of FRF 991,75 or better. The second supplier would have had to compensate the customer for moving its business by offering an inducement of FRF 2 312 000 (10 000 × FRF 231,25). On the assumption that its ex-works list price was the same as Solvay's (FRF 1 125), it would have had to absorb the whole FRF 2,5 million on business worth only FRF 11 250 000 at list price, i.e. give an effective discount of over 20 %.

4. SAINT-GOBAIN

(81) The Saint-Gobain group, which operated almost 30 glassworks across Europe — in France, Germany, Italy, Spain, Belgium and Portugal — was Solvay's largest customer with purchases of over 550 000 tonnes of soda ash in 1988.

(82) Saint-Gobain produced both flat and container glass. Out of its total consumption of soda ash in western Europe of 822 000 tonnes (1988), Solvay supplied 68 % (1987: 67 %).

(83) Solvay supplied 100 % of Saint-Gobain's requirements in all important national markets outside France, where it was in the position of second supplier, 75 % of Saint-Gobain's requirement in that Member State having traditionally been supplied by Rhone-Poulenc. Prices and other conditions were negotiated at a national level between the local Saint-Gobain subsidiary and the Solvay 'DN' in that country. In most cases the supply agreement was to run indefinitely ('evergreen' contracts) with a notice period of two years. (In Italy however there was no formal contract and for France, Saint-Gobain terminated the agreement by giving 24 months' notice on 10 March 1987; new conditions were being negotiated at the date of the Commission's investigations.)

(84) There were substantial price variations between the different Member States but Saint-Gobain (to Solvay's evident dissatisfaction) used its presence in several countries to exercise downward pressure on Solvay's differential pricing.

(85) A secret Protocol was concluded in November 1982 (effective 1 January 1983) to give expression to the special relationship between Solvay and the Saint-Gobain group based on a reciprocated 'most-favoured partner' status.

(86) By clause 2 of the Protocol:

'On European markets other than France Saint-Gobain will continue to give priority to Solvay for supplies of soda ash, for quantities of at least 400 000 tonnes per annum, based on Saint-Gobain's glass production in 1981; in France Saint-Gobain will progressively increase purchases from Solvay to bring them to the level of 50 000 to 100 000 tonnes per year.'

(87) In addition to provisions under which Saint-Gobain was to receive the lowest prices offered by Solvay in each country for comparable glass-making uses, clause 4 provided for a special group rebate on Saint-Gobain's purchases from Solvay:

'Under this Protocol Solvay further grants Saint-Gobain an additional rebate of 1,5 % calculated on Saint-Gobain's total soda ash purchases from Solvay in Europe.'

(88) The Protocol also contained a 'competition clause' under which:

'Competing offers received by Saint-Gobain at prices below Solvay's for long-term deliveries will be examined by the parties together in their mutual interest. If a solution acceptable to both parties cannot be agreed, this Protocol will cease to be valid. No account shall be taken of "spot" offers or offers at "dumping" prices.'

(89) The 'super group rebate' granted to Saint-Gobain amounted to some BEF 50 million to BEF 60 million annually.

(90) Internal documentation of Solvay leaves little doubt about the purpose of this special arrangement with Saint-Gobain:

'— It should be noted that the SG "super group rebate" of 1,5 %, which helps to "tie in" the SG group, is not an "absolute" weapon (it being difficult to increase the amount owing to EEC rules). In particular it requires SG to "come clean" if it buys significant quantities from competitors.'

(91) DSW frankly informed a representative of Saint-Gobain's German subsidiary Vegla on two occasions that the protocol concluded between Saint-Gobain and Solvay in Brussels was to all intents and purposes an exclusivity agreement even if for obvious reasons the parties could not actually say so in writing. The object of the agreement was said to be to maintain the *status quo*, clearly a reference to Solvay's position as exclusive supplier. The only difference of opinion between DSW and the Solvay headquarters as to the interpretation of the agreement was that Solvay in Brussels seems to have taken the view that Saint-Gobain was not precluded in principle from making spot purchases.

5. EXCLUSIVITY ARRANGEMENTS IN GERMANY

(92) Quite apart from the secret 'Protocol' with the Saint-Gobain group, DSW also had a long-standing, if unofficial, arrangement (referred to as a 'gentleman's agreement') with Vegla, the German Saint-Gobain subsidiary, by which it was understood that this customer took all its requirements of soda ash from Solvay. With an eye presumably on the letter of the Community competition rules, the Vegla agreement had however been formally expressed as a 'tonnage' contract. Vegla, in common with most of Solvay's large customers in Germany, had an 'evergreen' contract dating from 1981, i.e. one of undetermined duration subject to termination on 24 months' notice. The exact quantities were the subject of annual negotiation.

(93) When a Vegla representative reminded DSW that the Commission had in 1981 required Solvay to amend its exclusive supply agreements, DSW's reaction was:

'But we — Vegla and DSW — have always worked on the understanding that the agreement related to the total requirements of the factories (except Bergisch-Gladbach).'

(94) The exclusivity arrangements seem to date back to the time when the Protocol was concluded with Saint-Gobain and when Vegla (according to one DSW document) gave a promise of 'loyalty'. It is apparent from the documents discovered at DSW that the top-slice rebates and other benefits were dependent upon Vegla obtaining all its requirements from Solvay.

(95) There are also strong indications that DSW had told Vegla at one time that unless it purchased its total consumption from Solvay, all supplies would be cut off: a Solvay note of a meeting in Paris with senior officials of Saint-Gobain reads:

'He […] points out that, according to SG/D [Saint-Gobain Germany] DSW has imposed an unacceptable condition: SG/D to buy 100 % of requirements from DSW or DSW will not supply SG/D at all!'

(96) In the margin of the note is written 'so plump wurde das nicht gesagt' ('It was not put as bluntly as that'): the implication, however, is that, whatever was said, the meaning was the same.

(97) In at least one other case a major customer in Germany (Oberlandglas) was told in unambiguous terms by DSW that the 'special conditions' (20 % top-slice rebate, cheque for DEM 1 million) depended upon its taking 100 % of its requirements from Solvay from 1987 onwards. Oberlandglas has always taken its total requirements from Solvay.

6. EXCLUSIVITY ARRANGEMENTS IN FRANCE

(98) In addition to the fidelity rebates given to several major customers in France, the tie of exclusivity with Solvay was reinforced by the device of concluding long-term delivery agreements which, although formulated as 'tonnage' contracts, in fact stipulated for a tonnage which corresponded closely with the customer's total requirements. The Commission had warned Solvay against such a practice in December 1980.

(99) The 'evergreen' supply contract with BSN which dated from 18 June 1981 required BSN to purchase from Solvay annually a quantity of 300 000 tonnes ± 15 % for its glass factories in France. BSN's total soda ash requirement from 1982 to 1984 was in reality some 300 000 tonnes, falling from 1985 onwards to around 270 000 tonnes to 280 000 tonnes annually. The minimum tonnage which BSN was obliged to purchase from Solvay under the terms of the 1981 agreement was 265 000 tonnes, a tonnage which was not far short of its total requirements. The contract was of indefinite duration and continued for a period of two years after notice of termination either side. Solvay was the virtually exclusive supplier of soda ash to BSN from 1982 onwards, supplying each year some 98 % of its requirements.

(100) The supply contracts with a number of other major glassmaking customers in France — for example Perrier, Verrerie d'Albi — also required the customer to take a tonnage close to its actual requirements: Perrier: contractual tonnage 50 000 tonnes ± 10 %; annual requirements after 1982, ± 55 000 tonnes, all supplied by Solvay. Verrerie d'Albi: contractual tonnage 25 000 tonnes ± 5 000 tonnes; annual requirements after 1982, 20 000 tonnes to 25 000 tonnes, all supplied by Solvay. Again both these contracts required two years' notice of termination.

7. THE BELGIAN GLASSMAKER CONTRACTS

(101) Another example of 'tonnage' contracts for what was close to the customer's estimated total requirement is provided by the contracts concluded between Solvay and the three major Belgian glass producers Saint-Roch (Saint-Gobain group), Glaverbel and Verlipack. As Solvay stated in an internal note of 11 February 1986 the Belgian price was effectively determined by the price to these three customers. Up to 1978 these customers had always purchased almost all of their requirements from Solvay. In January of that year the Belgian Government intervened to prevent the three glass producers from entering into a contract with FMC to purchase substantial quantities of soda ash from the United States of America.

(102) On 7 February 1978 agreements were signed between the Belgian glassmakers and Solvay under which they were required to purchase the totality of their requirements from Solvay for a period of five years. The Commission insisted in the course of the discussions with Solvay between 1980 and 1981 that these contracts would also have to be modified.

(103) New agreements were concluded with the three glassmakers, effective from 1 January 1983, providing for the customer to take a specified tonnage ± 15 %. The tonnages stipulated were:

St. Roch:	75 000	± 15 %
Glaverbel:	85 000	± 15 %
Verlipack:	70 000	± 15 %.

(Since the failure of Verlipack and its restructuring in 1985 its annual consumption fell by half and it purchased under an annual contract.) The agreements were to be of an unspecified duration subject to termination at 24 months' notice. Before 1 November of each year, the customer had to inform Solvay of the tonnages which it intended to take during the following year; there were also special provisions dealing with the eventuality of the customer taking more or less than the contractual tonnage.

(104) In practice, the basic contractual tonnages were a reasonably close approximation of the total annual consumption of the customers at the time. From 1983 onwards the three customers in fact took virtually all of their requirements from Solvay ([8]). An exception was the 7 800 tonnes to 8 000 tonnes imported by Saint-Roch in early 1988 under inward processing arrangements. This business was the subject of intensive negotiations between Solvay and Saint-Gobain and was regained by Solvay for 1989.

([8]) Glaverbel (to Solvay's knowledge) had to purchase some 10 000 tonnes per annum from East Germany to offset its exports of glass to that country. Apart from this tonnage it was supplied only by Solvay.

(105) It is clear that, whatever the formal instructions given by Solvay in its letter of 19 February 1981 to the 'DN', there was, in the case of Saint-Roch at least, detailed discussion with the customer regarding the exact tonnage of its total requirements, followed by a successful attempt to secure the customer's express agreement (a) to limit to 8 000 tonnes the volume which would be acquired in 1988 from competing suppliers and (b) to revert to Solvay completely for 1989.

8. OTHER EXCLUSIVITY ARRANGEMENTS IN BELGIUM

(106) A number of contracts with smaller customers also contained clauses designed to secure the customer's tie to Solvay.

(107) Durobur of Soignies had from 1983 onwards a series of annual or biennial delivery contracts with Solvay with an annual offtake of some 5 000 tonnes to 5 500 tonnes.

(108) The contracts made on each occasion contained a clause which effectively ensured that Durobur did not change to another supplier at the end of the contractual period. The agreements provided that Solvay and Durobur would meet at the end of the period to negotiate the conditions of the next contract, and then stipulated:

> 'Before these negotiations take place Durobur will not make any purchase commitment for soda ash supplies for (the following year).'

(109) Similar provisions appeared in the Solvay contract with Pittsburg Corning (approximately 4 500 tonnes to 6 000 tonnes per year).

(110) There is also one example at least where the agreements provided for a total requirements clause and a special fidelity rebate. From mid-1985 the agreements with Owens Corning (5 000 tonnes per year) provided expressly for an 'exceptional' rebate based on a total requirements contract:

> 'In the context of a deal covering your total requirements, estimated at around 2 500 tonnes in the second half of the year, we grant you an exceptional rebate of BEF 150 per tonne on the tonnage supplied.'

9. COMPETITION CLAUSES

(111) A number of the supply agreements contained particular forms of 'competition clause' which reinforced the tie between the customer and Solvay and made it difficult or impossible for a competitor to take business from Solvay.

(a) ***Competition clauses***

(112) A considerable number of Solvay's 'evergreen' contracts with major customers contained variants of the 'competition clause' or 'English clause' (see Case 85/76 *Hoffmann-La Roche* v *Commission*, paragraphs 102 to 108 ([9])). These clauses provided for machinery by which competing offers received during the contract term were to be notified to Solvay so that it could, if it so wished, adjust its prices accordingly. The competition clauses are found in a number of different forms.

(113) In Germany the supply agreements (most of which required 24 months' notice of termination) stipulated that the customer had to take a minimum tonnage from Solvay, the exact quantities having to be specified at the beginning of each year. The customer was thus contractually bound to Solvay for a specified minimum tonnage over a long period: this tonnage could in fact correspond to the customer's total requirements (see, for example, Vegla, Oberlandglas).

(114) The majority of the supply contracts contained a competition clause in the following (or similar) terms:

> 'Competition clause
>
> If X is able to prove through a certified accountant that it received an offer for soda from another supplier during the term of this contract at a better price and on comparable terms, the product originating in a country with a free market economy, and DSW does not match that price within four weeks, X shall be free to purchase soda from that supplier. DSW may in such a case cancel the contract with immediate effect.'

(115) While in theory this clause allowed the customer to obtain part of its annual requirements from another (cheaper) source, it gave Solvay the option in such a case of terminating the agreement forthwith and refusing all further supplies. In only a very few cases (for example, Granus) did the agreement allow the customer to set off purchases from the competitor against its contractual obligations vis-à-vis Solvay.

([9]) [1979] ECR 461.

(116) The utility of this form of 'competition clause' was that it informed Solvay of the exact price of any competing material and allowed it to decide for itself whether or not it would meet the offer. On the other hand it was highly unlikely that the customer would risk its security of supply by purchasing even a limited quantity from the competitor since this would give Solvay the opportunity to cancel the 'evergreen agreement' and refuse all further supplies.

(117) In the case of Vegla the standard provision giving Solvay the right to cancel the whole agreement in the event of purchases from a competitor was deleted from the 'competition clause'. In practice the understanding between DSW and Vegla was that the customer would take all its requirements from Solvay.

(118) Thus when in 1983 Vegla informed Solvay of a competing offer and asked whether it could purchase, Solvay refused. The real purpose of the 'competition clause' is made apparent by DSW's noting, with some satisfaction, that it had been informed by this large customer of the details of the competing offer.

(119) A draconian form of 'competition clause' is found in the contract with Verrerie d'Albi. As drafted, the competition clause in the Albi contract (Article 4) allowed Solvay the option of terminating the contract on receiving notice of a competing offer even if the customer did not actually commit itself to buying from the competitor.

(120) The Saint-Gobain 'Protocol' provided for a joint examination by Solvay and Saint-Gobain of any competing offer in order to arrive at a solution acceptable to both. In this case, there was not even the limited concession to 'anonymity' which was contained in the German agreements. The provision allowed Solvay to be completely informed of the details of the commercial conduct of its competitors and potential competitors so that it could, if it considered it necessary, negotiate with Saint-Gobain changes in prices and conditions which would maintain the relationship of reciprocal exclusivity. As Solvay itself observed, the main purpose of the whole arrangement was to oblige Saint-Gobain to 'come clean' if it bought significant quantities from a competitor.

(121) The concrete examples of the proposed purchase by Vegla of 15 000 tonnes of American soda and by Saint-Roch of 8 000 tonnes in 1988 show exactly how Solvay was able either to prevent the competitors entering at all or to restrict the quantity purchased.

(122) The amendments made on 30 December 1983 to the BSN supply agreement required the customer to advise Solvay of competing offers (although the identity of the competitor was not to be disclosed) so that the parties could 'concert' in order to find a solution ('The parties would then concert as quickly as possible (not more than six months) in order to find a solution.') Like the Saint-Gobain clause, this mechanism gave Solvay the option of adapting its price and conditions with perfect knowledge of the competing offer (apart from the identity of the supplier). It was extremely likely in practice that the operation of the clause would enable Solvay to maintain its effective exclusivity with the customer.

(b) ***Safeguard clauses***

(123) A number of supply contracts which clearly envisaged the maintenance of long-term relations between Solvay and the customer (e.g. Glaverbel, Perrier) provided for a concertation procedure in case of a change in economic circumstances, in particular if competing offers were more advantageous than those of Solvay. While such provisions may not be objectionable 'per se', in the context of the present case, it is clear that Solvay was particularly concerned to prevent any competing supplier from entering the market. While the safeguard clauses allowed the customer the opportunity to use competing offers to bring down Solvay's price, it was unlikely that the competitor would ever actually succeed in obtaining (or if he did, retaining) a share of the business.

PART II

LEGAL ASSESSMENT

A. *ARTICLE 82 OF THE TREATY*

1. THE TERMS OF ARTICLE 82

(124) Under Article 82, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States. Special rebates or other financial inducements granted to customers by dominant undertakings in order to secure the whole or a substantial part of their business may be prohibited by Article 82 as an exclusionary practice.

(125) In the present case, the essential questions to be decided are:

— whether Solvay held a dominant position within the meaning of Article 82,

— whether the alleged conduct constituted an abuse of such a dominant position,

— whether there was an appreciable effect upon trade between Member States.

2. DOMINANT POSITION

(a) ***Definition***

(126) The term 'dominant position' is not defined in Article 82. The Court of Justice has however described a dominant position under that Article as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers. 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 competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment' (judgment in Case 85/76 *Hoffmann-La Roche* v *Commission*, paragraphs 38 and 39).

(127) 'Dominance' is therefore the power to hinder effective competition. Such power may involve the ability to eliminate or seriously weaken existing competition or to prevent potential competitors from entering the market. As the Court stated, the existence of a dominant position does not however require the producer enjoying it to have eliminated all possibility of competition (see also Case 27/76 'United Brands v Commission', paragraph 113 ([10])).

(128) The existence of a dominant position may depend upon a combination of factors, where no single one is necessarily decisive.

(b) ***The relevant market***

(129) In order to determine whether an undertaking holds a dominant position, it is necessary first of all to identify the area of business in which conditions of competition and the market power of the allegedly dominant undertaking fall to be assessed. This examination enables the Commission to identify the actual and potential competitors of the undertaking in question and other constraints which may exist on the exercise of its supposed market power. Account has to be taken of the nature of the abuse which is being alleged and of the particular manner in which competition is impaired in the case in question: see judgment in Case 22/78 *Hugin* v *Commission* ([11])).

(130) In the present case, the particular abuses which are suspected concern the foreclosure by Solvay of actual and potential competition from other suppliers of soda ash.

(131) Solvay produces both light and dense soda ash. Glassmakers almost all consume dense ash, while for chemical and metallurgical applications light ash is the preferred form. Although the competition which Solvay was aiming to exclude related principally to dense ash, it would be artificial to draw a strict boundary line between light and dense ash.

(132) In Germany a number of Solvay's glassmaking customers purchased both dense and light ash (Schott, Ruhrglass) while others purchased entirely or almost entirely light ash (Gerresheimer, Woellner). The fidelity rebate system was applied to both forms. From the geographic standpoint, it is true that the Community market was still to a large extent divided along national lines. However, while there were price differences between the different national markets, the Community could be divided for purposes of competitive analysis into two broad zones or 'spheres of influence', one dominated by Solvay, the other by ICI. Solvay's traditional market area covered the whole of the Community with the exception of the United Kingdom and Ireland, where because of their anti-competitive arrangements entirely different competitive conditions prevailed.

(133) While there was no other producer which like Solvay sold in all the countries of continental western Europe, CFK, M & W and Akzo all increased their export operations after 1982 and there was no overwhelming reason why they should not make their product available throughout the Community. Similarly the American producers of natural ash, which Solvay regarded as probably the major competitive threat, were aiming to market the product throughout continental western Europe.

(134) It is also significant that Solvay itself supplied a particular market as occasion demanded from a plant in

([10]) [1978] ECR 207.

([11]) [1979] ECR 1869.

a different Member State and a large proportion of reported interState trade thus consisted of 'Solvay balancing'.

(135) From the demand side, the larger customers operated in several Member States and, as Solvay itself observed, their spread of operations had tended to increase the pressure for price equalisation.

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

(c) ***Market power***

(137) Solvay's own documentation recognises that it held a dominant position in western Europe. Its historic market share of some 70 % in continental western Europe over the whole of the period under consideration is in itself indicative of a significant degree of market power. Market share, while important, is only one of the indicators from which the existence of a dominant position may be inferred. Its significance may vary from case to case according to the characteristics of the relevant market.

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

(i) Solvay's position as the only soda ash producer operating throughout the Community (with the exception of the United Kingdom and Ireland);

(ii) Solvay's manufacturing strength, with plants in Belgium, France, Germany, Italy, Spain and Portugal;

(iii) Solvay's upstream integration in raw materials as the largest producer of salt in the Community;

(iv) the absence of any competition from ICI, the only other Community producer of comparable market strength to Solvay;

(v) Solvay's high market share in the Benelux countries, France and Germany and its monopoly or near-monopoly position in Italy, Spain and Portugal;

(vi) Solvay's excellent market coverage as the exclusive or near-exclusive supplier to almost all the major customers in the Community;

(vii) the improbability of any new producer of synthetic ash entering the market and setting up manufacturing facilities in the Community;

(viii) the protection against non-Community producers afforded by the anti-dumping duties;

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

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

(139) In assessing the extent of Solvay's market power, the Commission took account of the possible substitutability of caustic soda for soda ash. Caustic soda (sodium hydroxide) is largely used for the production of paper and aluminium and may also in theory replace soda ash for certain manufacturing applications as a source of alkali particularly in the manufacture of detergents and in metallurgical processes. (NB: The reverse is also true: soda ash is in theory also an alternative for caustic soda in some processes.) In practice however the possible availability of caustic soda did not constitute a substantial limitation on Solvay's market power in the Community, which is principally based on supply to glass manufacturers, few if any of which were prepared to substitute caustic soda for soda ash.

(140) Caustic soda is a co-product of the manufacture of chlorine, a basic raw material in the manufacture of PVC. Since long-term storage is not feasible, production of chlorine is tailored to current PVC demand. The supply of caustic soda inevitably fluctuates in line with that of chlorine. Demand for caustic soda on the other hand depends largely on the requirements of the paper industry. The price of caustic soda is therefore, unlike soda ash, subject to considerable fluctuation.

(141) During the period under consideration caustic soda was 'short', i.e. the growth in demand for caustic soda exceeded that for chlorine: the product was in short supply and was likely to remain so for the foreseeable future. It was also considerably more expensive than the equivalent in soda ash. There was thus no incentive for soda ash users to switch to caustic soda. Further, conversion from soda ash to caustic requires a substantial capital investment. Even if caustic soda is 'long' at a particular time the cyclical nature of the alkali market and uncertainty as to future pricing acts as a deterrent to switching.

(142) In the glass sector, the main consumer of soda ash, accounting for two-thirds of Solvay's sales in the period under consideration, caustic soda substitution is even less likely than in metallurgical and detergent applications. In theory up to 15 % of the alkali requirement of glassmakers may be provided by caustic soda. Again, capital investment in plant modification is required. In practice, by 1990 only one glassmaker had ever converted to caustic soda.

(143) It should also be noted that the major soda ash producers (Solvay, ICI, Akzo) between them made around one third of the caustic soda produced in the Community.

(144) Solvay has also argued that the availability of cullet (recycled broken glass) excluded its having a dominant position. A customer's requirements of soda ash in container glass manufacture can be reduced by up to 15 % by using cullet and with appropriate technology the proportion may be higher. It may well be that the use of cullet reduces the dependence of customers upon soda ash suppliers generally. It does not, however, reduce the ability of a powerful soda ash producer to exclude smaller producers of that product.

(145) The possibilities of substitution did not therefore act as a significant constraint on the exercise of Solvay's market power vis-à-vis the other producers of soda ash.

(146) The Commission assessed Solvay's market power in relation to the whole of the geographic area within which it operated, which in the present case consisted of those Member States in which it had production facilities. Solvay's own internal documentation shows that it tended to consider the nine ‘directions nationales’ as forming a homogeneous market. (This market delineation included two non-member countries, namely Switzerland and Austria, and excluded the United Kingdom and Ireland, which were traditional ‘ICI’ markets, and Denmark and Greece, which were ‘non-producer’ markets.)

(147) However, even if each of the national markets particularly concerned by Solvay's exclusionary conduct were considered as a separate market, Solvay was still dominant in each one, and most of the considerations set out above apply equally.

(148) On the basis of the above considerations the Commission concludes that throughout the period under consideration Solvay occupied a dominant position within the meaning of Article 82.

3. ABUSE OF DOMINANT POSITION

(a) *Exclusionary practices and fidelity rebates*

(149) As the Court of Justice has observed in several cases, conduct by a dominant undertaking which undermines the objectives of Article 3(g) of the EC Treaty (formerly Article 3(f) of the EEC Treaty) by endangering the structure of competition may constitute an infringement of Article 82. Exclusionary behaviour which hinders existing competition or the development of new competition has been condemned by the Court. Practices designed to block the access of competitors to customers by tying the latter to the dominant supplier have been identified as abusive in the following leading cases in particular: Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and others* v *Commission* ([12]), Case 85/76 *Hoffmann-La Roche* v *Commission*, and Case 322/81 *Nederlandsche Banden Industrie Michelin* v *Commission* ([13]) (see also Commission Decision 89/22/EEC *British Gypsum/BPB Industries* ([14]).

(150) The present case primarily concerns the tying of customers to Solvay by means of a number of devices which all served the same exclusionary purpose.

(i) **Rebates on marginal tonnage**

(151) The assessment under this heading relates to the following:

— the 20 % ‘Spitzenrabatt’ system in Germany,

— the giving of ‘fidelity’ cheques in Germany,

— rebates on marginal tonnage in France (BSN, Durand, Vergeze, Hoechst).

(152) In contrast to a quantity discount, which is linked solely to the volume of purchases from the manufacturer concerned, a fidelity rebate involves offering customers financial advantages in order to prevent them from obtaining their supplies from competing producers and when practised by a dominant undertaking may fall under Article 82.

([12]) [1975] ECR 1663.
([13]) [1983] ECR 3465.
([14]) OJ L 10, 13.1.1989, p. 50.

(153) There is no need, in order for fidelity rebates to fall under Article 82, for a contractual obligation or express stipulation that the customer obtain its supplies exclusively from the dominant undertaking. What is important is that the terms of sale of the dominant supplier make it financially attractive for the customer to take its supplies exclusively or mainly from it. The precise means by which this result is achieved are immaterial.

(154) From 1982 onwards Solvay adopted a system of progressive rebates which according to its own internal documentation was specifically intended to ensure the loyalty of the customer and exclude or limit competition:

— granting customers substantial financial inducements to obtain from Solvay all or the major part of the marginal tonnage which might otherwise have been obtained from a competitor,

— making it difficult or impossible for an existing or potential supplier to enter as second supplier for the marginal tonnage, since in order to match the substantial pecuniary advantages offered by Solvay and obtain the order for the top 'slice' of business, they would have to sell at unprofitable or at 'dumping prices',

— tying the customer to Solvay for an indefinite period and thereby contributing to the rigidity of the market,

— removing any interest on the part of the customer to canvass Solvay's competitors for some of its requirements.

(155) As an example, any supplier attempting to obtain a share of the business of Vegla in Germany would have had to match an effective ex-works price per tonne for the top 40 000 tonnes of DEM 245 per tonne, compared with a 'list price' of DEM 403 per tonne and an 'average' price in Germany of DEM 360 per tonne.

(156) The price of DEM 245 was far below any economic price which the other Community producers could have offered. Any natural ash producer selling at that price would have been in breach of the anti-dumping minimum price undertakings.

(157) The ability of a second supplier to displace Solvay for a part of the business of a major customer was rendered even more difficult by the obligation of secrecy with regard to the percentage rebate and the cheque payment.

(158) The Commission's objections to the rebate system apply not only to cases where Solvay had complete exclusivity but also to those where it was the principal, but not the sole, supplier. In such cases the progressive rebates contributed to the maintenance of Solvay's overall dominant position by securing its share of the customer's business. The rigidity of the market was preserved since it was extremely difficult for any second supplier to break into Solvay's 'core' business.

(159) Solvay claimed in its written observations in reply to the statement of objections that the rebates were not intended as an inducement to loyalty but simply represented a form of volume rebate which depended upon the customers reaching an objective and predetermined tonnage threshold. Such an argument wholly ignores the character attributed to the rebates in Solvay's own documents.

(160) It is also clear that the various rebates and financial advantages which they conferred were not related to any cost savings associated with the quantities delivered. There were substantial differences from country to country in the amount of the rebates, and inside each Member State the 'trigger' tonnage at which the top-slice rebate was activated varied from customer to customer according to its total offtake. For instance, in Germany the 20 % rebate was activated for PLM at 3 000 tonnes and for Vegla at 85 000 tonnes.

(ii) **The Saint-Gobain group rebate**

(161) The secret Saint-Gobain 'Protocol' was intended to confirm Solvay in the position of Saint-Gobain's exclusive or near-exclusive supplier in western Europe apart from France. As DSW itself said, it was designed to maintain the status quo but the parties were reluctant to say so in writing.

(162) The provision by which Saint-Gobain benefited from Solvay's 'best conditions' in each country for comparable usages was not necessarily anti-competitive on its own. However in addition to this stipulation Saint-Gobain received a 'group rebate' of 1,5 % on the whole of its purchases across Europe. It was implicit in the agreement that payment was dependent upon Saint-Gobain continuing to give Solvay 'priority' as its supplier. Solvay in its own documentation recognises that this rebate, although not an 'absolute weapon', contributed to ensuring the loyalty of the group. The remark that 'it requires SG to "come clean" if it buys significant quantities from competitors' demonstrates also that Solvay had to be satisfied that it had been given 'priority'.

(163) Solvay claimed that the Saint-Gobain rebate did no more than reflect the cost savings attributable to Saint-Gobain's position as the largest customer in Europe. The argument overlooks the fact that at Solvay's insistence the individual Saint-Gobain subsidiaries were supplied by the national Solvay subsidiaries in each Member State and not on any global basis.

(164) It is also clear from the documents that the whole purpose of the Saint-Gobain rebate was to secure the loyalty of the group in Member States other than France and thus exclude competitors.

(165) The assessment of the 'competition clause' in the Saint-Gobain protocol in the light of Article 82 is set out in recitals 177 to 180.

(iii) **Exclusivity agreements**

(166) This part of the assessment applies in particular to:

— Vegla

— Oberland

— Owens Corning

— BSN

— Saint Roch

— Verreries d'Albi

— Perrier

— Glaverbel

— Verlipack.

(167) Solvay was informed by the Commission in 1981 that it had to abandon the system of total requirements contracts. It was also informed that any new tonnage contracts should not in fact stipulate for a quantity which corresponded to the customer's total requirements.

(168) In a number of cases however it is apparent that:

— even if the supply agreement was expressed in the form of a 'tonnage' contract, the clear understanding was that the customer was to obtain all or nearly all of its requirement from Solvay,

or

— the stipulated tonnage corresponded to the customer's total requirements,

or

— the customer was informed that the payment of any rebate was dependent upon its taking 100 % from Solvay.

(169) In the case of Vegla, apart from the various financial inducements (20 % 'Spitzenrabatt', fidelity cheque) there was a clear, if unofficial, understanding that the customer would take its total requirement from Solvay. Similarly, Oberlandglas was informed that the 'special conditions' depended upon its taking its total requirements from DSW. In the case of Owens Corning in Belgium the agreement made the BEF 150 rebate dependent upon its committing its total requirements to Solvay.

(170) In some cases (Vegla, Oberlandglas, Owens Corning), the express understanding was that the customer would obtain all its requirements from Solvay. Any such arrangement was clearly intended to bind the customer to Solvay for its total requirement and constituted an exclusionary practice under Article 82.

(171) In the other cases, the contractual tonnage stipulated in the main 'evergreen' contract (which required two years' notice of termination) corresponded to the customer's total anticipated requirements but allowed for a margin (usually 15 %) up or down. The customer indicated to Solvay at the beginning of each year what its exact requirements would be within that range.

(172) The Commission does not consider that the exclusionary effect of these agreements, based as they were on the maintenance of a long-term commercial relationship, was alleviated by the tolerance margin.

(173) In the first place, even if the customer did consider a second source, it was still contractually bound to Solvay for a very large proportion of its requirements so long as the 'evergreen' contract was in operation. In the case of the Belgian glassmakers there was even a clause providing that if the forecast offtake in one year exceeded the maximum provided in the basic contract of 1 January 1983 (i.e. X tonnes + 15 %), the basic contract tonnage was to be revised upward. The purpose of the clause was to ensure that Solvay remained the preponderant supplier.

(174) Secondly, it is clear that Solvay made it its business to obtain full details of any competing offers and any intention on the part of the customer to look for other

sources of supply (e.g. Saint-Gobain's American imports in 1988). In many cases it is also shown that Solvay was informed as to the customer's total annual requirements. It could thus, with full knowledge of the relevant details of the offer (price, tonnage, etc.) and the customer's intentions and total requirements, ensure that the competitive effect was limited or even removed.

(175) It may well be that in some cases a customer was content — for the time being at least — to purchase all its requirements from Solvay. The Commission fully recognises the freedom of customers to obtain all their requirements from one supplier if they wish to do so. They should not however be obliged to do so.

(176) If a customer contracts for a tonnage which is in fact equivalent or close to its total requirements, such arrangements may still be exclusionary and fall under Article 82, particularly if they are of long duration. In the case of 'evergreen' contracts the 24-month notice period imposed by Solvay was excessively long. It prevented the customer from reacting in an informed or competitive manner to changes in market conditions. Since it is impossible to predict with any certainty what conditions will prevail in two years' time, the long period of notice acted as a strong deterrent against terminating the link with Solvay. Some customers at least considered the length of the notice period oppressive.

(iv) **Competition clauses and other exclusionary clauses in agreements**

(177) The various forms of 'competition clause' and other similar mechanisms set out in recitals 111 to 123 all reinforced the tie with Solvay, limited the opportunities for the customer to change suppliers and made entry for competitors at established Solvay customers more difficult. The purpose of these various clauses was to give Solvay as the established supplier a built-in advantage over any other supplier attempting to compete for all or even a part of the business of the customer in question.

(178) Far from mitigating the anticompetitive effect of the long-term supply agreements with Solvay (with their fidelity rebates and de facto exclusivity), the competition clauses in fact strengthened the tie between Solvay and the customer and were exclusionary in object and effect. They allowed Solvay to be fully informed of the details of competitors' activity while effectively excluding the possibility of the competitor actually obtaining any business. 'Competition clauses' which give the dominant supplier the option of terminating the whole agreement if the customer obtains even a small part of its supplies from a competitor are already a deterrent to competition: the customer is extremely unlikely to jeopardise its security of supply in such circumstances.

(179) All the above measures as set out in recitals 149 to 178 were designed to remove or restrict the opportunity of other producers or suppliers of soda ash to compete effectively with Solvay. They also consolidated the dominant position of Solvay in a manner which is incompatible with the concept of competition inherent in Article 82.

(180) Even considered on their own, each of the arrangements described tended to bind the customer to Solvay in such a way as to exclude competitors. The combined effect of the various devices was such as to ensure that Solvay's dominant position was almost wholly protected from competition.

(b) ***Discrimination***

(181) In addition to its exclusionary object and effect, the rebate system applied by Solvay also falls under the express prohibition in Article 82(c) against the application of dissimilar conditions to equivalent transactions. The rebates and other financial inducements did not reflect possible differences in costs based on the quantities supplied but were prompted by the concern to secure the whole or the largest possible percentage of the customer's requirements.

(182) Within a particular Member State there were considerable differences both as to the size of the rebate and other inducements and the 'trigger' tonnage at which it was activated. The amount of the special 'cheque rebate' also seems to have varied in a wholly arbitrary way.

(183) The result of the rebate system in Germany was not only in theory to disadvantage customers who might not take their full or the major part of their requirement from Solvay (only a few did not do so) but also to discriminate as between customers who did. Thus a large customer could well pay substantially more per tonne than a smaller producer even though both were buying their total requirement from Solvay.

(184) The special 1,5 % group rebate given to the Saint-Gobain companies was also discriminatory in nature. It is true that the Saint-Gobain group as a whole was by far the largest customer but under the agreements with Solvay the group's purchases were fragmented on a national basis. The group rebate did not in fact reflect any cost advantage attributable to the quantities delivered but was (as Solvay itself stated in its own documents) intended to secure the loyalty of the group. The result was that the Saint-Gobain subsidiary in one Member State could receive a substantially better price from Solvay than a competitor which actually took a similar or even larger volume from the local Solvay factory.

(185) The price discrimination had a considerable effect upon the costs of the undertakings affected. In the glass sector (which accounts for the majority of soda ash consumption) soda ash is, after fuel costs, the most expensive single item in the manufacturing process. Although it is only 13 % by weight of the finished product, it accounts for up to 70 % of the raw material batch cost. The cost of soda ash thus affects the profitability and competitive position of glass manufacturers.

4. EFFECT ON TRADE BETWEEN MEMBER STATES

(186) Article 82 covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure in the common market as envisaged by Article 3(g) of the Treaty.

(187) The fidelity rebates and other inducements to exclusivity applied by Solvay affected trade between Member States by reinforcing the links between the customers and the dominant supplier. The opportunities for competing suppliers to enter new markets or obtain new customers were effectively removed since the customer's marginal tonnage requirements for which they would be competing were then being supplied by Solvay at prices which they were unable to meet. The various devices employed by Solvay to tie customers had the result of reinforcing the structural rigidity and the division of the soda ash market along national lines, and thus harmed or threatened to harm the attainment of the objective of a single market between Member States.

(188) The fact that Solvay's measures were aimed principally at imports from the United States of America does not affect the application of Article 82. Imports of natural ash from the United States of America were seen as the main threat to Solvay's domination of the soda ash market in continental western Europe. The activities therefore affected the basic competitive structure of the soda ash industry within the Community.

(189) It should also be noted that if the major glass producers had imported soda ash from the United States of America in substantial quantities, they would probably have done so in order to supply their works in several Member States. Furthermore, Solvay's exclusionary measures were aimed not only at the American producers but also at smaller producers of synthetic ash located inside the Community. All of these producers had since 1982 been making deliveries from their own national market to other Community Member States although their opportunities were severely constrained by Solvay's pricing policies.

B. *ARTICLE 15(2) OF REGULATION No 17*

(190) Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from EUR 1 000 to EUR 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 82. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

(a) ***Gravity***

(191) In the present case the Commission considers that the infringements were of extreme gravity. Solvay was the major producer of soda ash in the Community and the infringements enabled it to consolidate its hold over the market by excluding effective competition in a large part of the common market. By foreclosing for a long time sales opportunities for all competitors, Solvay caused lasting damage to the structure of the market concerned, to the detriment of consumers. This infringement is under the specific circumstances of the case more serious than the infringements of Article 81 in which Solvay was also involved. Solvay was well aware from its extensive negotiations with the Commission between 1980 and 1982 of the requirements of Article 82 in relation to exclusivity. It was also clearly cognisant of the prohibition of fidelity rebates. The documentation obtained from Solvay shows that company officials at a high level knew the risk involved but nevertheless persisted in the abusive conduct.

(192) In determining the amount of the fine the Commission will take account of the fact that in the negotiations with Solvay between 1980 and 1982 it accepted a notice period of two years in the case of 'evergreen' contracts and did not object to the competition clauses in the form in which they were drafted. It is also possible that Solvay was led to believe that long-term tonnage contracts could be concluded which limited purchases from other sources to 15 % of the customer's requirements.

(193) From its investigations in the present case the Commission has ascertained that in practice these provisions tended to reinforce Solvay's exclusivity, particularly when combined with other abusive devices such as the secret fidelity rebates and unofficial 'undertakings' that the customer would obtain all its requirements from Solvay. It will therefore impose a fine only in respect of the fidelity rebates and the 'unofficial' exclusivity agreements.

(194) Solvay has been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry: Peroxides, Polypropylene, PVC.

(b) ***Duration***

(195) The infringements began in about 1983 — very shortly after the negotiations with the Commission and the closure of the Commission's file — and continued up until at least the end of 1990.

C. *PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE AND THE COURT OF JUSTICE*

(196) On 19 December 1990 the Commission, acting pursuant to Article 86 of the EEC Treaty, adopted Decision 91/299/EEC finding that Solvay had committed an infringement and requiring it to pay a fine of ECU 20 million. The Decision was notified to the undertaking by registered letter on 1 March 1991. Solvay brought an action for annulment of the Decision before the Court of First Instance on 2 May 1991. On 10 April 1992 Solvay submitted a 'supplementary application', in which it put forward a new plea to the effect that the contested Decision should be declared non-existent following the judgment delivered by the Court of First Instance on 27 February 1992 in Joined Cases T-79/89, 84/89, 85/89, 86/89, 89/89, 91/89, 92/89, 94/89, 96/89, 98/89, 102/89 and 104/89 *BASF and others* v *Commission* ([15]). The Court of Justice ruled on the appeal brought by the Commission against that judgment in Case C-137/92 P *Commission* v *BASF and others* ([16]) and annulled the Decision at issue in those proceedings (Decision 89/190/EEC) on the grounds that the Commission had failed to comply with Article 12 of its Rules of Procedure, in the version in force at the time, which required decisions to be authenticated in the language or languages in which they are binding by the signatures of the President and the Secretary-General.

(197) In its judgment of 29 June 1995 in Case T-32/91 *Solvay* v *Commission* ([17]) (Solvay II) concerning Decision 91/299/EEC, adopted by the Commission in the present proceedings on 19 December 1990, the Court of First Instance ruled that the new plea submitted by Solvay was admissible and, finding that the text of the contested Decision had not been authenticated before it was notified, annulled it on the grounds that the Commission had infringed an essential procedural requirement within the meaning of Article 173 of the EEC Treaty (now Article 230 of the EC Treaty).

(198) The Commission brought an appeal against that judgment before the Court of Justice. The Court dismissed the appeal in its judgment of 6 April 2000 in Joined Cases C-287/95 P and C-288/95 P ([18]).

(199) The Court of First Instance took the view in its judgment of 20 April 1999 in Joined Cases T-305/94, T-306/94, 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 LVM and others v Commission ([19]) (PVC II) that the Commission is entitled to adopt again a decision that has been annulled on account of purely procedural defects; a new decision may in such cases be adopted without initiating fresh administrative proceedings; the Commission is not required to organise a further hearing if the text of the new decision does not contain objections other than those set out in the first decision; and the rights of the defence of the undertakings concerned are not infringed if the new decision is taken within a reasonable time.

(200) The Court of First Instance also upheld the Commission's interpretation 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 ([20]).

(201) In accordance with Regulation (EEC) No 2988/74, the Commission's power to impose fines or penalties for

([15]) [1992] ECR II-315.

([16]) [1994] ECR I-2555.

([17]) [1995] ECR II-1825.

([18]) [2000] ECR I-2391.

([19]) [1999] ECR II-931.

([20]) OJ L 319, 29.11.1974, p. 1.

infringement of the competition rules is subject to a limitation period of five years. In the case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases (i.e. the end of 1990 in the present case).

(202) Under Article 2 of Regulation (EEC) No 2988/74, any action taken by the Commission to investigate or initiate proceedings against an infringement interrupts the limitation period. Each interruption starts time running afresh, but the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty, in other words ten years from the date on which the infringement ceases.

(203) Article 2(1) of Regulation (EEC) No 2988/74 lists certain Commission actions which interrupt the running of the limitation period, including the statement of objections. The list is not exhaustive. The Court of First Instance left open the question whether adoption of the annulled Decision itself constituted an action that interrupted the running of the limitation period. Even supposing that (i) the infringement ceased on 31 December 1990 and (ii) adoption (and notification) of the annulled Decision did not interrupt the running of the limitation period, the Commission would have had at least until the end of 1995 in order to adopt its decision.

(204) The limitation period must be extended by the time during which the action for annulment of the Decision was pending before the Court of First Instance. Under Article 3 of Regulation (EEC) No 2988/74, the limitation period in proceedings is to be suspended for as long as the Commission decision is the subject of proceedings pending before the Court of Justice (which, in this context, is to be understood as including the Court of First Instance).

(205) As the Court of First Instance stated in paragraph 1098 of its judgment in *PVC II*, the specific purpose of Article 3 is to enable the limitation period to be suspended where a decision finding an infringement and imposing a fine is annulled. The limitation period was therefore suspended for as long as Decision 91/299/EEC was the subject of proceedings pending before the Court of First Instance and the Court of Justice.

(206) In the case in point, Solvay's action for annulment was brought before the Court of First Instance on 2 May 1991 and the latter delivered its judgment on 29 June 1995. The Commission's appeal to the Court of Justice was brought by an application introduced on 30 August 1995 and the judgment in those proceedings was handed down on 6 April 2000. Even disregarding the time that elapsed between delivery of the judgment of the Court of First Instance and introduction of the appeal to the Court of Justice, the limitation period was suspended for at least eight years, nine months and four days.

(207) If that suspension is added to the limitation period expiring on 31 December 1995, the Commission has until September 2004 in order to adopt again the annulled Decision,

HAS ADOPTED THIS DECISION:

Article 1

Solvay et Cie SA, now Solvay SA (Solvay), infringed Article 86 of the EEC Treaty (now Article 82 of the EC Treaty) from 1983 until around the end of 1990 by a course of conduct aimed at excluding or severely limiting competition and consisting of:

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

(b) the granting of substantial rebates and other financial inducements referable to marginal tonnage over and above the customer's basic contracted tonnage in order to ensure that they bought all or most of their requirements from Solvay;

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

Article 2

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

The fine shall be paid within three months of the date of notification of this Decision to the following account:

Account No 642-0029000-95
European Commission
Banco Bilbao Vizcaya Argentaria (BBVA)
SWIFT code: BBVABEBB
IBAN code: BE76 6420 0290 0095
Avenue des Arts/Kunstlaan, 43
B-1040 Brussels.

After expiry of that period, interest shall become automatically payable at the rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, namely 8,32 %.

Article 3

This Decision is addressed to Solvay SA, rue du Prince Albert/Prins Albertstraat 33, B-1050 Brussels.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 13 December 2000.

For the Commission

Mario MONTI

Member of the Commission