

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 14 April 2011¹

Table of contents

I — Introduction	I - 10337
II — Background to the dispute	I - 10338
III — Procedure before the Court of Justice	I - 10340
IV — Claim that the judgment under appeal should be set aside	I - 10341
A — Certain points of law concerning the application of Article 82 EC (sixth, seventh, eighth and ninth pleas in law)	I - 10341
1. Preliminary remarks	I - 10341
2. Definition of the relevant geographic market (sixth plea in law)	I - 10342
a) First part of the sixth plea in law	I - 10342
b) Second part of the sixth plea in law	I - 10344
c) Certain further arguments in connection with the sixth plea in law	I - 10345
d) Interim conclusion	I - 10346
3. Solvay's dominant position (seventh plea in law)	I - 10346
a) Solvay's references to its sixth plea in law	I - 10347

¹ — Original language: German.

b)	Dominant position on national markets (second part of the seventh plea in law)	I - 10347
i)	Allegation that the General Court's analysis is confined to market shares alone	I - 10347
ii)	Alleged failure to take into account a number of Solvay's arguments	I - 10348
iii)	Allegation of insufficient evidence of the market share	I - 10349
c)	Allegation of exceptional circumstances (third part of the seventh plea in law)	I - 10349
i)	Requirements relating to the statement of reasons in the judgment under appeal	I - 10349
ii)	Requirements relating to the statement of reasons in the contested decision	I - 10350
iii)	Alleged infringement of Article 102 TFEU (Article 82 EC)	I - 10351
d)	Interim conclusion	I - 10351
4.	Abuse of the dominant position held by Solvay (eighth and ninth pleas in law)	I - 10351
a)	Group rebate granted to Saint-Gobain (eighth plea in law)	I - 10351
i)	Argument as to the absence of any exclusivity commitment	I - 10352
ii)	Argument as to the low value of the group rebate	I - 10354
iii)	Argument as to the absence of any impact on competition	I - 10355
iv)	Interim conclusion	I - 10356
		I - 10333

b)	Discriminatory nature of Solvay's business practices (ninth plea in law)	I - 10356
i)	First part of the ninth plea in law	I - 10356
—	Alleged distortion of Solvay's written pleadings	I - 10356
—	Error of substantive law	I - 10357
ii)	Second part of the ninth plea in law	I - 10361
—	Alleged distortion of Solvay's pleadings	I - 10361
—	Failure to state reasons	I - 10361
iii)	Interim conclusion	I - 10363
B —	Prohibition on the use of evidence obtained in the investigation of April 1989 (second plea in law)	I - 10363
1.	Admissibility of the second plea in law	I - 10363
2.	Merits of the second plea in law	I - 10364
a)	First and second parts of the second plea in law (infringement of Article 14(3) and Article 20(1) of Regulation No 17).	I - 10364
b)	Third part of the second plea in law (complaint of distortion of facts)	I - 10367
c)	Interim conclusion	I - 10368
C —	Rights of the defence (third, fourth and fifth pleas in law)	I - 10368
1.	Right of access to the file (third and fourth pleas in law)	I - 10369
a)	Admissibility of the third and fourth pleas in law	I - 10371

b)	The documents from the file which were accessible only before the General Court (fourth plea in law)	I - 10372
i)	First part of the fourth plea in law	I - 10372
ii)	Second part of the fourth plea in law	I - 10375
iii)	Interim conclusion	I - 10377
c)	Loss of parts of the file (third plea in law)	I - 10377
2.	Right to a hearing (fifth plea in law)	I - 10381
a)	First part of the fifth plea in law	I - 10381
b)	Second part of the fifth plea in law	I - 10382
c)	Interim conclusion	I - 10386
D —	Right to have a matter adjudicated upon within a reasonable time (first plea in law)	I - 10386
1.	Requirements attaching to an assessment of the length of the proceedings (first and second parts of the first plea in law)	I - 10386
a)	The preliminary question of whether Solvay's complaints are ineffective	I - 10387
b)	Need for an overall assessment of the length of the proceedings (first part of the first plea in law)	I - 10387
c)	Alleged failure to state reasons (second part of the first plea in law)	I - 10389
2.	Legal consequences of excessively long proceedings (third to fifth parts of the first plea in law)	I - 10390
a)	Requirement that the rights of the defence must be infringed (third part of the first plea in law)	I - 10390
		I - 10335

b)	Impact of the length of the proceedings on Solvay's ability to defend itself in this case (fourth part of the first plea in law)	I - 10393
i)	Alleged failure to state reasons	I - 10394
ii)	Alleged error of substantive law	I - 10394
iii)	Some additional complaints	I - 10396
iv)	Interim conclusion	I - 10396
c)	Alleged waiving by Solvay of a reduction in the fine (fifth part of the first plea in law)	I - 10396
3.	Interim conclusion	I - 10398
E —	Setting aside of the judgment under appeal	I - 10398
F —	Decision on the action at first instance	I - 10399
1.	Right of access to the file	I - 10399
2.	Right to a hearing	I - 10400
3.	Right to have a matter adjudicated upon within a reasonable time	I - 10400
4.	Interim conclusion	I - 10403
V —	Application for a reduction of the fine	I - 10403
A —	Preliminary remark	I - 10404
B —	Reduction of the fine	I - 10406
1.	Excessive length of the administrative and judicial proceedings	I - 10406
2.	Extent of the reduction in the fine	I - 10409
VI —	Costs	I - 10411
VII —	Conclusion	I - 10412
I -	10336	

I — Introduction

1. Whether time really does heal all wounds, as the old saying goes, may seriously be called into question in the light of the present dispute. This case has been occupying the European administrative and judicial authorities for over 20 years now. Generations of lawyers have worked on it. Documents have disappeared and the court proceedings have dragged on for years.

2. This dispute traces its beginnings back to the 1980s. The European Commission accused the Belgian undertaking Solvay, among others, of abusing its dominant position on the market for soda ash² from 1983 to 1990. Accordingly, the Commission made two attempts (in 1990 and 2000) to impose a fine on Solvay, against which Solvay has so far managed to defend itself before the courts.

3. This is the second time that the Court of Justice has dealt with this case in its appellate jurisdiction. In addition to numerous other issues, the dispute between the parties to the proceedings now centres essentially on points of law which are of fundamental significance,

one of which concerns the right of access to the file and the other the principle that proceedings must take place within a reasonable time.

4. First, Solvay complains that it was not granted due access to the file and that, as a result, its rights of defence have been infringed. In this connection, the Court is faced with the question of how to assess the fact that the Commission can no longer find some of the documents relating to the administrative procedure.

5. Secondly, Solvay claims that the administrative and judicial proceedings in this case were excessively long. This, it contends, constitutes an infringement of its fundamental right to have its case adjudicated upon within a reasonable time, which infringement calls for an effective penalty.

6. In parallel to the present appeal proceedings, Solvay has also raised the complaint as to the excessive length of the proceedings in an application to the European Court of Human Rights (ECtHR) which is directed against all 27 Member States of the European

2 — Soda ash is used in the manufacture of glass (dense soda ash) as well as in the chemical industry and in metallurgy (light soda ash). A distinction must be drawn between natural (dense) soda ash and synthetic (dense and light) soda ash. Natural soda is obtained by crushing, purifying and roasting trona ore. Synthetic soda is the result of the reaction of ordinary salt and calcium in the 'ammonia-soda' process developed by the Solvay brothers in 1863.

Union and is based on an alleged infringement of Article 6(1) of the ECHR.^{3 4}

other hand, of abusing its dominant position on the soda ash market.

II — Background to the dispute

7. As the General Court has established,⁵ in April 1989, the European Commission carried out unannounced searches (investigations), provided for in Article 14 of Regulation No 17,⁶ at the premises of a number of undertakings operating in the soda ash market, including the Belgian undertaking Solvay.⁷ It subsequently obtained additional information from the undertakings concerned.

8. Following the conclusion of its enquiries, the Commission accused Solvay, on the one hand, of participating in cartels and, on the

9. The present proceedings are concerned only with the Commission's finding of abuse of a dominant position on the market.⁸ On the basis of that finding, in 1990, in an initial decision pursuant to Article 86 of the EEC Treaty in conjunction with Regulation No 17 (Decision 91/299/EEC⁹), the Commission imposed on Solvay a fine equivalent to EUR 20 million,¹⁰ which was a relatively high sum for the time. However, as that decision was vitiated by a procedural defect relating to its authentication, it had to be annulled.¹¹ Thereafter, in 2000, the Commission, without

3 — European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', signed in Rome on 4 November 1950).

4 — Solvay's application to the ECtHR was made on 26 February 2010 and is attached as an annex to the appeal brought by that undertaking in the present proceedings.

5 — See in this regard and in connection with the following points paragraphs 19 to 59 of the judgment under appeal.

6 — Council Regulation (EEC) No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (O), English Special Edition 1959-1962, p. 87).

7 — Solvay SA (formerly Solvay et Cie SA) is a public limited company governed by Belgian law operating in the pharmaceutical, chemical, plastic and processing sectors. In addition to Solvay, the investigations also related to the undertakings AKZO, Chemische Fabrik Kalk (CFK), Imperial Chemical Industries (ICI), Matthes & Weber and Rhône Poulenc. The basis for those investigations was the Commission decision of 5 April 1989 ordering the investigation, an extract from which is cited in paragraph 19 of the judgment under appeal.

8 — With regard to the Commission's finding that Solvay was participating in a cartel, I refer to my Opinion of today's date in the parallel proceedings in Case C-110/10P *Solvay v Commission*, pending before the Court.

9 — Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133—C: Soda — Solvay; OJ 1991 L 152, p. 21). That decision is only one of four which the Commission addressed to the undertakings operating on the soda ash market that day. Of the other decisions, one was directed against Solvay and ICI (Commission Decision 91/297/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty [IV/33.133—A: Soda — Solvay, ICI; OJ 1991 L 152, p. 1]), one against Solvay and CFK (Commission Decision 91/298/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty; OJ 1991 L 152, p. 16]), and one against ICI (Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty [IV/33.133—D: Soda — ICI; OJ 1991 L 152, p. 40]).

10 — At that time, ECU 20 million.

11 — Case T-32/91 *Solvay v Commission* [1995] ECR II-1825, confirmed by Joined Cases C-287/95 P and C-288/95 P *Commission v Solvay* [2000] ECR I-2391.

taking any further procedural steps¹² – in particular, without hearing Solvay again – adopted a second decision, this time on the basis of Article 82 EC in conjunction with Regulation No 17, in which it again imposed on Solvay a fine in the same amount (Decision 2003/6/EC).¹³ The latter decision constitutes the starting point for these judicial proceedings.

11. Chronologically, the most important stages in the dispute so far may be summarised as follows:

— *Administrative proceedings up to the adoption of the first decision imposing a fine*

April 1989: Investigations by the Commission

March 1990: Notification of the statement of objections

December 1990: Commission Decision 91/299 imposing a fine

— *Judicial proceedings relating to the annulment of the first decision imposing a fine*

May 1991: Action for annulment brought by Solvay before the General Court (T-32/91)

June 1995: Annulment of Decision 91/299

August 1995: Appeal by the Commission (C-288/95 P)

April 2000: Dismissal of the appeal

10. At first instance, Solvay had only marginal success with its action for annulment against Decision 2003/6. It is true that, by judgment of 17 December 2009, the General Court reduced the amount of the fine by 5% to EUR 19 million. However, it dismissed the remainder of Solvay's action as unfounded.¹⁴ By the present appeal, Solvay¹⁵ is now contesting that judgment at first instance, which took no less than eight years and nine months to deliver.

¹² — Paragraph 455 of the judgment under appeal.

¹³ — Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/33.133–C: Soda ash – Solvay; OJ 2003 L 10, p. 10; 'the contested decision'). On the same day, the Commission also adopted Decision 2003/5/EC of 13 December 2000 relating to a proceeding under Article 81 of the EC Treaty (COMP/33.133–B: Soda ash – Solvay, CFK; OJ 2003 L 10, p. 1), which forms the background to the parallel appeal in Case C-110/10P *Solvay v Commission*, pending before the Court.

¹⁴ — Case T-57/01 *Solvay v Commission* [2009] ECR II-4621. On the same day, the General Court also gave judgment in the parallel Case T-58/01 *Solvay v Commission* [2009] ECR II-4781; the latter judgment is the subject of the appeal in Case C-110/10P *Solvay v Commission*, also pending before the Court.

¹⁵ — 'The appellant'.

- *Administrative proceedings up to the adoption of the second decision imposing a fine*

December 2000: Commission Decision 2003/6 imposing a fine

- *Judicial proceedings since the adoption of the second decision imposing a fine*

March 2001: Action for annulment brought by Solvay before the General Court (T-57/01)

December 2009: Judgment of the General Court under appeal (T-57/01)

March 2010: Present appeal by Solvay (C-109/10 P)

- re-examine the action in respect of the points raised and annul the Commission Decision of 13 December 2000, in its entirety or in part, in accordance with the pleas submitted;

- cancel the fine of EUR 19 million or, failing that, reduce that fine by a very substantial amount in order to compensate the appellant for the serious damage it has suffered on account of the extraordinary length of the proceedings;

- order the Commission to pay the costs of the appeal proceedings and the costs of the proceedings before the General Court.

13. The Commission, for its part, contends that the Court should:

- dismiss the appeal; and

III — Procedure before the Court of Justice

12. In the present appeal, Solvay claims that the Court should:

- set aside the judgment under appeal of 17 December 2009;

- order the appellant to bear the costs.

14. The appeal was examined before the Court of Justice by way of the presentation, first, of written pleadings and then, on 18 January 2011, oral argument. The hearing related to both Case C-109/10 P and Case C-110/10 P.

IV — Claim that the judgment under appeal should be set aside

A — *Certain points of law concerning the application of Article 82 EC (sixth, seventh, eighth and ninth pleas in law)*

15. In its principal claim, Solvay seeks to have the judgment under appeal set aside on the basis of a total of nine pleas in law. I shall examine those pleas in law in a different order: the points of law relating to the application of Article 82 EC will be discussed first (see section A below), the procedural issues will be assessed next (see sections B and C below) and the pleas in law relating to the right to have a matter adjudicated upon within a reasonable time will be addressed at the end of the legal assessment (see section D below).

16. Although the old regulation on anti-trust proceedings, in the version of Regulation No 17, was applicable to this case, the points of law raised are no less relevant now that the law on anti-trust proceedings has been modernised by Regulation (EC) No 1/2003.¹⁶

17. By its sixth, seventh, eighth and ninth pleas in law, Solvay raises a number of points concerning the application of Article 82 EC to the present case.

1. Preliminary remarks

18. Before actually addressing the complaints raised by Solvay, I need to make two brief remarks concerning the provisions of substantive law applicable, on the one hand, and the significance of some of the Commission's statements on competition policy, on the other.

19. With regard, first, to the provisions of substantive law applicable, Solvay refers throughout to Article 102 TFEU. However, as the material legal position is that which obtained at the time when the contested decision was adopted, I consider it preferable to refer to Article 82 EC.¹⁷ Admittedly, this makes no difference to the legal assessment of the appeal, since, in so far as they are relevant

¹⁶ — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). The second paragraph of Article 45 of that regulation states that it has been applicable since 1 May 2004.

¹⁷ — As the contested decision was adopted in December 2000, it falls within the scope of the EC Treaty in the version of the Amsterdam Treaty (which was signed on 2 October 1997 and entered into force on 1 May 1999).

here, those two provisions are the same in terms of their content.

2. Definition of the relevant geographic market (sixth plea in law)

20. With regard, next, to the Commission's statements on competition policy, Solvay repeatedly relies in its appeal on a communication from 2009 containing 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'.¹⁸

21. That communication has no bearing on the assessment of the present appeal. It is immaterial how the Commission intends to make adjustments to the future implementation of its competition policy in relation to Article 102 TFEU (formerly Article 82 EC). After all, any new emphasis in the application of that provision is potentially relevant only to future decisions adopted by the Commission, but not to the legal assessment of a decision already taken. What is more, even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by the Treaties as interpreted by the Court of Justice.¹⁹

22. The sixth plea in law, which is directed against paragraphs 252 to 259 of the judgment under appeal, criticises the General Court's findings on the definition of the relevant geographic market.

23. Solvay complains, in essence, that the General Court failed to state the reasons for the judgment under appeal. On the one hand, it submits, the reasoning on which the judgment was based is unclear and contradictory (first part of the sixth plea in law); on the other hand, it is incomplete and does not address many of the arguments raised by the applicant at first instance (second part of the sixth plea in law). The focal point of the appeal, therefore, is the obligation incumbent on the General Court to provide a proper statement of the reasons on which its judgments are based (Article 36 in conjunction with the first paragraph Article 53 of the Statute of the Court of Justice).

(a) First part of the sixth plea in law

24. The first part of the sixth plea in law is attributable to some confusion in the use of terminology in the contested decision. While the Commission defines the relevant geographic market in that decision as 'the

¹⁸ — OJ 2009 C 45, p. 7.

¹⁹ — See in this regard my Opinion in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, point 28.

Community (excluding the United Kingdom and Ireland),²⁰ in many places, it also uses expressions such as ‘the Community’, ‘west Europe’ and ‘western Europe’.²¹ If the Commission had used clear and consistent terminology in the contested decision, the EU courts would probably have been spared the need to consider the arguments exchanged in this regard.

25. Solvay takes the view that it is not clear from the judgment under appeal whether the General Court regards the expressions ‘Community’, ‘Community (excluding the United Kingdom and Ireland)’, ‘west Europe’ and ‘western Europe’ as having the same meaning or as being contradictory.

26. This argument does not stand up to closer examination.

27. It is settled case-law that the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court’s thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review.²²

28. Taken together, paragraphs 251 to 254 of the judgment under appeal show clearly and unambiguously that the General Court assumed that there was *no* substantive difference between the aforementioned expressions.

29. The starting point for the General Court’s thinking was the Commission’s definition of the relevant geographic market as ‘the Community (excluding the United Kingdom and Ireland)’.²³ Furthermore, it obtained confirmation from the Commission in the proceedings at first instance that references in certain parts of the contested decision to ‘western Europe’ and ‘west Europe’ or the ‘Community’ relate to the same geographic market, that is to say ‘the Community (excluding the United Kingdom and Ireland)’.²⁴ In addition, the General Court found that the definition of the relevant geographic market as ‘the Community (excluding the United Kingdom and Ireland’ in recital 136 to the contested decision was not ‘inconsistent with other recitals to the contested decision’.²⁵

30. The judgment under appeal therefore provides clear and uncontradictory reasons in relation to the point raised by Solvay. It may be that Solvay does not consider the General Court’s findings concerning the relevant geographic market to be substantively accurate. However, the fact that the General Court, on

20 — Recital 136 to the contested decision, reproduced in paragraph 251 of the judgment under appeal.

21 — See in this regard the references in paragraph 253 of the judgment under appeal.

22 — Case C-259/96 P *Council v de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33, Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, paragraph 70, Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 29, and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 136.

23 — Paragraph 251 of the judgment under appeal.

24 — Paragraphs 252 and 253 of the judgment under appeal.

25 — First paragraph of paragraph 254 of the judgment under appeal.

the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgment for failure to state reasons.²⁶ The allegation of failure to state reasons is therefore untenable.

any means ‘consider national markets to be relevant’. It considered the question of national markets only in the alternative, in the event that the Commission had not – as Solvay claimed – correctly defined the relevant geographic market as ‘the Community (excluding the United Kingdom and Ireland)’.^{27 28}

(b) Second part of the sixth plea in law

31. In the second part of the sixth plea in law, Solvay criticises the General Court for not having explained in more detail why it considers national markets to be relevant for the purposes of assessing the legality of the contested decision. In Solvay’s submission, the General Court also failed to consider numerous arguments which it put forward in this regard in the proceedings at first instance.

32. This part of the sixth plea in law is untenable for two reasons.

33. First, Solvay’s complaint is based on an erroneous interpretation of the judgment under appeal. Contrary to the view expressed by Solvay, the General Court did not by

34. The appellant’s criticism relating to national markets is thus directed ultimately against a part of the grounds of the judgment which contains not the operative reasons on which the judgment is based but only *obiter dicta*. It is settled case-law that such complaints must be dismissed as being ‘ineffective’ or ‘nugatory’ (in French, ‘inopérant’).²⁹

35. Secondly, the appellant’s complaint places excessive demands on the scope of the obligation to state reasons applicable to judgments at first instance. According to settled case-law, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and the reasoning may therefore be implicit on condition that it

26 — Case C-362/05 P *Wunenburger v Commission* [2007] ECR I-4333, paragraph 80, and Case C-583/08 P [2010] ECR I-4469, paragraph 35.

27 — See again in this regard recital 136 to the contested decision and paragraph 251 of the judgment under appeal.

28 — This is clear in particular from paragraph 259 of the judgment under appeal.

29 — Case C-35/92 P *Parliament v Frederiksen* [1993] ECR I-991, paragraph 31, Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, paragraph 106, Case C-431/07 P *Bouygues and Bouygues Télécom v Commission* [2009] ECR I-2665, paragraphs 148 and 152, and Case C-280/08 P *Deutsche Telekom v Commission* (cited in footnote 22, paragraph 108).

enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.³⁰

had wrongly assumed the market to be the EC market without the United Kingdom and Ireland rather than correctly assuming it to be the national markets), this could not result in the annulment of the contested decision.³³ That clear conclusion did not require further explanation.

36. It is true that the General Court is required to examine in its judgment all the infringements of law alleged at first instance.³¹ In a major competition case such as the present one, however, the EU courts cannot be expected, given their limited resources, to give exhaustive consideration to every single submission put forward by the parties. All that matters in a case such as this is that the General Court should give – albeit in condensed form – comprehensible reasons why it considers the contested Commission decision to be lawful.

37. The General Court satisfied those requirements in this case. It explained that, even on the basis of national markets, Solvay held a dominant position in each State in which it was found to have committed infringements.³² The General Court logically and rightly concluded from this that, even if the Commission had made an error in its definition of the market (that is to say, if it

(c) Certain further arguments in connection with the sixth plea in law

38. As part of the sixth plea in law, Solvay also claims that there has been an infringement of Article 102 TFEU (Article 82 EC). However, since its complaints in this regard raise no points which are not already covered by Solvay's complaint of failure to state reasons, they do not need to be discussed separately. They are covered by my earlier comments on the failure to state reasons.³⁴

39. Solvay also maintains that the General Court distorted facts and evidence. However, this complaint too raises no new points. In particular, Solvay does not satisfy the requirements deriving, in accordance with settled case-law, from Article 256 TFEU, Article 58(1) of the Statute of the Court of Justice

30 — Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Commission* [2008] ECR I-6513, paragraph 96, Case C-440/07 P *Commission v Schneider Electric* [2009] ECR I-6413, paragraph 135, Case C-480/09 P *AcceaElettrabel Produzione v Commission* [2010] ECR I-13355, paragraph 77.

31 — Judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others v Commission* [2007], paragraph 22.

32 — Paragraph 258 of the judgment under appeal.

33 — Paragraph 259 of the judgment under appeal.

34 — See in this regard points 24 to 37 of this Opinion.

and Article 112(1)(c) of the Rules of Procedure of the Court of Justice.³⁵ The appeal does not indicate precisely the evidence alleged to have been distorted by the General Court or show the errors of appraisal which the General Court is alleged to have committed in distorting the evidence in this way.

does not necessarily have to conform to traditional geographic or political conceptions, however undesirable this may be. For, as the Commission rightly states, in competition law, the relevant geographic market is a functional concept the definition of which rests primarily on economic considerations.

40. Finally, Solvay alleges infringement of Article 299(1) EC (formerly Article 227(1) of the EEC Treaty), which defines the territory of the European Community.³⁶ In the light of that provision, it submits, it was not lawful to treat the terms ‘European Community’, ‘west Europe’ and ‘western Europe’ as having the same meaning.

(d) Interim conclusion

42. The sixth plea in law is therefore unfounded in its entirety.

41. That argument is also unconvincing. It is true that, in normal parlance, the geographic or political term ‘west Europe’ does not correspond exactly to the territory of what was then the European Community. However, in a decision in anti-trust proceedings, the Commission (and, by extension, the EU courts) may use its (their) own terminology, which

3. Solvay’s dominant position (seventh plea in law)

43. The seventh plea in law concerns Solvay’s dominant position. It is directed against paragraphs 275 to 305 of the judgment under appeal. In Solvay’s view, the General Court wrongly upheld the Commission’s findings on the dominant position held by that undertaking. The General Court thus infringed the obligation to state reasons (Article 36 in conjunction with the first paragraph of Article 53

35 — Joined Cases C-204/00 P C-205/00 P C-211/00 P C-213/00 P C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 50, *Kominou and Others v Commission* (cited in footnote 31, paragraph 41), and Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361, paragraph 16.

36 — Strictly speaking, it defines the geographic scope of the E(E)C Treaty.

of the Statute of the Court of Justice) and Article 102 TFEU (Article 82 EC).

(b) Dominant position on national markets (second part of the seventh plea in law)

46. The second part of the seventh plea in law is concerned with the requirements attaching to evidence of a dominant position

(a) Solvay's references to its sixth plea in law

44. In the first part – and also in certain passages of the second and third parts – of the seventh plea in law, Solvay essentially refers only to its submissions under the sixth plea in law. It argues that, since the relevant geographic market is not clearly defined, the General Court is not entitled to find that there is a dominant position 'on the Community market'.³⁷

(i) Allegation that the General Court's analysis is confined to market shares alone

47. On the one hand, Solvay claims that the General Court infringed Article 102 TFEU (Article 82 EC) by basing its assumption that the undertaking had a dominant position on national markets on an examination of market shares alone, without taking other relevant factors into account.

45. With respect to their substance, the complaints raised here depend entirely on the fate of the sixth plea in law, to which they predominantly refer. If, as I have suggested, the first part of the sixth plea in law is dismissed,³⁸ the same must also apply to the first part of the seventh plea in law. Those parts of the second and third parts of the seventh plea in law which relate only to the issue of market definition must likewise be dismissed.

48. That claim is unconvincing. It rests on a clearly erroneous reading of the judgment under appeal.

49. The General Court did not in any way confine its analysis to an examination of market shares alone. Rather, it was guided, as a first step, by the case-law to the effect that the existence of a dominant position derives in

37 — Paragraph 283 of the judgment under appeal.

38 — See points 24 to 30 and 38 of this Opinion, above.

general from a combination of several factors which, taken separately, would not necessarily be determinative.³⁹

50. However, the General Court rightly assumed, as a second step, that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.⁴⁰ Furthermore, it rightly held that a market share of 50% constitutes in itself, save in exceptional circumstances, evidence of the existence of a dominant position.⁴¹

51. Finally, as a third step, the General Court examined a number of issues raised in the proceedings at first instance which, being exceptional circumstances in Solvay's view, might have undermined the presumption that it held a dominant position.⁴²

52. Consequently, contrary to Solvay's claim, the General Court also examined factors other than market shares. It simply took as the starting point for its considerations the presumption of a dominant position based on a market share in excess of 50%, but then supplemented that presumption with findings

on the existence or otherwise of exceptional circumstances. Such an approach is entirely consistent with the requirements arising from Article 82 EC (Article 102 TFEU) and the related case-law.

(ii) Alleged failure to take into account a number of Solvay's arguments

53. On the other hand, Solvay complains that the General Court did not examine many of the arguments it raised at first instance. These concern, first, the difference between Solvay's market share and the market shares of its competitors and, secondly, their production capacity. That submission amounts effectively to a claim of infringement of the obligation to state reasons.⁴³

54. For the reasons given in connection with the sixth plea in law,⁴⁴ that complaint is untenable. As long as the General Court adopts a reasoned position on all the infringements of law complained of, as it did in this case, it does not need to examine in detail each specific argument put forward in the party's submissions.

39 — Paragraph 276 of the judgment under appeal, with reference to Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, paragraph 66.

40 — Paragraph 277 of the judgment under appeal, with reference to Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 41.

41 — Paragraph 279 of the judgment under appeal, with reference to Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 60.

42 — Paragraphs 286 to 304 of the judgment under appeal.

43 — *Gogos v Commission* (cited in footnote 26, paragraph 29); see to the same effect, previously, Case C-283/90 P *Vidrányi v Commission* [1991] ECR I-4339, paragraph 29, and Case C-68/91 P *Moritz v Commission* [1992] ECR I-6849, paragraphs 37 to 39.

44 — Points 35 and 36 of this Opinion.

(iii) Allegation of insufficient evidence of the market share

55. Finally, Solvay claims that insufficient evidence was adduced of the market share supporting the assumption that it held a dominant position.

56. That submission must be rejected without further examination as inadmissible because it effectively calls into question the General Court's assessment of the facts and evidence, which the Court of Justice does not have jurisdiction to do in an appeal.⁴⁵

(c) Allegation of exceptional circumstances (third part of the seventh plea in law)

57. In the third part of the seventh plea in law, Solvay criticises the General Court for not having considered its arguments concerning the existence of exceptional circumstances which, in Solvay's opinion, would have militated against the proposition that that undertaking holds a dominant position.

58. That complaint is entirely unfounded. No less than nineteen paragraphs in the judgment under appeal are dedicated⁴⁶ to an examination of the existence or otherwise of exceptional circumstances and to Solvay's submissions in this regard.

(i) Requirements relating to the statement of reasons in the judgment under appeal

59. As I have already said, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.⁴⁷

60. Solvay may not agree with the substance of the General Court's reasoning for its rejection of the existence of exceptional circumstances. However, it cannot be inferred from this that the judgment under appeal fails to state the reasons on which it is based.⁴⁸

45 — *Aalborg Portland* (cited in footnote 35, paragraphs 47 to 49), *Wununburger v Commission* (cited in footnote 26, paragraph 66), *Sumitomo* (cited in footnote 29, paragraph 38) and *Commission v Schneider Electric* (cited in footnote 30, paragraph 103).

46 — Paragraphs 286 to 304 of the judgment under appeal.

47 — See in this regard the case-law cited in footnote 30 of this Opinion.

48 — See paragraph 30 and footnote 26 of this Opinion.

61. Moreover, contrary to the appellant's claim, the General Court does not rule out the existence of exceptional circumstances by reference to Solvay's large market share alone. Indeed, in the part of the judgment at issue, the General Court examines numerous other factors, such as the alleged possibilities of substituting other products for Solvay's own⁴⁹ and the question of the countervailing market power of its customers.⁵⁰

did not censure the contested Commission decision for failing to state reasons in relation to the countervailing market power of Solvay's customers.

64. That argument too has no prospect of success.

62. Moreover, other than in the event of distortion, which is not claimed here, it is not the task of the Court of Justice in appeal proceedings to substitute its own assessment of the facts for that of the General Court in the context of an allegation of exceptional circumstances.⁵¹

65. It is settled case-law that the statement of reasons required under Article 253 EC (Article 296 TFEU) must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the EU institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review.⁵²

(ii) Requirements relating to the statement of reasons in the contested decision

63. On the margins of the third part of the seventh plea in law, Solvay also claims that the General Court infringed Article 296 TFEU (formerly Article 253 EC) because it

66. The institution which adopted the measure is not required, however, to define its position on matters which are plainly of secondary importance or to anticipate potential objections.⁵³ Like the General Court in the judgment under appeal, therefore, the Commission too was not necessarily required, in the contested decision, to examine each and every one of the arguments raised by Solvay.

49 — The General Court examines in particular the 'possibility that caustic soda and cullet could be substituted for soda ash' (paragraphs 295 to 298 of the judgment under appeal).

50 — Paragraphs 299 to 303 of the judgment under appeal, which are concerned with the 'competitive pressure brought to bear by customers'.

51 — See in this regard the case-law cited in footnote 45 above.

52 — Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63), Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, paragraph 166, and *Deutsche Telekom v Commission* (cited in footnote 22, paragraph 130).

53 — Joined Cases C-465/02 and C-466/02 *Germany and Denmark v Commission ('Feta')* [2005] ECR I-9115, paragraph 106, and *Impala* (cited in footnote 52, paragraph 167).

(iii) Alleged infringement of Article 102 TFEU (Article 82 EC)

(a) Group rebate granted to Saint-Gobain (eighth plea in law)

67. Finally, at numerous points in the third part of the seventh plea in law, Solvay claims that there have been infringements of Article 102 TFEU (Article 82 EC). However, that provision is merely referred to, without further comment, as part and parcel of the allegation of failure to state reasons.⁵⁴ Such a complaint raises no new points and does not need to be considered separately.

(d) Interim conclusion

68. Considered in its entirety, the seventh plea in law is therefore in part inadmissible and in part unfounded.

4. Abuse of the dominant position held by Solvay (eighth and ninth pleas in law)

69. In the eighth and ninth pleas in law, Solvay alleges that the Commission committed errors of law in the context of its finding of abuse of the dominant position held by Solvay.

70. The eighth plea in law concerns the group rebate of 1.5 % which Solvay had granted to the French undertaking Saint-Gobain as one of its most important customers in a 'secret protocol'. In the contested decision, the Commission had, with the General Court's approval, considered the group rebate to be an abuse by Solvay of its dominant position.⁵⁵ In this regard, Solvay criticises the General Court's findings in paragraphs 348 to 358 of the judgment under appeal. It claims that the General Court wrongly regarded the aforementioned rebate as an abusive fidelity rebate which is incompatible with Article 82 EC.⁵⁶

71. In particular, Solvay claims that there has been an infringement, on the one hand, of Article 102 TFEU (Article 82 EC) and, on the other hand, of the obligation to state reasons applicable to judgments at first instance (Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice). In this connection, however, the alleged infringement of the obligation to state reasons is of no independent significance in relation to the alleged errors of substantive law. The truth is that Solvay takes a different view from the General Court on the *substance* of the question of how the group rebate is to be assessed. As explained at greater length above, differences of opinion as to substance have no

54 — The submissions relating to the seventh plea in law contain numerous formulations such as 'l'arrêt attaqué ne motive pas régulièrement sa décision et viole de surcroît l'article 102 TFUE'.

55 — Recitals 161 to 165 to the contested decision and paragraph 48 of the judgment under appeal.

56 — See in particular paragraphs 354, 355 and 358 of the judgment under appeal.

bearing on the obligation to state reasons,⁵⁷ which means that the complaint of failure to state reasons must be rejected from the outset. From this point onwards, therefore, I shall examine the eighth plea in law exclusively from the point of view of the alleged infringement of Article 82 EC (Article 102 TFEU).

(i) Argument as to the absence of any exclusivity commitment

72. First, Solvay criticises the General Court for having wrongly classified the group rebate granted to Saint-Gobain as a fidelity rebate. The General Court, it submits, disregarded the fact that, at the time, Solvay catered for only around 67% of Saint-Gobain's requirements, and only 15% in France. The group rebate granted by Solvay was not therefore linked to the exclusive or quasi-exclusive supply of Saint-Gobain's requirements, which, in the appellant's view, it would have to be in order to support the assumption of an abusive fidelity rebate.

73. The conclusion might be drawn, *prima facie*, that, by this submission, Solvay seeks to prompt the Court of Justice, in its appellate jurisdiction, to take the improper step of substituting its own assessment of the facts and evidence for that of the General Court.

However, what the submission actually states is that, in assessing the group rebate, the General Court failed to take into account a criterion which Solvay considers to be decisive: exclusive or quasi-exclusive supply to the recipient of the rebate by the dominant undertaking. Whether such a criterion of exclusivity is legally relevant in the context of the assumption of abuse within the meaning of Article 82 EC is a point of law which the Court of Justice has jurisdiction to review on appeal.⁵⁸

74. Solvay considers itself able to infer from the previous case-law of the Court of Justice that fidelity rebates are an abusive commercial practice only where they are linked to exclusive or quasi-exclusive supply to the customer by the dominant undertaking.

75. That assumption is wrong. Tellingly, Solvay relies only on the judgment in *Hoffmann-La Roche*.⁵⁹ Other relevant judgments

⁵⁷ — See in this regard point 30 of this Opinion and the case-law cited in footnote 26, above.

⁵⁸ — See to this effect *Deutsche Telekom v Commission* (cited in footnote 22, paragraphs 77, 155 and 195), in which the Court held to be admissible a number of complaints claiming that, in the judgment at first instance, the General Court applied an incorrect legal test; see also *Sumitomo* (cited in footnote 29, paragraph 40), *Impala* (cited in footnote 52, paragraph 117) and Case C-47/07 P *Masdar (UK) v Commission* [2008] ECR I-9761, paragraph 77.

⁵⁹ — Cited above in footnote 40.

of the Court of Justice on matters relating to rebates, in particular, *Michelin I*⁶⁰ and *British Airways*,⁶¹ are not mentioned even in passing.

sources of supply or commercial partners.⁶⁴ It must also be examined whether there is an objective economic justification for the rebates and bonuses granted.⁶⁵

76. As the Court has held, it cannot be inferred from its earlier judgments relating to Article 86 of the EEC Treaty (Article 82 EC) that bonuses and discounts granted by undertakings in a dominant position are abusive only in the circumstances there described.⁶²

78. It cannot be inferred from the previous case-law that rebates are abusive only where the customer is exclusively or quasi-exclusively tied to the undertaking in a dominant position. On the contrary, *Michelin I*⁶⁶ and *British Airways*⁶⁷ concerned discount systems or bonus schemes *without* such an exclusivity commitment.

77. The abusive nature of rebates granted by dominant undertakings must instead be assessed in the light of all the circumstances of the case in question, with particular reference to the criteria and rules governing the grant of the rebate.⁶³ The decisive question is whether rebates can produce an *exclusionary effect*, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various

79. Accordingly, the fact that the General Court refrained from reaching an express finding as to whether Saint-Gobain was exclusively or quasi-exclusively supplied by Solvay does not constitute an error of law.⁶⁸

60 — Case 322/81 *Nederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461.

61 — Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331.

62 — *British Airways* (cited in footnote 61, paragraph 64).

63 — *Michelin I* (cited in footnote 60, paragraph 73) and *British Airways* (cited in footnote 61, paragraph 67).

64 — *British Airways* (cited in footnote 61, paragraph 68); see to the same effect *Michelin I* (cited in footnote 60, paragraph 73).

65 — *British Airways* (cited in footnote 61, paragraphs 69 and 84 to 86); on the criterion of an objective economic justification for the market conduct of an undertaking in a dominant position, see, generally, *United Brands* (cited in footnote 39, paragraph 184); joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia* [2008] ECR I-7139, paragraph 39; Case C-52/07 *Kanal 5 and TV 4* [2008] ECR I-9275, paragraph 47; and Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, paragraphs 31 and 75.

66 — *Michelin I* (cited in footnote 60, paragraph 72); see also *British Airways* (cited in footnote 61, paragraph 65).

67 — *British Airways* (cited in footnote 61, paragraphs 3 to 9).

68 — In the judgment under appeal (paragraphs 349 and 352), it is simply found that the group rebate of 1.5% applies 'to all purchases of soda ash by Saint-Gobain from Solvay in Europe'. However, this does not necessarily mean that Saint-Gobain sources all or nearly all of its soda ash requirement in Europe from Solvay.

80. I would add merely for the sake of completeness that Solvay's (ill-substantiated) complaint to the effect that the case-law of the Court of Justice concerning fidelity rebates is formalistic and has no economic basis is also unfounded. As has already been said, when assessing rebate schemes, the Court of Justice takes into account all the circumstances of the individual case and expressly recognises the possibility of an objective economic justification.⁶⁹ This is anything but formalistic.

'that, even where it is moderate, the amount of a fidelity rebate has an impact on the conditions of competition', must be viewed in connection with its previous findings. The General Court pointed out, in particular, that Solvay's group rebate was granted independently of any consideration linked with economic advantages in terms of efficiency and economies of scale and extended to all purchases of soda ash by Saint-Gobain from Solvay in Europe.⁷⁰

(ii) Argument as to the low value of the group rebate

81. Secondly, Solvay argues that, at 1.5 %, the group rebate was too small to have been able to have a noticeable effect on the business decisions of the Saint-Gobain group. In its submission, the General Court does not explain to what extent the rebate granted by Solvay was actually capable of influencing the behaviour of the Saint-Gobain group.

83. The capacity of such rebates to produce anti-competitive exclusionary effects is recognised in case-law. As the Court of Justice has held, the commitment of co-contractors towards the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount or bonus does not relate solely to the growth in turnover in relation to purchases or sales of products of that undertaking made by those co-contractors during the period under consideration, but extends also to the whole of the turnover relating to those purchases or sales.⁷¹

82. It is true that, in paragraph 355 of the judgment under appeal, the General Court examined the question of the possible anti-competitive effects of the group rebate only very briefly. However, its lapidary statement

84. It is also particularly difficult for competitors of the undertaking in a dominant position to outbid it in the face of discounts

69 — *British Airways* (cited in footnote 61, in particular paragraphs 67, 69 and 84 to 86).

70 — Paragraphs 349, 352 and 354 of the judgment under appeal.

71 — *British Airways* (cited in footnote 61, paragraph 73).

or bonuses based on overall sales volume. Merely by reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus.⁷²

85. The rebates or commission payments that have been found to be abusive in the previous case-law have sometimes amounted to no more than 1 %⁷³ and were therefore even lower in percentage terms than the group rebate of 1.5 % at issue here.

86. Against that background, the General Court's finding 'that, even where it is moderate, the amount of a fidelity rebate has an impact on the conditions of competition' is beyond legal reproach in the light of the

circumstances of the present case. It is based on reasonable economic considerations.

(iii) Argument as to the absence of any impact on competition

87. Thirdly, Solvay takes exception to the General Court's finding that it did not substantiate its assertions concerning the conduct of Saint-Gobain's national subsidiaries. This is a reference to Solvay's argument at first instance that Saint-Gobain's national subsidiaries had managed to negotiate more advantageous contractual conditions, or even to breach their contract with Solvay, as in the case of Saint-Gobain France.⁷⁴

88. The General Court did indeed reject Solvay's foregoing argument as insufficiently substantiated.⁷⁵ However, the question whether Solvay's submission was indeed insufficiently substantiated or proven can be left open. After all, that argument was in any event unfounded, as the General Court rightly held.⁷⁶ The anti-competitive nature of a business practice of an undertaking in a dominant position cannot be removed by the fact that it is pursued at the request of a

72 — *British Airways* (cited in footnote 61, paragraph 75).

73 — See *British Airways* (cited in footnote 61, paragraph 9), according to which any travel agent in the United Kingdom could earn an additional commission of 'up to 1%' on top of the normal basic rate of commission for providing BA domestic tickets.

74 — Paragraph 346 of the judgment under appeal.

75 — Paragraph 357 of the judgment under appeal.

76 — The General Court held in paragraph 357 of the judgment under appeal that the aforementioned argument 'does not relate to an exceptional circumstance that would justify the conduct characterised as an abuse of a dominant position'.

customer⁷⁷ and certainly not by the fact that the customer succeeds, by skilful manoeuvring, in obtaining further concessions from the dominant undertaking.⁷⁸

of the judgment under appeal, concerning the discriminatory nature of Solvay's business practices under subparagraph (c) of the second paragraph of Article 82 EC.

89. Consequently, Solvay's third argument is also unsound.

(i) First part of the ninth plea in law

(iv) Interim conclusion

90. The eighth plea in law is unfounded in its entirety.

92. In the first part of the ninth plea in law, Solvay specifically criticises paragraphs 397 to 400 of the judgment under appeal, claiming that the General Court distorted its written pleadings at first instance and infringed subparagraph (c) of the second paragraph of Article 102 TFEU (subparagraph (c) of the second paragraph of Article 82 EC).

(b) Discriminatory nature of Solvay's business practices (ninth plea in law)

— Alleged distortion of Solvay's written pleadings

91. The ninth plea in law concerns the General Court's findings in paragraphs 397 to 402

93. First, the appellant objects to that part of the judgment under appeal in which the General Court assumes that Solvay did not dispute the findings relating to the system of rebates set up in France.⁷⁹ In Solvay's view, that statement is contradicted by its application and its rejoinder at first instance, which, it argues, the General Court distorted.

⁷⁷ — *Hoffmann-La Roche* (cited in footnote 40, paragraph 89); *AKZO v Commission* (cited in footnote 41, paragraph 149); Case C-393/92 *Almelo* [1994] ECR I-1477; and Case C-552/03 P *Unilever Bestfoods v Commission* [2006] ECR I-9091, paragraph 129, last sentence.

⁷⁸ — See in this regard recital 84 to the contested decision, referred to by Solvay itself, which states that 'Saint-Gobain (to Solvay's evident dissatisfaction) used its presence in several countries to exercise downward pressure on Solvay's differential pricing.'

⁷⁹ — See in particular paragraph 397 of the judgment under appeal.

94. According to settled case-law, there is such distortion where, without recourse to new evidence, the assessment of the existing evidence is manifestly incorrect.⁸⁰ If that rule is transposed to an argument put forward by a party at first instance, such an argument may be assumed to have been distorted only where it was clearly misunderstood by the General Court or reproduced by it such a way as to misrepresent its meaning.

incidentally to the French market and do not in any event deal with the matter at issue here of discrimination against business partners.⁸³

97. Against that background, the General Court cannot be criticised for having clearly misunderstood Solvay's argument or for having reproduced it in such a way as to misrepresent its meaning. The complaint of distortion must therefore be rejected.

95. There is insufficient evidence that that was so in this case.

— Error of substantive law

96. As Solvay itself admits,⁸¹ the country-specific statements in its application at first instance related to the German market. Otherwise, Solvay confined itself to disputing in general the proposition that the rebates granted by it are in the nature of fidelity rebates. Neither its application nor its rejoinder contained submissions relating specifically to the French market. Even the passages from its rejoinder at first instance of which Solvay makes particular mention⁸² relate only

98. Solvay also claims that paragraphs 398 and 400 of the judgment under appeal contain an infringement of subparagraph (c) of the second paragraph of Article 102 TFEU (subparagraph (c) of the second paragraph of Article 82 EC). It alleges that the General Court erred in law by failing to examine whether there was a relationship of competition between the undertakings in the sets of Solvay's customers referred to by way of example, in particular between two French customers (Durand and Perrier), on the one hand, and the German flat glass and hollow glass producers, on the other.

99. The Commission disputes the *admissibility of that claim* by arguing that Solvay did not

80 — Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 37, Case C-260/05 P *Snitace v Commission* [2007] ECR I-10005, paragraph 37, and *Lafarge v Commission* (cited in footnote 35, paragraph 17).

81 — Paragraphs 329 and 330 of the appeal.

82 — Solvay refers to paragraphs 375 and 387 of its rejoinder at first instance.

83 — Paragraphs 464 to 474 of the rejoinder at first instance were devoted to the issue of discrimination, although they too did not deal specifically with France.

claim infringement of subparagraph (c) of the second paragraph of Article 102 TFEU at first instance; only in connection with the alleged absence of discrimination was it pointed out that the flat glass and hollow glass producers operate on different markets and are not, therefore, in comparable situations.

the legal opinion expressed by the General Court in the judgment under appeal.⁸⁶

100. I must admit that I find this objection to be extremely formalistic and unconvincing. In relation to the discriminatory nature of Solvay's rebate system, the contested decision made express reference to subparagraph (c) of the second paragraph of Article 82 EC.⁸⁴ It therefore goes without saying that, when debated before the General Court, too, the issue of discrimination must be viewed in the context of that provision, even if it is no longer expressly cited by the parties in their pleadings.⁸⁵

102. That is the case here. The summary of the pleas in law and arguments of the parties in the judgment under appeal shows that Solvay had already claimed at first instance that flat glass producers operate on a different market from hollow glass producers.⁸⁷ The question discussed at first instance, whether undertakings operate on different markets, and the question raised now, whether there is competition between those undertakings, are two sides of the same coin. Thus, by raising on appeal the complaint concerning the existence of a relationship of competition, Solvay is merely developing the arguments which it has already put forward at first instance.

101. Furthermore, it is true that, under Article 42(2) in conjunction with Article 118 of the Rules of Procedure of the Court of Justice, no new pleas in law may be introduced in appeal proceedings. The appellant is, however, permitted to put forward new arguments in relation to the pleas in law which it raised at first instance, in particular in response to

103. Moreover, by that complaint, Solvay is not seeking to prompt the Court of Justice to carry out an improper assessment of the facts in the appeal proceedings. What is at issue is, rather, whether the General Court, in refraining from addressing the relationship of competition between flat glass and hollow glass producers, failed to take into account a criterion consideration of which is required by law under subparagraph (c) of the second

⁸⁴ — Recital 180 to the contested decision.

⁸⁵ — In any event, the General Court does indeed refer to subparagraph (c) of the second paragraph of Article 82 in connection with the issue of discrimination (see paragraph 396 of the judgment under appeal).

⁸⁶ — *PKK and KNK v Council* (cited in footnote 80, paragraphs 64 and 66, Case C-295/07 P *Commission v Département du Loiret* [2008] ECR I-9363, paragraph 99, see to the same effect Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraphs 38 and 39; see also point 28 of my Opinion in that case.

⁸⁷ — Paragraph 393, last sentence, of the judgment under appeal.

paragraph of Article 82 EC. This is a point of law which is open to review on appeal.⁸⁸

104. As to whether *that complaint is well-founded*, it must first be recalled that subparagraph (c) of the second paragraph of Article 82 EC (subparagraph (c) of the second paragraph of Article 102 TFEU) provides for a two-stage test. The phrase ‘thereby placing them at a competitive disadvantage’ is independent and is not merely in the nature of an explanatory addition with declaratory effect.⁸⁹

105. Consequently, in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others.⁹⁰

106. The rationale behind subparagraph (c) of the second paragraph of Article 82 EC is that the commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words between suppliers or customers of that undertaking. Co-contractors of the dominant undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves.⁹¹

107. In the context of the present case, this means that, when examining subparagraph (c) of the second paragraph of Article 82 EC, the General Court should not have refrained from taking into account the competitive relationship which Solvay’s customers have with each other. An infringement by Solvay of subparagraph (c) of the second paragraph of Article 82 EC should have been assumed only in so far as Solvay’s customers were in competition with each other, in which respect it was not the market for soda ash but the downstream market or markets for glass which were relevant. The General Court therefore erred in law in taking the view, in paragraph 100 of the judgment under appeal, that only the soda ash market and not the glass market was significant.

108. It is true that, for the purposes of assuming the existence of abuse within the meaning of subparagraph (c) of the second paragraph of Article 82 EC, it is sufficient to find that the

88 — See in this regard point 73 of this Opinion and the case-law cited in footnote 58, above.

89 — See in this regard my Opinion in *British Airways* (cited in footnote 19, point 124).

90 — *British Airways* (cited in footnote 61, paragraph 144) and *Kanal 5 and TV 4* (cited in footnote 65, paragraph 44); see to the same effect Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraphs 523 and 524, and *United Brands* (cited in footnote 39, paragraphs 232 to 234).

91 — *British Airways* (cited in footnote 61, paragraph 143).

behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.⁹² The Commission rightly drew attention to the foregoing.

109. However, it is an error of law to declare the competitive relationships on the downstream market on which the customers of the undertaking in a dominant position are active to be entirely insignificant, as the General Court did in the present case.

110. Contrary to the view taken by the Commission, that error of law cannot be disregarded by reference to the fact that the aforementioned French customers Durant and Perrier and the German customers from the flat glass and hollow glass sectors are only individual examples. Where the General Court, in response to a complaint raised by a party to the proceedings, examines individual examples taken from the contested decision in order to determine whether there have been any errors of assessment, it must carry out

that examination on the basis of legally correct criteria. This was not the case here.

111. A different conclusion cannot be drawn from the judgments in *Hoffmann-La Roche*⁹³ and *Michelin I*.⁹⁴ The passages from those judgments which are cited by the Commission do not specifically relate to the application of subparagraph (c) of the second paragraph of Article 82 EC⁹⁵ but contain general statements on the abusive nature of rebate systems operated by undertakings in a dominant position.

112. The fact that the competitive relationships between the business partners of the undertaking in a dominant position are significant for the purposes of subparagraph (c) of the second paragraph of Article 82 EC is demonstrated by the judgment concerning Portuguese airport charges. In that judgment, the Court of Justice expressly referred to the '[unjustified] economic advantage' which the discount recipients are able to obtain 'compared with their competitors'.⁹⁶

113. The first part of the ninth plea in law is therefore unfounded.

⁹³ — *Hoffmann-La Roche* (cited in footnote 40, paragraph 90).

⁹⁴ — *Michelin I* (cited in footnote 60, paragraph 85); in that case, discrimination had already been ruled out, so the question of a competitive disadvantage did not arise.

⁹⁵ — At that time, subparagraph (c) of the second paragraph of Article 86 of the EEC Treaty.

⁹⁶ — Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraph 52.

⁹² — *British Airways* (cited in footnote 61, paragraph 145).

(ii) Second part of the ninth plea in law

114. In the second part of the ninth plea in law, Solvay specifically objects to paragraph 401 of the judgment under appeal. That part of the judgment deals with Solvay's argument at first instance concerning the allegedly low costs of soda ash for glass producers. The General Court finds in this regard that Solvay's 'assertion' is 'unsubstantiated' and 'not of such a kind as to call in question the discriminatory nature of [Solvay's] practices'. Solvay takes the view that, in reaching this finding, the General Court, on the one hand, distorted its pleadings at first instance and, on the other hand, infringed the obligation to state reasons under Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice as well as subparagraph (c) of the second paragraph of Article 102 TFEU (subparagraph (c) of the second paragraph of Article 82 EC).

— Alleged distortion of Solvay's pleadings

115. The complaint of distortion of pleadings appears to be unfounded. There is no

indication that the General Court clearly misunderstood the written submissions advanced by the applicant at first instance or reproduced them in such a way as to misrepresent their meaning.⁹⁷ It should be recalled that Solvay had argued at first instance that, while soda ash is the most important raw material used in the manufacture of glass, it represents only 2 to 6% of the average selling price of the glass. The General Court correctly reproduced that argument.⁹⁸ The mere fact that supplementary submissions to similar effect which Solvay advanced in its rejoinder were not expressly mentioned in the judgment under appeal does not mean that the General Court thereby distorted the substance of Solvay's argument.

— Failure to state reasons

116. The position is different as regards the complaint alleging failure to state reasons. As has already been said, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review.⁹⁹ Not even

⁹⁷ — On the criterion for assessing the distortion of a party's arguments, see point 94 of this Opinion.

⁹⁸ — These contentions are summarised in paragraph 394 of the judgment under appeal.

⁹⁹ — See in this regard the case-law cited in footnote 22 above.

on the most sympathetic of readings does paragraph 401 of the judgment under appeal satisfy those requirements.

in fact be good reasons for that statement,¹⁰² but they are not even hinted at in the judgment under appeal.

117. The General Court gives no explanation for why it regards Solvay's arguments concerning the low cost of soda ash for glass producers as 'unsubstantiated'. In particular, it is not clear from the grounds of the judgment whether the General Court had taken note of the arguments put forward by Solvay in its rejoinder at first instance at all. In that rejoinder, as evidence for its contention as to lower costs, Solvay had cited a Commission regulation on anti-dumping¹⁰⁰ in which the cost share represented by soda ash in glass production was said to be 8%.¹⁰¹

119. Did the General Court take the view that the cost share represented by an important raw material is *generally immaterial* for the purposes of assessing the existence or otherwise of discrimination between customers of the undertaking in a dominant position? Or was it of the opinion that a cost share *of the order described by Solvay* (2 to 6%) has no bearing on the discriminatory nature of the business practices in question? And if so, why? A few additional sentences in the grounds of the judgment could and should have provided the clarity necessary here.

120. The General Court's findings in paragraph 401 of the judgment under appeal leave the reader uncertain as to why Solvay's arguments on the allegedly low cost of soda ash in glass production were rejected. As a result, moreover, the Court of Justice is unable to

118. Nor does the General Court explain why the allegedly low cost share represented by soda ash in glass production is 'not of such a kind as to call in question the discriminatory nature of Solvay's practices'. There may

100 — Commission Regulation (EC) No 823/95 of 10 April 1995 imposing a provisional anti-dumping duty on imports of disodium carbonate originating in the United States of America (OJ 1995 L 83, p.8).

101 — Recital 62 in the preamble to Regulation No 823/95 states 'that the cost of soda ash (batch after recycling) represents at most some 8 % of the price of a tonne of glass'.

102 — A distortion of the competition between business partners of an undertaking in a dominant position is not by any means confined to situations where the most significant parameters of the competition between them are affected. Even advantages in relation to smaller cost factors can easily give a customer of the undertaking in a dominant position competitive advantages over other customers of the same undertaking. In particular, subparagraph (c) of the second paragraph of Article 82 EC (subparagraph (c) of the second paragraph of Article 102 TFEU) does not require the competitive disadvantage to be *serious*. Such a restrictive interpretation of that provision would appreciably weaken the effectiveness of the EU competition rules. This would be incompatible with the fundamental objective of an open market economy with free competition.

exercise its power of review. Consequently, paragraph 401 of the judgment under appeal is vitiated by a failure to state reasons, with the result that the second part of the ninth plea in law is well-founded.

of the second plea in law). The undertaking also claims that the General Court distorted facts and evidence (third part of the second plea in law).

121. Accordingly, there is no need to examine the complaint of infringement of subparagraph (c) of the second paragraph of Article 102 TFEU. In any event, it raises no points which are not already contained in the complaint of failure to state reasons.

(iii) Interim conclusion

122. In summary, it must be concluded that the ninth plea in law is in part well-founded.

124. The background to this plea in law is the fact that, in the decision ordering an investigation of 5 April 1989, by which the Commission ordered a search of the premises of undertakings operating on the European soda ash market, reference is made only to possible infringements of Article 85 of the EEC Treaty (agreements between undertakings and concerted practices), whereas the contested decision imposing a fine establishes an infringement of Article 86 of the EEC Treaty or Article 82 EC (abuse of a dominant position). Solvay takes the view that the evidence found during a search in connection with Article 85 of the EEC Treaty must not be relied on as the basis for a decision under Article 86 of the EEC Treaty or Article 82 EC.

1. Admissibility of the second plea in law

B — Prohibition on the use of evidence obtained in the investigation of April 1989 (second plea in law)

123. By its second plea in law, which is directed against paragraphs 218 to 230 of the judgment under appeal, Solvay alleges infringement of Article 14(3) and Article 20(1) of Regulation No 17 (first and second parts

125. The Commission considers the second plea in law to be inadmissible because it is based on the same complaints that Solvay raised in the proceedings at first instance.

126. That objection is unfounded.

127. It is true that, according to settled case-law, the appellant must not confine itself to reproducing the pleas in law and arguments previously submitted to the General Court.¹⁰³ However, where a party challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, as the Court has held, if a party could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose.¹⁰⁴

128. In its appeal, Solvay looks in detail at paragraphs 218 to 230 of the judgment under appeal and, with reference to judgments of the Court of Justice, directs specific legal complaints against the General Court's findings. There can therefore be no question of a mere wholesale repetition of the corresponding plea in law raised at first instance.

129. Consequently, the admissibility of the second plea in law cannot seriously be called in question.

¹⁰³ — Order in case C-244/92 P *Kupka-Florida v WSA* [1993] ECR I-2041, paragraph 10, and judgments in case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35), and *France Télécom v Commission* (cited in footnote 22, paragraph 69).

¹⁰⁴ — Case C-234/02 P *European Ombudsman v Lamberts* [2004] ECR I-2803, paragraph 75, *Bouygues and Bouygues Télécom v Commission* (cited in footnote 29, paragraph 112), Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 116, and *Deutsche Telekom v Commission* (cited in footnote 22, paragraph 25).

2. Merits of the second plea in law

(a) First and second parts of the second plea in law (infringement of Article 14(3) and Article 20(1) of Regulation No 17).

130. Under Article 20(1) of Regulation No 17, information acquired during an investigation conducted by the Commission in the course of anti-trust proceedings may be used only for the purpose of the investigation. That provision thus contains, on the one hand, an obligation as to the purpose pursued and, on the other hand, a prohibition on use of the evidence obtained by the Commission.

131. The scope of the obligation as to purpose and the prohibition on use of evidence is a matter of dispute in the present case. The parties are in disagreement as to whether the Commission, for the purpose of establishing an abuse of a dominant position, was entitled to rely on evidence which it had previously obtained during an investigation into alleged infringements of the prohibition on anti-competitive agreements between undertakings on the same market.

132. The wording of Article 20(1) of Regulation No 17 provides no specific guidance in

this regard. Recourse must therefore be had to the meaning and purpose of that provision.

133. It is recognised that Article 20(1) of Regulation No 17 serves to protect the rights of the defence of undertakings affected by investigation measures adopted by the Commission.¹⁰⁵ As the Court has stated, those defence rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof.¹⁰⁶

134. The decisive criterion for the purposes of determining the scope of the obligation as to purpose and the prohibition on use of evidence laid down in Article 20(1) of Regulation No 17 is therefore the subject-matter and purpose of the investigation in question. Both follow from the order, issued by the Commission, under which the investigation is carried out.¹⁰⁷ According to the second sentence of Article 14(3) of Regulation No 17, they must be specified in the relevant Commission decision ordering the investigation, which fact constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned.¹⁰⁸

135. In the present case, the Commission decision of 5 April 1989 ordering the investigation, pursuant to which Solvay's business premises were searched, referred only to Article 85 of the EEC Treaty (Article 81 EC).¹⁰⁹ According to the General Court's findings, at that time, the Commission sought only to ascertain whether the applicant was participating in agreements and/or concerted practices. There was no reason to consider that an abuse of a dominant position was also suspected.¹¹⁰

136. Solvay concludes from all of the foregoing that use of the evidence obtained during the investigation to establish abuse of a dominant position within the meaning of Article 82 EC (formerly Article 86 of the EEC Treaty) was not permissible.

137. I am not convinced by that view.

138. It is true that, in a decision ordering an investigation, the Commission must 'clearly indicate the presumed facts which it intends to investigate'.¹¹¹ This serves to ensure that the Commission does not carry out investigations on a speculative basis, without having any concrete suspicions,¹¹² a practice

¹⁰⁵ — Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137, paragraph 18, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, PVC II [2002] ECR I-8375, paragraph 299.

¹⁰⁶ — *Dow Benelux v Commission* (cited in footnote 105, paragraph 18), *PVC II* (cited in footnote 105, paragraph 300), and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 48.

¹⁰⁷ — See to this effect *Dow Benelux v Commission* (cited in footnote 105, paragraph 17).

¹⁰⁸ — Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 41; see also *Roquette-Frères* (cited in footnote 106, paragraph 47).

¹⁰⁹ — See paragraph 220 of the judgment under appeal.

¹¹⁰ — See paragraph 222 of the judgment under appeal.

¹¹¹ — *Hoechst* (cited in footnote 108, paragraph 41, second half of the last sentence).

¹¹² — Opinion of Advocate General Mischo in *Hoechst* (cited in footnote 108, point 206).

for which the English term ‘fishing expeditions’ is often used.

implement the competition rules laid down in the Treaties and to protect competition in the internal market from distortion.¹¹⁵

139. However, the aim of the obligation to state the subject-matter and purpose of an investigation cannot be to secure a definitively binding description of all the legal provisions which the undertakings concerned might have infringed, since the Commission is not required to make a precise legal analysis of the suspected infringements at that early stage of its enquiries.¹¹³

142. In the light of the foregoing, to restrict the subject-matter and purpose of an investigation in anti-trust proceedings *ex ante* to specific prohibitory provisions under substantive law which are expressly defined in the decision ordering the investigation, while categorically ruling out other prohibitory provisions, would represent an excessively narrow and formalistic approach.

140. In any event, it is sometimes very difficult to assess in advance whether the conduct of an undertaking with a strong market position infringes the prohibition of cartels (Article 85 of the EEC Treaty, Article 81 EC or Article 101 TFEU) or constitutes an abuse of a dominant position (Article 86 of the EEC Treaty, Article 82 EC or Article 102 TFEU). As the Commission rightly points out, the scope *ratione materiae* of the prohibition of cartels and that of the prohibition against abuse of a dominant position may even overlap.¹¹⁴

143. The primary purpose of an investigation in anti-trust proceedings is to establish facts and obtain evidence¹¹⁶ on matters such as the existence of a specific agreement between undertakings, the existence of a specific form of market conduct and the economic considerations informing that conduct.

144. The Commission is not required to establish the precise legal classification of the facts investigated by it until very much later

141. Moreover, investigations serve the same fundamental objective from the point of view of both provisions, that is to say to help

113 — *Hoechst* (cited in footnote 108, paragraph 41, first half of the last sentence).

114 — The Commission refers in this regard to the judgment in Case T-65/98 [2003] ECR II-4653, which was confirmed by the order in *Unilever Bestfoods v Commission* (cited in footnote 77).

115 — On the legal position at the time when the contested decision was adopted, see Article 3(1)(g) EC. The same position can now be inferred from Protocol No 27 on the Internal Market and Competition annexed to the Treaties (OJ 2008 C 115, p. 309; OJ 2010 C 83, p. 309), as the Court of Justice confirmed most recently in connection with Article 102 TFEU (*TeliaSonera Sverige*, cited in footnote 65, paragraphs 20 to 22). See also Article 119(1) TFEU (formerly Article 4 EC), under which the Member States and the European Union are required to observe the principle of an open market economy with free competition.

116 — See also to this effect the Opinion of Advocate General Mischo in *Hoechst* (cited in footnote 108, point 174).

in the administrative procedure, first provisionally in the form of the statement of objections and then definitively in its decision concluding the proceedings.¹¹⁷ This does not adversely affect the rights of defence of the undertakings concerned; indeed, these are in fact protected by the statement of objections and the associated right to a fair hearing.

of a dominant position established in the contested decision.¹¹⁹

145. The General Court did not therefore commit an error of law in assuming that the documents acquired during the investigation of April 1989 could also be used in the context of the contested decision based on Article 82 EC.¹¹⁸

147. That criticism, too, is unfounded. It is based on an imprecise reading of the judgment under appeal.

(b) Third part of the second plea in law (complaint of distortion of facts)

148. The appellant fails to take into account that the General Court did not consider that the infringements covered by Article 85 of the EEC Treaty (Article 81 EC, Article 101 TFEU) and Article 86 of the EEC Treaty (Article 82 EC, Article 102 TFEU) were themselves similar but only that the facts ('practices') which the Commission examined as part of its investigation and on which it also ultimately relied in the contested decision were similar.¹²⁰ However, it is precisely those facts – and not their legal classification – which are material when it comes to assessing whether the Commission infringed the obligation as to purpose and the prohibition on use of evidence laid down in Article 20(1) of Regulation No 17.¹²¹

146. Under this second plea in law, Solvay also accuses the General Court of having distorted the facts. In its submission, the General Court wrongly relies on a similarity between the agreements between undertakings and concerted practices which formed the basis of the 1989 investigation and the abuse

149. As the General Court held (without contradiction in this regard),¹²² the decision ordering the investigation of 1989 and the

117 — See also to this effect the Opinion of Advocate General Mischo in *Hoechst* (cited in footnote 108, point 176).

118 — See in particular paragraph 228 of the judgment under appeal.

119 — Solvay makes a similar claim at the end of its submissions under the first part of the second plea in law.

120 — Paragraph 225 ('practices') and paragraph 226 ('facts') of the judgment under appeal.

121 — See also in this regard points 139 and 143 of this Opinion.

122 — Paragraphs 223 and 224 of the judgment under appeal.

contested decision of 2000 were both concerned, *inter alia*, with the implementation of exclusive purchase arrangements. Accordingly, the General Court was entitled to assume, without erring in law, that the contested decision was sufficiently connected with the subject-matter and purpose of the 1989 investigation¹²³ to rule out an infringement of the prohibition on use of evidence laid down in Article 20(1) of Regulation No 17.

(c) Interim conclusion

150. The second plea in law is therefore unfounded in its entirety.

C — Rights of the defence (third, fourth and fifth pleas in law)

151. By its third, fourth, and fifth pleas in law, Solvay complains in essence that there has been an infringement of its rights of defence.

152. In all proceedings which may lead to the imposition of penalties, in particular fines or penalty payments, protection of the rights of

the defence is a fundamental principle of European Union law which has been repeatedly affirmed in the case-law of the Court of Justice.¹²⁴ It has also since been codified in Article 41(2)(a) and Article 48(2) of the Charter of Fundamental Rights.¹²⁵

153. The complaints raised by Solvay under its third, fourth and fifth pleas in law are of fundamental importance and give the Court of Justice an opportunity to clarify its case-law on the rights of the defence during the administrative procedure in an anti-trust case.

154. The procedural background to these three pleas in law is as follows:

- Before it adopted its first decision imposing a fine in this case, in 1990 (Decision 91/299), the Commission gave Solvay the opportunity to submit observations on its statement of objections.¹²⁶ However, Solvay was not given proper access to the

¹²⁴ — Case C-550/07 P *Akzo Nobel Chemical and Akros Chemicals v Commission and Others* [2010] ECR I-8301, paragraph 92; see also Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 30, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler v Commission* [2009] ECR I-7191, paragraph 34.

¹²⁵ — The Charter of Fundamental Rights of the European Union was solemnly proclaimed, first, in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then, for a second time, in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1, and OJ 2010 C 83, p. 389).

¹²⁶ — Paragraphs 24 and 27 of the judgment under appeal.

¹²³ — Paragraph 226 of the judgment under appeal

file; it was merely provided with copies of the inculpatory documents on which the Commission based its objections at that time.¹²⁷ This was in order to 'simplify the procedure'.¹²⁸

longer find the remaining documents – more specifically, five binders.¹³³ The Commission could not even submit an enumerative list of the missing documents to the Court.¹³⁴

- In 2000, that is to say before the second decision imposing a fine at issue here was adopted (Decision 2003/6), Solvay was not given a further hearing;¹²⁹ nor was it allowed access to the file.¹³⁰

155. In the light of the foregoing, Solvay claims, on the one hand, that there has been an infringement of its right of access to the file (third and fourth pleas in law; see in this regard section 1 below) and, on the other hand, that there has been an infringement of its right to be heard (fifth plea in law; see in this regard section 2 below).

- Not until the second set of proceedings before the General Court (T-57/01) did the Commission submit some of the documents from the administrative procedure, which the General Court had repeatedly asked it to do by way of measures of organisation of procedure.¹³¹ Solvay was able to consult numerous documents to which it had not previously had access in the Court Registry. The undertaking was also given the opportunity to submit its observations on the usefulness of those documents for its defence.¹³²

1. Right of access to the file (third and fourth pleas in law)

- The Commission was forced to concede before the General Court that it could no

156. A corollary of the principle of protection of the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.¹³⁵

127 — Paragraphs 24, 450 and 451 of the judgment under appeal.

128 — Paragraph 451 of the judgment under appeal.

129 — Paragraph 43 of the judgment under appeal and recital 199 to the contested decision.

130 — Paragraphs 455 and 456 of the judgment under appeal.

131 — Paragraphs 57 to 65 of the judgment under appeal.

132 — Paragraphs 67 and 68 of the judgment under appeal.

133 — Paragraphs 65, 66 and 462 of the judgment under appeal.

134 — Paragraphs 66, 454 and 464 of the judgment under appeal.

135 — *Aalborg Portland* (cited in footnote 35, paragraph 68) and Case C-407/08 P *Knauf Gips* [2011] ECR I-6375, paragraph 22.

157. It is common ground that, in the administrative procedure, Solvay was made aware only of those documents in the file which the Commission used against that undertaking in the contested decision. Numerous other documents from the file which Solvay would also have been entitled to inspect by virtue of its rights of defence were withheld from it. The Commission thus infringed a fundamental rule of procedure¹³⁶ which is a corollary of the right to good administration.¹³⁷ Such a procedural infringement cannot be remedied after the decision has been adopted, in particular not by submitting individual documents during subsequent judicial proceedings.¹³⁸

158. At the present stage, the parties to the proceedings are concerned only with the question whether the General Court should have annulled the contested decision in the light of the aforementioned procedural error committed by the Commission. It is settled case-law that procedural defects in connection with access to the file in the course of the administrative procedure cause the Commission's decision to be annulled if the rights of

defence of the undertaking concerned have been infringed.¹³⁹

159. Unlike the Commission and the General Court, Solvay considers that its rights of defence have been infringed and puts forward numerous arguments to support that view. In so doing, the appellant relies in essence on the general legal principles, recognised in European Union law, of respect for the rights of defence, presumption of innocence and allocation of the burden of proof. In addition, Solvay alleges infringement of the obligation to state reasons under Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice as well as infringements of the second paragraph of Article 47, Article 48 and Article 52(3) of the Charter of Fundamental Rights, Article 6 of the ECHR and Article 6(1) TEU.

160. However, Solvay puts forward detailed submissions only in respect of the rights of defence, as well as, incidentally, in connection with the presumption of innocence and the obligation to state reasons. Its specific references to the Charter of Fundamental Rights,

¹³⁶ — The General Court, too, proceeds on the assumption of this procedural defect in paragraphs 453 to 456 of the judgment under appeal.

¹³⁷ — See in this regard the second indent of Article 41(2) of the Charter of Fundamental Rights.

¹³⁸ — Case C-51/92 P *Hercules Chemical v Commission* [1999] ECR I-4235, paragraph 78, Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraph 128, *PVC II* (cited in footnote 105, paragraph 318), and *Aalborg Portland* (cited in footnote 35, paragraph 104); see also Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 98, and Case T-36/91 *ICI v Commission* [1995] ECR II-1847, paragraph 108.

¹³⁹ — *Hercules* (cited in footnote 138, paragraph 77), *Corus UK* (cited in footnote 138, paragraph 127, and *PVC II* (cited in footnote 105, paragraphs 317, 322 and 323).

to Article 6(1) of the ECHR and to Article 6(1) TEU raise no new points and do not therefore require detailed discussion. With regard to Article 6(1) TEU, it is sufficient to point out that that provision itself does not contain any guarantees in relation to fundamental rights. Article 6 of the ECHR is not directly applicable to the EU institutions before the EU's accession to the ECHR,¹⁴⁰ but is to be taken into consideration in the interpretation and application of the general legal principles and fundamental rights of European Union law which have been relied on.¹⁴¹

concerning the documents which disappeared from the file (third plea in law; see section (c) below).

(a) Admissibility of the third and fourth pleas in law

161. For the purposes of assessing the complaints raised by Solvay with respect to the rights of defence, the presumption of innocence and the obligation to state reasons, I propose to follow the order in which these are examined by the Commission, which is based on the structure of the judgment under appeal. I shall therefore begin by commenting on the admissibility of the third and fourth pleas in law (see in this regard section (a) below) before examining the complaints relating to the documents accessible at first instance (fourth plea in law; see section (b) below); I shall then turn to the complaints

162. The Commission disputes the admissibility of the fourth and of certain parts of the third plea in law. It contends that the evaluation of the usefulness of specific documents to an undertaking's defence forms part of the assessment of the facts and evidence, which is the responsibility of the General Court alone and cannot in principle be reviewed on appeal.

163. I am not convinced by that approach. In this case, the Court of Justice is not asked to substitute its own assessment of individual documents from the file for that of the General Court.¹⁴² Rather, it is asked to examine whether the General Court applied the

¹⁴⁰ — Article 6(2) TEU in the version of the Treaty of Lisbon.

¹⁴¹ — See inter alia *Aalborg Portland* (cited in footnote 35, paragraph 64); to the same effect, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 25 and 26, Case C-450/06 *Varec* [2008] ECR I-581, paragraphs 44 and 46, and Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-1847, paragraph 43.

¹⁴² — This would in fact be inadmissible (see *PVC II*, cited in footnote 105, paragraphs 330 and 331, and *Aalborg Portland*, cited in footnote 35, paragraph 77 in conjunction with paragraph 76).

correct criteria and standards in its assessment of the facts and evidence. This is a question of law amenable to review by the Court of Justice in its appellate jurisdiction.¹⁴³

(b) The documents from the file which were accessible only before the General Court (fourth plea in law)

164. The fourth plea in law is directed against paragraphs 417 to 446 of the judgment under appeal, which are concerned with the usefulness for Solvay's defence of the documents from the file which were accessible for the first time in the proceedings before the General Court. As the General Court did not consider their usefulness to have been proven, it concluded that the Commission had not breached the rights of the defence.¹⁴⁴

(i) First part of the fourth plea in law

165. The first part of the fourth plea in law contains two criticisms of the judgment under appeal, of which I consider the first to be unfounded and the second well-founded.

166. On the one hand, the appellant considers that the General Court should have examined the allegations of infringements of the rights of defence made at first instance in the first place, in other words before the alleged errors of assessment under material law. There would otherwise be a risk of the General Court's being influenced in its assessment of the usefulness of various documents for the undertaking's defence by the outcome of its review of the content of the contested decision.

167. That first criticism must be rejected. As the Commission rightly points out, there is no logically compelling order of priority as between the examination of complaints relating to material law, on the one hand, and procedural law, on the other.¹⁴⁵ (Whether, in terms of the content of its assessment of the complaints relating to procedural law, the General Court may be influenced by the fate of the complaints relating to material law which are raised by an undertaking, will have to be addressed separately in the context of the third plea in law.¹⁴⁶)

168. On the other hand, the appellant criticises the General Court for having adopted too restrictive a view of the purpose of access to the file. In its opinion, the General Court should not have rejected the usefulness of

¹⁴³ — *Aalborg Portland* (cited in footnote 35, paragraph 125); see in addition point 73 of this Opinion and the case-law cited in footnote 58, above.

¹⁴⁴ — Paragraph 446 of the judgment under appeal.

¹⁴⁵ — The Court of Justice, too, has in the past examined points of material law before the procedural complaints raised; see, for example, *Corus UK* (cited in footnote 138, paragraphs 72 to 114 and 115 to 138) and Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, paragraphs 38 to 105 and 106 to 117.

¹⁴⁶ — See points 197 to 200 of this Opinion, below.

various documents for the defence on the ground that Solvay was either already aware of the information contained in them or that they related to points which the undertaking had already raised anyway.

communicated to an undertaking concerned, that undertaking must subsequently establish only that their non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission.¹⁴⁹ In this regard, it is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence.¹⁵⁰

169. Unlike the first criticism, the second criticism is well-founded.

170. Access to the file is designed to ensure that undertakings involved in the administrative procedure which are accused of infringing the competition rules laid down by European Union law (also known as the 'undertakings concerned') are able to exercise their rights of defence effectively.¹⁴⁷ It must enable them to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections.¹⁴⁸ This also helps to ensure equality of arms between the undertakings concerned and the Commission and thus, ultimately, a fair administrative procedure.

172. Of course, this applies primarily to documents which would have enabled the undertaking concerned to put forward new evidence in the administrative procedure. In *Aalborg Portland*, the Court refers in this connection to evidence 'which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine'.¹⁵¹

171. Where, in the administrative procedure, exculpatory documents have not been

173. I do not consider, however, that *Aalborg Portland* and certain other judgments in which the Court has used similar forms

147 — *Hercules* (cited in footnote 138, paragraph 76), *Corus UK* (cited in footnote 138, paragraph 126), *PVC II* (cited in footnote 105, paragraph 315), and Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraph 55.

148 — *Hercules* (cited in footnote 138, paragraph 75), *Corus UK* (cited in footnote 138, paragraph 125), and *PVC II* (cited in footnote 105, paragraph 315).

149 — *Aalborg Portland* (cited in footnote 35, paragraph 74) and *Knauf Gips* (cited in footnote 135, paragraph 23).

150 — *PVC II* (cited in footnote 105, paragraphs 318 and 324), *Aalborg Portland* (cited in footnote 35, paragraph 75), and *Knauf Gips* (cited in footnote 135, paragraph 23).

151 — *Aalborg Portland* (cited in footnote 35, paragraph 75); see also *Knauf Gips* (cited in footnote 135, paragraph 23 and paragraph 28 *in fine*, which assumes that the Commission has already taken certain arguments into account in the contested decision).

of wording can be interpreted as generally restricting the purpose of access to the file to the discovery of new evidence.¹⁵² On the contrary, even in *Aalborg Portland*, the Court of Justice seems to me to demonstrate a certain openness to the idea that access to the file may serve other purposes, particularly when it uses the phrase ‘would ... have been able to have some influence.’¹⁵³

174. As Solvay rightly points out, the purpose of access to the file is not confined to enabling the undertaking concerned to put forward new arguments or evidence in the administrative procedure. On the contrary, access to the file is also of very considerable practical interest because it enables the undertaking concerned to compare its contentions in the administrative procedure with the observations submitted by third parties – such as customers, suppliers, competitors and professional associations, for example. In particular, the undertaking concerned may, where appropriate, use many of the observations submitted by third parties to provide additional corroboration for the observations on which it has itself relied as against the Commission.

175. Clearly, the submissions put forward by the undertaking as against the Commission may carry more weight if they are based not only on its own internal documents and findings or on generally accessible sources but are also confirmed by the observations of third parties with potentially opposing interests.¹⁵⁴ After all, the administrative procedure requires not only that the undertaking concerned should submit valid arguments but also that it should substantiate them and furnish sufficient evidence to support them.

176. The General Court fails to take this into account when it states at several points in the judgment under appeal that the non-communication of certain documents during the administrative procedure was not capable of influencing the conduct of the procedure and the content of the contested decision to Solvay’s detriment:

— because the undertaking was ‘not unaware’ of the points alluded to in the documents,¹⁵⁵

152 — See *Corus UK*, referred to by the Commission (cited in footnote 138, paragraph 134), and *Knauf Gips* (cited in footnote 135, paragraph 23 and paragraph 28 *in fine*).

153 — *Aalborg Portland* (cited in footnote 35, paragraph 75), recently confirmed by *Knauf Gips* (cited in footnote 135, paragraph 23).

154 — The Commission was wrong to examine this central argument put forward by the appellant merely in a footnote, only to dismiss it as ‘cheap’.

155 — Paragraphs 423 and 424 of the judgment under appeal.

- because the undertaking was able to supply certain information itself,¹⁵⁶ without there being any need for it to rely on its competitors' documents;¹⁵⁷

(ii) Second part of the fourth plea in law

- because the undertaking had already developed certain arguments contained in the documents;¹⁵⁸ or

178. In the second part of the fourth plea in law, Solvay accuses the General Court of having imposed excessively strict requirements in connection with the furnishing of evidence to demonstrate an infringement of the rights of the defence. The appellant refers in this regard to certain passages from the judgment under appeal in which the General Court states that:

- because the Commission was already aware of the factual situation outlined in the documents.¹⁵⁹

- Solvay has 'not established that the non-disclosure [of certain documents] had influenced, to its detriment, the conduct of the procedure and the content of the contested decision';¹⁶²

177. Access to the file is intended to enable the undertaking concerned to *ensure its defence better*¹⁶⁰ than it could have done by its own efforts. Because of its excessively narrow understanding of the purpose of access to the file, which does not take account of the factors just mentioned,¹⁶¹ the General Court underestimated the scope of the rights of the defence in the administrative procedure and thus committed an error of law.

- the elements put forward by Solvay following consultation of the file before the General Court do not call in question the Commission's analysis in the contested decision.¹⁶³

156 — Paragraph 427 of the judgment under appeal.

157 — Paragraph 442 of the judgment under appeal.

158 — Paragraph 432 of the judgment under appeal.

159 — Paragraph 440 of the judgment under appeal.

160 — Accordingly, the Court of Justice emphasises in its case-law concerning competition and anti-dumping proceedings that an infringement of the rights of defence must always be assumed where the undertaking concerned would have been *better able to ensure its defence* had there been no procedural error (*Thyssen Stahl* (cited in footnote 124, paragraph 31, and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware v Council* [2009] ECR I-9147, paragraph 94).

161 — See points 174, 175 and 176 of this Opinion, immediately above.

179. As Solvay rightly argues, the criterion for determining whether there has been an infringement of the rights of the defence as a result of procedural errors in connection with access to the file is not whether the non-disclosure of an exculpatory document 'influenced' the conduct of the procedure and the

162 — Paragraph 441 of the judgment under appeal.

163 — Paragraph 428 of the judgment under appeal.

content of the Commission's decision to the detriment of that undertaking but whether it 'was able to influence' the content of the Commission's decision.¹⁶⁴

180. The difference in wording between 'influenced' and 'was able to influence' may appear to be minimal at first sight. There is therefore a temptation to discount Solvay's complaint as semantic hair-splitting.

181. In actual fact, these linguistic nuances reveal that the General Court applied the wrong criteria when examining Solvay's allegation that its rights of defence had been infringed: it wrongly required evidence to demonstrate that the outcome of the administrative procedure would have been different if the documents at issue had been disclosed.¹⁶⁵ The General Court should have taken into account only whether the undertaking concerned had demonstrated that there was even a small *chance* that the documents which were not accessible in the administrative procedure could have been useful to its defence.¹⁶⁶ The undertaking concerned does not have to show that, if it had had access to the documents which were not communicated to it, the Commission decision would have been different in content.¹⁶⁷

182. The General Court therefore erred in law in its assessment of the rights of the defence.

183. Solvay also complains in this connection that there has been an infringement of the presumption of innocence, but, as that complaint does not in my view raise any points not already covered by the complaint as to infringement of the rights of the defence, I shall not examine it further.

184. Finally, Solvay considers that the grounds of the judgment under appeal are contradictory because the General Court starts by citing the correct criterion for assessment ('even a slight chance of altering the outcome of the administrative procedure'¹⁶⁸), but then goes on to apply a stricter criterion (Solvay had 'not established that the non-disclosure of the ... documents had influenced, to its detriment, the conduct of the procedure and the content of the contested decision',¹⁶⁹ and the elements which it had put forward did not 'call in question the Commission's analysis in the contested decision'¹⁷⁰). As has already been shown above,¹⁷¹ however, the requirements relating to evidence of an infringement of the rights of the defence are a matter of substance, not a matter relating to the grounds of the judgment under appeal. The General Court may have erred in law in

¹⁶⁴ — *Aalborg Portland* (cited in footnote 35, paragraph 74).

¹⁶⁵ — *Knauf Gips* (cited in footnote 135, paragraph 28).

¹⁶⁶ — *Aalborg Portland* (cited in footnote 35, paragraph 131).

¹⁶⁷ — *Hercules* (cited in footnote 138, paragraph 81), *Corus UK* (cited in footnote 138, paragraph 128), and *PVC II* (cited in footnote 105, paragraph 318).

¹⁶⁸ — Paragraph 407 of the judgment under appeal.

¹⁶⁹ — Paragraph 441 of the judgment under appeal.

¹⁷⁰ — Paragraph 428 of the judgment under appeal.

¹⁷¹ — See point 180 of this Opinion, above.

connection with the rights of the defence but this does not mean that it also failed to state the reasons on which its judgment was based.

(iii) Interim conclusion

185. The fourth plea in law is therefore for the most part well-founded. On the one hand, the General Court misconstrued the purpose of access to the file when examining the usefulness of the documents that were not accessible during the administrative procedure and, on the other hand, it imposed excessive requirements in connection with the furnishing of evidence to demonstrate that the rights of the defence had been infringed.

(c) Loss of parts of the file (third plea in law)

186. The third plea in law concerns the loss of parts of the Commission's file. It is directed against paragraphs 465 to 482 of the judgment under appeal, in which the General Court examines the question whether the absence of five binders gave rise to an infringement of Solvay's rights of defence¹⁷² and answers it in the negative.¹⁷³

172 — Paragraph 465 of the judgment under appeal.

173 — Paragraphs 481 and 482 of the judgment under appeal.

187. The appellant directs numerous criticisms against the part of the judgment in question and these form the subject-matter of all six parts of this third plea in law. However, they overlap in many respects. In essence, they all raise the same question: was the General Court entitled to rule out the possibility that the missing documents might have been useful for Solvay's defence?¹⁷⁴

188. I share the appellant's view that that question must be answered in the negative.

189. The starting point for these considerations should be that an undertaking which has been unlawfully refused access to the file during the administrative procedure has to demonstrate before the General Court only that it would have been able to use the documents in question in its defence.¹⁷⁵ It is sufficient for the undertaking to show that there is even a small *chance* that the documents which were not accessible in the administrative procedure could have been useful for its defence.¹⁷⁶

174 — See, in particular, paragraph 479 of the judgment under appeal.

175 — *PVC II* (cited in footnote 105, paragraphs 318 and 324), *Aalborg Portland* (cited in footnote 35, paragraph 75), and *Knauf Gips* (cited in footnote 135, paragraph 23).

176 — *Aalborg Portland* (cited in footnote 35, paragraph 131).

190. It is true that, in this case, the General Court's task of examining the usefulness of those elements of the file not inspected by Solvay was made more difficult by the fact that the documents concerned could not be found.

191. It would of course be inappropriate always to assume that parts of a file which have gone missing could have been useful to the defence of the undertaking concerned. Where, for example, it can reasonably be concluded, on the basis of a detailed index, that the parts of the file in question contained only documents which would not have been accessible in any event (this may be assumed to be true in particular of draft decisions and internal memoranda of the Commission, but may also apply to other confidential documents¹⁷⁷), an infringement of the rights of the defence may be ruled out from the outset.

192. In this case, however, it was not possible even to begin to reassemble the missing parts of the file.¹⁷⁸ As far as I can tell, the question of who should bear the responsibility for that fact has not yet been clarified in case-law, the judgments delivered to date

having concerned documents from the administrative procedure the content of which was established and amenable to review by the Court.¹⁷⁹

193. In principle, it is for the undertaking concerned to present the facts and adduce the evidence to prove that it could have used in its defence parts of the file to which it was unlawfully denied access during the administrative procedure.¹⁸⁰ However, this is feasible only in so far as the undertaking can at least give a useful indication of the authors and nature and content of the documents which have been withheld from it.

194. Responsibility for the fact that parts of the file cannot be found, on the other hand, lies with the Commission. For, in accordance with the principle of good administration, the Commission has an obligation to ensure the file's proper management and safe storage. Proper management of the file includes not least the production of a meaningful index to be used for the purposes of granting access to the file at a later date.

195. Where – as here – the content of the missing parts of the file cannot be reassembled with any certainty because no such index exists, there is only one conclusion to

¹⁷⁷ — *Aalborg Portland* (cited in footnote 35, paragraph 68) and *Knauf Gips* (cited in footnote 135, paragraph 22).

¹⁷⁸ — Paragraph 464 of the judgment under appeal.

¹⁷⁹ — See, in particular, *PVC II* (cited in footnote 105); *Aalborg Portland* (cited in footnote 35); *Corus UK* (cited in footnote 138) and *Knauf Gips* (cited in footnote 135, paragraph 22).

¹⁸⁰ — *PVC II* (cited in footnote 105, paragraphs 318 and 324), *Aalborg Portland* (cited in footnote 35, paragraphs 74, 75 and 131), and *Knauf Gips* (cited in footnote 135, paragraphs 23 and 24).

be drawn in respect of the rights of the defence: it cannot be ruled out that the undertaking concerned might have been able to use the missing documents in its defence.

196. The judgment under appeal none the less assumes the exact opposite. In the view of the General Court, the possibility that Solvay might have found the missing parts of the file of use for its defence can be precluded.¹⁸¹

197. The General Court bases its view on the fact that all of the material-law objections ('substantive objections') to the contested decision which have been raised by Solvay must be rejected.¹⁸² The assessment of the usefulness of the missing parts of the file for Solvay's defence is therefore linked to the merits of its objections to the finding of abuse of a dominant position.¹⁸³ In other words, the General Court seems to assume that anyone already playing with a bad hand would not have found any trump cards in the remaining parts of the file.

198. That approach is erroneous in law. It goes without saying that the question whether the rights of the defence have been infringed must be examined by reference to the specific circumstances of each particular case. Such

an examination must, however, be conducted in the light of what *the Commission* is accusing the undertaking of having done, that is to say in the light of the complaints which it raises as against the undertaking.¹⁸⁴ After all, the undertaking has to defend itself against those 'objections' from the Commission. It is on the other hand entirely irrelevant what substantive objections *the undertaking* has previously raised to the contested decision and whether those complaints are successful.

199. The General Court wrongly makes the usefulness of the missing documents to Solvay dependent on whether the previous submissions put forward by the undertaking are 'ineffective'¹⁸⁵ or 'factually incorrect'¹⁸⁶, whether Solvay has contested certain findings made by the Commission¹⁸⁷ and whether it has thus far failed to explain certain points.¹⁸⁸

200. The correct approach would have been to ask only whether the missing parts of the file might have contained information which would have enabled Solvay to provide better corroboration for the arguments it had previously directed against the contested decision or to put forward new arguments altogether.

181 — Paragraph 479 of the judgment under appeal.

182 — Paragraphs 469 to 478 of the judgment under appeal.

183 — Paragraph 468 of the judgment under appeal.

184 — *Aalborg Portland* (cited in footnote 35, paragraphs 127, 128 and 131).

185 — Paragraphs 472, 474 and 478 of the judgment under appeal.

186 — Paragraph 476 of the judgment under appeal.

187 — Paragraphs 472, 474, 477 and 478 of the judgment under appeal.

188 — Paragraph 476 of the judgment under appeal.

201. The General Court avoids that question by giving priority to the evidence adduced by the Commission to establish the existence and abuse of a dominant position.¹⁸⁹ However, in so doing, it largely disregards the fact that the missing parts of the file might contain information that could cast doubt on that evidence or at any rate shed a different light on it. Solvay has rightly drawn attention to this.

existing countervailing market power held by customers of the undertaking concerned.¹⁹³

203. Secondly, it should be recalled that the abusive nature of certain courses of conduct followed by Solvay – such as the rebate it granted – is indeed established by ‘specific documentary evidence’.¹⁹⁴ Contrary to that initial impression, however, the existence of abuse may have to be rejected if there are indications of the existence of an objective economic justification.¹⁹⁵ Such indications do not necessarily have to come from the undertaking in a dominant position itself, but may also be supplied by third parties – such as the customers of the undertaking concerned. Accordingly, it cannot be ruled out that such indications might have been contained in the missing parts of the file.¹⁹⁶

202. First of all, it is significant in this regard that, while large market shares do provide *prima facie* evidence of a dominant position on Solvay’s part, this is true, as the General Court itself admits,¹⁹⁰ only if there are no exceptional circumstances.¹⁹¹ The General Court does not explain, however, why Solvay itself should be aware of any exceptional circumstances that may exist, with the result that the missing documents could not yield anything new that would be relevant to its defence.¹⁹² It is perfectly possible, for example, that the observations of third parties might provide useful information on market shares, competitors’ strengths and the extent of any

204. Contrary to the view taken by the General Court, it was not incumbent upon Solvay to show to precisely what extent the missing parts of the file might contain evidence in its favour. It was impossible to reconstruct the content of those documents before the Court and nobody can be asked to do the impossible. Nor was it appropriate to expect Solvay to bear the consequences of that

189 — Paragraphs 470 to 478 of the judgment under appeal.

190 — Paragraph 470 of the judgment under appeal.

191 — See also in this regard points 50 to 53 and 57 to 62 of this Opinion, above.

192 — This, *mutatis mutandis*, is the finding reached by the General Court in paragraph 470 of the judgment under appeal.

193 — Interestingly, the Commission itself seems to assume that at least some of the missing binders ‘contained correspondence relating to Article 11 of Regulation No 17, that is to say requests for information sent by the Commission to various undertakings and their replies to those requests (see paragraph 66 of the judgment under appeal).

194 — See in particular paragraphs 473 and 476 of the judgment under appeal.

195 — See in this regard point 77 of this Opinion and the case-law cited in footnote 65, above.

196 — See again in this regard the reference contained in footnote 193.

impossibility, since responsibility for the disappearance of the documents in question lay with the Commission.¹⁹⁷ The General Court's ever-recurring assumption that Solvay should have adduced evidence to demonstrate the usefulness of the missing documents for its defence¹⁹⁸ was therefore erroneous in law.

205. In summary, therefore, the General Court applied the wrong criteria when examining whether the missing documents from the file might be useful to Solvay's defence. It misconstrued the requirements resulting from the rights of the defence in this regard. The third plea in law must therefore be upheld.

2. Right to a hearing (fifth plea in law)

207. Solvay's fifth plea in law is directed against paragraphs 184 to 193 of the judgment under appeal, in which the General Court concludes that the Commission was not required to hear the undertaking again before adopting the contested decision.¹⁹⁹ In Solvay's view, however, a hearing should have taken place in the administrative procedure in 2000 because the first decision imposing a fine (Decision 91/299) – which was annulled by the General Court – had not only been incorrectly authenticated but had also been adopted without the necessary access having been given to the file.

(a) First part of the fifth plea in law

206. The further allegation made by Solvay in this connection, of infringement of the presumption of innocence, does not in itself raise any points additional to those covered by the questions, already discussed, relating to the obligation to present the facts and the burden of proof in the context of the rights of the defence. It is therefore unnecessary to examine it separately.

208. In the first part of the fifth plea in law, Solvay complains that there has been an infringement of the obligation to state reasons under Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice. It submits that the judgment under appeal does not examine the question whether the procedural defects relating to access to the file which had vitiated the first administrative procedure necessitated a further hearing. The General Court, Solvay contends,

¹⁹⁷ — See point 194 of this Opinion.

¹⁹⁸ — See, for example, paragraphs 473 ('the applicant must endeavour to prove'), 474 ('the applicant ought to have endeavoured to indicate') and 476 ('the applicant has not explained') of the judgment under appeal.

¹⁹⁹ — See in particular paragraph 191 of the judgment under appeal.

does not therefore address a complaint which it raised in the proceedings at first instance.

209. That argument must be rejected. The General Court did, albeit in only one sentence, examine the need for a new hearing on account of the previous procedural defects connected with access to the file. It referred by way of answer to that question to its findings concerning access to the file.²⁰⁰ From the point of view of the General Court, this was the logical and consistent thing to do, since it assumed that the Commission had not infringed the rights of the defence by failing to grant access to the file.²⁰¹ In accordance with the thinking adopted in the judgment under appeal, there was therefore no need to hear Solvay again.

210. Consequently, the General Court's findings concerning the right to a hearing are sufficiently reasoned. Whether, from the point of view of their substance, they are also free from any error of law is the subject-matter of the second part of the fifth plea in law, to which I shall turn now.

(b) Second part of the fifth plea in law

211. In the second part of the fifth plea in law, Solvay examines from a substantive point

of view the question whether the procedural defects relating to access to the file which occurred in 1990 made it necessary later – before the second decision imposing a fine at issue here (Decision 2003/6) was adopted – for the undertaking to be heard again.

212. Solvay claims in essence that there has been an infringement of its right to a hearing and its rights of defence in general. The appellant also alleges infringements of Article 47(2), Article 48 and Article 52(3) of the Charter of Fundamental Rights, Article 6 of the ECHR and Article 6(1) TEU, as well as of the principle of good administration and Article 266 TFEU (formerly Article 233 EC). Common to all those complaints is the criticism that the General Court failed to take into account the need for the Commission to hear Solvay again.

213. The right to a hearing is one of the rights of the defence which must be observed during the administrative procedure in an anti-trust case. The right to a hearing requires that the undertaking under investigation must be afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts alleged and on the documents used by the

²⁰⁰ — Paragraph 192 of the judgment under appeal.

²⁰¹ — See in this regard points 156 to 206 of this Opinion, above.

Commission in support of its claim.²⁰² In secondary law, that principle was laid down in Article 19(1) of Regulation No 17 at the time when the contested decision was adopted.²⁰³

214. In this case, it is common ground that Solvay was heard by the Commission, on the basis of a statement of objections, in 1990 – prior to the adoption of the first decision imposing a fine (Decision 91/299). The point at issue is simply whether the measures to be adopted by the Commission under Article 233 EC (now Article 266 TFEU) following the annulment of that first decision included a new hearing.

215. Article 233 EC does not necessarily require the Commission, during the administrative procedure in an anti-trust case under Regulation No 17, to start the entire process again. Rather, the Commission may resume the procedure from the point at which the EU courts found there to have been a procedural

error. In so far as the procedural steps taken before the procedural error were lawful, they do not need to be repeated.

216. In *PVC*, in which an initial Commission decision was annulled because of a procedural defect arising at the final stage of adoption by the College of Commissioners, the Court of Justice allowed the Commission to adopt a second, essentially similar, decision without giving the undertaking concerned a new hearing.²⁰⁴ The General Court relied on that case-law in the judgment under appeal in order to support the proposition that there was no need to grant Solvay a further hearing in this case.²⁰⁵

217. At first sight, the *PVC* case and this case do indeed appear to be similar. In this case, too, the first Commission decision imposing a fine (Decision 91/299) was annulled because of a procedural error at the end of the administrative procedure – more specifically, as regards authentication of the decision.

218. On closer inspection, however, a crucial difference comes to light. Unlike in the *PVC* case, the administrative procedure in the present case was further vitiated by another serious defect which occurred well before the

202 — Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 44, and *SGL Carbon v Commission* (cited in footnote 147, paragraph 71); see also Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 101, *Michelin I* (cited in footnote 60, paragraph 7), *PVC II* (cited in footnote 105, paragraph 85) and *Impala* (cited in footnote 52, paragraph 61); see to the same effect – from other areas of law – Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, in particular, paragraph 348, and *Foshan* (cited in footnote 160, paragraph 83).

203 — It is now laid down in Article 27(1) and (2) of Regulation No 1/2003.

204 — *PVC II* (cited in footnote 105, in particular paragraph 88).

205 — See in particular paragraphs 184 and 185 of the judgment under appeal.

stage of the final adoption and authentication of the decision imposing a fine: the undertaking concerned, Solvay, was not granted sufficient access to the file to satisfy the legal requirements.²⁰⁶

219. It is true that, in their judgments on the first decision imposing a fine (Decision 91/299),²⁰⁷ the EU courts did not examine the right of access to the file and the rights of the defence, but rather confined themselves exclusively to considering the issue of the decision's authentication. However, it cannot be concluded from this that the EU courts would have confirmed that the administrative procedure was conducted properly in relation to access to the file and the rights of the defence.

220. On the contrary, in connection with Decision 91/297, which relates to the same anti-trust administrative procedure as Decision 91/299, the General Court held that the rights of the defence had been infringed because the undertaking concerned had not been granted full access to the file.²⁰⁸ Moreover, the

Commission had established a clear practice in relation to access to the file since 1982.²⁰⁹

221. The Commission might be forgiven for taking the view that the various judgments delivered by the General Court on 29 June 1995 did not send out a clear signal with respect to the objectives served by granting access to the file and the extent to which such access should be granted.²¹⁰ Certainly by the time the second decision imposing a fine at issue here was adopted in 2000, however, any doubts in this regard had long since been dispelled.²¹¹

222. This means that, in this case, following the annulment of the first decision imposing a fine, the Commission should have resumed the administrative procedure at the stage immediately after notification of the statement of objections. It should have granted Solvay

206 — See in this regard paragraphs 453 to 456 of the judgment under appeal and points 154 and 157 of this Opinion.

207 — See in this regard the references in footnote 11.

208 — Case T-30/91 *Solvay v Commission* (cited in footnote 138, in particular paragraphs 99, 103 and 104) and Case T-36/91 (cited in footnote 138, in particular paragraphs 103, 113 and 118). Those judgments were delivered on the same day as the judgment in Case T-32/91 (cited in footnote 11), by which the General Court annulled Decision 91/299 on grounds of irregular authentication.

209 — See in this regard the Commission's statement in the 12th Report on Competition Policy (1982), pp. 40 and 41 (reproduced in extract in paragraph 452 of the judgment under appeal).

210 — See in particular Case T-37/91 *ICI v Commission* [1995] ECR II-1901, paragraphs 61 to 66 and 73), in which it was found that the rights of the defence had not been infringed.

211 — See, on the one hand, *Hercules*, from 1999, (cited in footnote 138, paragraphs 75 and 76), and, on the other hand, the Commission's commitment to granting access to the file published back in 1997 ('Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89' (OJ 1997 C 23, p. 3)).

full access to the file in accordance with the relevant legal requirements and should have heard the undertaking again on that basis.

223. Moreover, the fact that the second decision imposing a fine at issue here (Decision 2003/6) was not based on any new objections does nothing to alter the Commission's obligation to conduct a new hearing after granting access to the file.²¹² It is true that Solvay had already had the opportunity in 1990 to submit its observations on all of the objections forming the basis of the Commission's first and second decisions imposing a fine. However, it had to do so on the basis of an extremely fragmentary knowledge of the file, as it had only been sent inculpatory documents.²¹³

224. The right to a hearing is not limited to a right to submit observations on all the Commission's objections. Rather, the undertaking concerned must be afforded the opportunity to express its views in the knowledge of all legally accessible parts of the file. The rights of the defence in anti-trust proceedings would otherwise be divested of much of their effectiveness.

225. The opportunity to submit observations is of an entirely different value where

the undertaking concerned has been given due access to the file beforehand. In particular, it goes without saying that an undertaking which has been given access not only to inculpatory but also to exculpatory documents can defend itself against the Commission's objections more effectively than an undertaking which has been shown only inculpatory material.

226. The General Court therefore erred in law with respect to the right to a hearing in taking the view that the Commission did not need to grant Solvay a further hearing. The errors of law vitiating the judgment under appeal in relation to the right of access to the file are effectively being perpetuated here.²¹⁴

227. The principle of good administration also relied on by Solvay requires no further examination here, since the arguments based on that principle raise no points which have not already been covered by the arguments put forward in connection with the rights of the defence and the right to a hearing. Nor, as has already been explained,²¹⁵ is there any need to examine Article 6(1) TEU.

212 — Paragraphs 42, 186 and 190 of the judgment under appeal.

213 — Paragraphs 24, 450 and 451 of the judgment under appeal.

214 — See in this regard points 156 to 205 of this Opinion.

215 — See in this regard point 160 of this Opinion.

(c) Interim conclusion

228. In summary, the second part of the fifth plea in law is well-founded.

D — *Right to have a matter adjudicated upon within a reasonable time (first plea in law)*

229. By its first plea in law, which is directed against paragraphs 119 to 142 of the judgment under appeal, Solvay claims that there has been an infringement of its right to have its case adjudicated upon within a reasonable time. That fundamental right is recognised in the case-law of the Court of Justice as a general principle of European Union law in the case of both administrative proceedings before the Commission and judicial proceedings before the EU courts.²¹⁶ That principle has in the meantime also found its way into Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights.

230. Although the EU courts have repeatedly been faced with the issue of what constitutes a reasonable time in competition proceedings,

the points of law raised by Solvay seem to me to be of special importance. First, they concern a case in which the absolute length of the proceedings, taking into account all stages of the administrative and judicial procedures, was without any doubt particularly long. Secondly, the complaints in this case arise against the background of the entry into force of the Treaty of Lisbon on 1 December 2009, at which time the Charter of Fundamental Rights of the European Union became binding in law (Article 6(1) TEU).

231. The first plea in law is divided into a total of five parts, which are concerned in part with an assessment of the length of the proceedings (see section (1) below) and in part with the legal consequences of excessively long proceedings (see section (2) below).

1. Requirements attaching to an assessment of the length of the proceedings (first and second parts of the first plea in law)

²¹⁶ — *PVC II* (cited in footnote 105, paragraph 179). On the application of that principle specifically in judicial proceedings, see also Case C-185/95 *P Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 21 *Thyssen Stahl* (cited in footnote 124, paragraph 154), *Sumotomo* (cited in footnote 29, paragraph 115), and Case C-385/07 *P Der Grüne Punkt - Duales System Deutschland v Commission* [2009] ECR I-6155, paragraphs 177 to 179; on the application of the same principle in administrative proceedings, see Case C-105/04 *P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, paragraphs 35 to 52, and Case C-113/04 *P Technische Unie v Commission* [2006] ECR I-8831, paragraphs 40 to 57.

232. The legal requirements attaching to an assessment of the length of the proceedings form the subject-matter of the first two parts of the first plea in law.

(a) The preliminary question of whether Solvay's complaints are ineffective

appeal is being challenged on both counts, the third to fifth parts of the first plea in law being specifically concerned with the legal consequences.

233. Contrary to the view expressed by the Commission, Solvay's complaints concerning the length of the proceedings are not 'largely ineffective'. It is true that any setting aside of the judgment under appeal presupposes a further step in the thought process – consideration of the sanctions for excessively long proceedings. None the less, an examination of the length of the proceedings per se is indispensable,²¹⁷ since, without a finding to the effect that the proceedings were excessively long, the right to have a matter adjudicated upon within a reasonable time cannot by definition be regarded as having been infringed. The criteria which the General Court applied when assessing the length of the proceedings cannot be sheltered from any legal review by the Court of Justice on appeal.

235. Accordingly, the objection of ineffectiveness raised by the Commission must be dismissed.

(b) Need for an overall assessment of the length of the proceedings (first part of the first plea in law)

234. Solvay's complaints concerning the length of the proceedings would be ineffective, at most, if the appellant had raised them separately from the complaints concerning the legal consequences of excessively long proceedings. That was not the case here, however. Rather, the judgment under

236. In the first part of the first plea in law, Solvay complains that, in assessing the length of the proceedings, the General Court confined itself to considering the individual stages of the administrative and judicial procedures in isolation, without assessing as a whole the proceedings which had been ongoing since the investigations of April 1989.

237. The reasonableness of the length of the proceedings is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent

217 — See also to this effect *PVC II* (cited in footnote 105, paragraphs 176 to 178); in *Der Grüne Punkt* (cited in footnote 216, paragraphs 176 to 196), the Court of Justice examined the reasonableness of the length of the proceedings, although no effects on the outcome of the case were discernible.

authorities.²¹⁸ The Court of Justice has held in this regard that the list of relevant criteria is not exhaustive.²¹⁹

the administrative proceedings and any judicial proceedings.²²²

238. There is no doubt that a proper examination of the length of the proceedings requires the General Court to assess each individual stage of the proceedings separately.²²⁰ If any stage of the proceedings was excessively long, this fact alone justifies the finding that there has been an infringement of the right to have a matter adjudicated upon within a reasonable time.²²¹

240. It is not possible to raise as against the requirement of an overall assessment the objection that administrative and judicial proceedings are different in nature and that the criteria to be satisfied by the administrative or judicial authority are laid down in different parts of the Charter of Fundamental Rights. From the point of view of the undertaking concerned, all that matters is when its ‘affair’ is finally adjudicated upon by an impartial authority. Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights simply contain two expressions of one and the same principle of procedural law, namely that a person is entitled to expect a decision within a reasonable time.

239. However, a proper examination of the length of the proceedings includes not only the aforementioned ‘piecemeal’ assessment but also an overall assessment of the length of

241. It is true that, as a rule, the right to have a matter adjudicated upon within a reasonable time cannot be assumed to have been

218 — *Baustahlgewebe* (cited in footnote 216, paragraph 29), *PVC II* (cited in footnote 105, paragraph 187), *Thyssen Stahl* (cited in footnote 124, paragraph 155), *Sumotomo* (cited in footnote 29, paragraph 116) and *Der Grüne Punkt* (cited in footnote 216, paragraph 181).

219 — *Thyssen Stahl* (cited in footnote 124, paragraph 156), *Sumotomo* (cited in footnote 29, paragraph 117) and *Der Grüne Punkt* (cited in footnote 216, paragraph 182); see also *PVC II* (cited in footnote 105, paragraph 188).

220 — See to this effect *PVC II* (cited in footnote 105, paragraph 184) as well as *FEG* (in particular paragraphs 37, 38 and 40) and *Technische Unie* (in particular paragraphs 42, 43 and 45), cited in footnote 216.

221 — This is quite separate from the question of the inferences that are to be drawn from such a procedural infringement; see in this regard points 248 to 281 and 323 to 356 of this Opinion, below.

222 — Although the Court of Justice did not fully clarify this point in *PVC II* (cited in footnote 105, paragraphs 229 and 230), the case-law of the ECtHR leaves no doubt about the importance of an overall assessment of the length of the proceedings. See in this regard, in particular, *Eckle v. Germany*, judgment of 15 July 1982, Series A No. 51, no. 8130/78; in that case, the ECtHR examines the period over which the proceedings at issue extended as a whole (§§ 79, 80) and finds that the duration of the proceedings ‘covers the whole of the proceedings in issue, including the appeal proceedings’, § 76). In *Gorou v. Greece* (No. 2, Grand Chamber), no. 12686/03, § 46, judgment of 20 March 2009, the ECtHR found that there had been a violation of Article 6 of the ECHR in respect of ‘the length of the proceedings as a whole’; see, similarly, *Kakamoukas and Others v. Greece* (Grand Chamber), no. 38311/02, § 32, judgment of 15 February 2008, where the ECtHR takes as the basis for its calculation the ‘total length of the disputed proceedings’.

infringed where no individual stage of the administrative and judicial proceedings was, in itself, excessively long. However, the more stages there are in the proceedings as a whole – consisting in one or more administrative and/or judicial procedures – the more important an assessment of their overall length becomes.

the administrative and judicial proceedings up to the delivery of the judgment under appeal. As the General Court failed to carry out such an overall assessment, the judgment under appeal is vitiated by an error of law. The first part of the first plea in law is therefore well-founded.

242. In this case, the first part of the administrative proceedings (from 1989 to 1990) and the first set of judicial proceedings (from 1991 to 2000) were followed by the – albeit rudimentary – second part of the administrative proceedings (2000) and the second set of judicial proceedings (since March 2001).²²³ The overall length of all these stages of the proceedings already amounted to more than 20 years at the time when the judgment under appeal was delivered; as many as 22 years have elapsed to date. Hardly any other proceedings under European competition law have lasted so long.²²⁴

(c) Alleged failure to state reasons (second part of the first plea in law)

244. Solvay also complains that there has been a failure to state reasons (Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice) because the General Court did not include its own stage of the proceedings in its assessment of the length of the proceedings.

243. In those circumstances, the length of the proceedings could not be properly assessed without including the total length of

245. Indeed, the General Court does not say a word about the length of that stage of the proceedings which it itself conducted (proceedings in Case T-57/01). It should be borne in mind, however, that the reasoning for a judgment at first instance may also be implicit, provided that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the

223 — See in this regard the chronological overview in point 11 of this Opinion.

224 — The total length of the proceedings in *PVC* none the less came very close to that of the present proceedings, given that the first Commission investigations took place in October 1983 (see Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraph 1) and the last judicial decision was delivered in October 2002 (*PVC II*, cited in footnote 105).

Court of Justice with sufficient material for it to exercise its power of review.²²⁵

consequences of any failure to adjudicate within a reasonable time.

246. In this case, the General Court assumed that the contested decision could be annulled not on the basis of the length of the proceedings per se but only on the basis of an infringement (caused by the length of the proceedings) of the rights of the defence. As the General Court took the view that the rights of the defence could not be assumed to have been infringed, it was legitimate for the judgment under appeal not to contain an express assessment of the arguments concerning the length of the proceedings which Solvay had put before the General Court. There is no failure to state reasons in this regard.

(a) Requirement that the rights of the defence must be infringed (third part of the first plea in law)

247. In those circumstances, the second part of the first plea in law is unsuccessful.

249. The third part of the first plea in law raises a fundamentally important point of law. The parties are in dispute as to whether an infringement of the fundamental right to have a matter adjudicated upon within a reasonable time, if there has been one, is in itself sufficient to warrant annulment of the contested decision or whether it must also be proved that the ability of the undertaking concerned to defend itself was adversely affected.²²⁶

2. Legal consequences of excessively long proceedings (third to fifth parts of the first plea in law)

250. In the judgment under appeal, the General Court assumed that a Commission decision may be annulled on account of excessively long proceedings only where it is established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves.²²⁷ That approach is in line with the consistent case-law developed by the Court of Justice according to which it needs to be assessed whether the

248. In the third to fifth parts of the first plea in law, Solvay deals with the legal

²²⁶ — Although this issue is also raised in other parts of the first plea in law, I am addressing the arguments put forward in this regard exclusively in the context of this third part of the first plea in law.

²²⁷ — Paragraph 132 of the judgment under appeal; see also paragraphs 139 to 141 of that judgment.

²²⁵ — See point 35 and footnote 30 of this Opinion.

length of the proceedings may have affected their outcome.²²⁸

251. However, Solvay considers that case-law to be outdated and asks the Court of Justice to reconsider it in the light of the binding force of the Charter of Fundamental Rights since the entry into force of the Treaty of Lisbon.

252. Of particular importance in this regard are the provisions of Article 52(3) of the Charter. The first sentence of Article 52(3) contains a homogeneity clause to the effect that fundamental rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR.

253. It is true that the fundamental right under European Union law to have a matter adjudicated upon within a reasonable time, in accordance with Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights, is modelled on Article 6(1) of the ECHR.²²⁹ Contrary to the view taken by Solvay, however, Article 6(1) of the ECHR as currently interpreted by the European Court of Human Rights does not require that a decision imposing a fine in anti-trust proceedings must be annulled and the administrative procedure discontinued on the sole ground of a failure to adjudicate within a reasonable time.

254. As the Commission has rightly pointed out, the ECHR generally allows its Contracting States a certain margin of discretion with respect to the ways and means of eliminating any infringements of fundamental rights.²³⁰

255. The case-law of the ECtHR relating to Article 6 of the ECHR also shows that the annulment of all penalties under criminal law and the discontinuance of the criminal proceedings concerned represent only one possible means of redress within the meaning of Article 41 of the ECHR for infringement of a fundamental right through the excessive length of the proceedings.²³¹ There is no question in that case-law of there being any *obligation* on the part of the national authorities to annul penalties and discontinue proceedings. Rather, the ECtHR also expressly recognises the reduction of a sentence imposed as

228 — *Baustahlgewebe* (cited in footnote 216, paragraph 49) and *Der Grüne Punkt* (cited in footnote 216, paragraph 193); with specific reference to the link with the rights of the defence, see *FEG* (cited in footnote 216, in particular paragraphs 42, 43 and 60 to 62) and *TU* (cited in footnote 216, in particular paragraphs 47, 48 and 69 to 71).

229 — Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17); see in particular those relating to the second paragraph of Article 47 (cited above, p. 30).

230 — In *Kudla v. Poland*, no. 30210/96, § 154, ECHR 2000-XII, the Grand Chamber of the ECtHR recognised that ‘there is no prevailing pattern in the legal orders of the Contracting States in respect of remedies for excessive length of proceedings’; see also ECtHR, *Simaldone v. Italy*, no. 22644/03, § 78, judgment of 31 March 2009. The European Commission for Democracy through Law (Venice Commission) adopted a comparative law study in 2006 (Study No. 316/2004, available on the internet at the address < [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)036rev-f.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)036rev-f.pdf) >, last visited on 26 January 2011). On the different approaches adopted within the European Union, see also the Opinion of Advocate General Léger in *Baustahlgewebe* (cited in footnote 216, points 52 and 53).

231 — ECtHR, *Eckle v. Germany* (cited in footnote 222, § 94) and *Ommer v. Germany* (no. 1), no. 10597/03, § 68, judgments of 13 November 2008; see also ECtHR, *Sprotte v. Germany*, no. 72438/01, decision of 17 November 2005.

an appropriate means of affording redress for excessively long proceedings.²³² In a specific case of economic crime which involved serious fraud offences and was notable in that the proceedings lasted for 17 years, the ECtHR considered the finding of an undue delay in the proceedings and a reduction of the sentence to be sufficient.²³³ In my view, such a solution can also be transposed to anti-trust proceedings, which are not dissimilar to proceedings relating to economic offences.

257. Thus, as things stand, it must be assumed that the requirement of homogeneity laid down in the first sentence of Article 52(3) of the Charter of Fundamental Rights does not necessarily oblige the EU courts, in the context of European competition law, to deal with an infringement of the fundamental right to have a matter adjudicated upon within a reasonable time by annulling the contested decision.

258. Although it is possible, in accordance with the second sentence of Article 52(3) of the Charter of Fundamental Rights, for EU law to go beyond the standard set in the ECHR, there is no reason for this to happen in the present context of competition law.

256. It must also be borne in mind, with respect to competition law, that the ECtHR itself does not regard that area of law as a traditional category of criminal law; outside the ‘hard core’ of criminal law, the ECtHR assumes that the criminal-law guarantees provided for in Article 6(1) of the ECHR will not necessarily apply with their full stringency.²³⁴

259. Where a penalty is imposed for infringement of the fundamental right to have a matter adjudicated upon within a reasonable time, due consideration must be given to both the interests of the undertaking concerned and the general interest.

260. The interest of the undertaking concerned consists in securing the fullest possible measure of redress for the consequences of infringement of the fundamental right.²³⁵ The general interest consists in ensuring the effective implementation of the competition rules in the European internal market, which

232 — ECtHR, *Dželili v. Germany*, no. 65745/01, § 103, judgment of 10 November 2005, *Ohlen v. Denmark*, no. 63214/00, §§ 29 and 30, judgment of 24 February 2005, and *Ommer v. Germany* (No 1) (cited in footnote 231, § 68) as well as *Menelaou v. Cyprus*, no. 32071/04, decision of 12 June 2008; see to the same effect *Eckle v. Germany* (cited in footnote 222, § 67), which at least in principle recognises reduction of sentence as a means of redress. See also paragraphs 119 to 123 of Venice Commission Study No 316/2004 (cited in footnote 230).

233 — ECtHR, *Eckle v. Germany* (Article 50), judgment of 21 June 1983, § 24, Series A no. 65, no. 8130/78.

234 — ECtHR, *Jussila v. Finland* (Grand Chamber), no. 73053/01, § 43, ECHR 2006-XIII.

235 — See also to this effect Article 41 of the ECHR.

form part of the fundamental provisions of the Treaties.^{236 237}

conduct which has been held to be contrary to the Community rules.²³⁹

261. The annulment of a Commission decision imposing a fine in an anti-trust case on the sole ground that there had been a failure to adjudicate within a reasonable time in the administrative or judicial proceedings would cancel not only the fine imposed but also the finding of infringement of the competition rules itself. Such a solution would be contrary to the general interest in the effective implementation of the competition rules and would go beyond the legitimate interest of the undertaking concerned in securing the fullest possible measure of redress for the infringement of the fundamental right which it had suffered.

263. Accordingly, I see no reason to propose that the Court should reconsider its previous case-law on this point. Consequently, the third part of the first plea in law must be rejected.

(b) Impact of the length of the proceedings on Solvay's ability to defend itself in this case (fourth part of the first plea in law)

262. The undertaking must not be allowed to reopen the question of the existence of an infringement on the sole ground that there was a failure to adjudicate within a reasonable time.²³⁸ The sanction for breach of the reasonable time requirement in the proceedings cannot in any case lead to an undertaking being allowed to continue or to resume

264. The fourth part of the first plea in law is concerned with paragraphs 132 to 136 of the judgment under appeal, in which the General Court finds that Solvay's ability to defend itself effectively was not adversely affected by any infringement of the reasonable time principle and that its rights of defence were not therefore infringed. Solvay regards this, in essence, as constituting a failure to state reasons and an infringement of the principle of preserving the rights of the defence and of the reasonable time principle. The General Court, it contends, did not sufficiently consider the difficulties connected with its defence which Solvay faces after such a long period.

²³⁶ — The importance of the effective implementation of Articles 101 TFEU and 102 TFEU (formerly Articles 81 EC and 82 EC) was recently emphasised, for example, in Case C-429/07 *X BV* [2009] ECR I-4833, paragraphs 33 to 35, and Case C-439/08 *VEBIC* [2010] ECR I-12471, in particular paragraphs 59 and 61.

²³⁷ — *Der Grüne Punkt* (cited in footnote 216, paragraph 194). See to the same effect, in relation to criminal-law proceedings in general, paragraphs 228 to 232 of the Venice Commission Study (cited in footnote 230); in paragraph 241, the Venice Commission emphasises that 'acquittal and discontinuance of the proceedings should be only applied in exceptional cases'.

²³⁸ — *Der Grüne Punkt* (cited in footnote 216, paragraph 194).

²³⁹ — Opinion of Advocate General Bot *Der Grüne Punkt* (cited in footnote 216, points 305 and 306); the Court of Justice expressly reproduces those findings in paragraph 194 of its judgment in that case.

(i) Alleged failure to state reasons

judicial proceedings in the present case and did not take into account any new factor requiring the exercise of a right of defence in the contested decision.²⁴¹

265. The alleged failure to state reasons within the meaning of Article 36 in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice is said to lie in the fact that the General Court did not examine the numerous arguments which Solvay raised at first instance on the subject of the difficulties it was experiencing in connection with its defence.

268. However much Solvay may disagree with the substantive assessment of the circumstances of the case, that assessment cannot be regarded as constituting a failure to state reasons.²⁴²

266. That argument is unconvincing. As has already been stated, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.²⁴⁰

(ii) Alleged error of substantive law

269. However, the General Court's statement that the length of the proceedings did not adversely affect Solvay's ability to defend itself is also criticised by the appellant from the point of view of its substance. Solvay regards that statement as constituting an infringement of the principle of preserving the rights of the defence and of the reasonable time principle.

267. Indeed, in the judgment under appeal, the General Court expressly examines, albeit rather briefly, Solvay's claim that it is difficult for it to defend itself against the Commission's charges after such a long time. It states, in essence, that the Commission did not carry out any measure of investigation after the first

270. It may appear at first sight that Solvay seeks to prompt the Court of Justice to substitute its own assessment of the facts for that of the General Court, which it may not do on appeal.²⁴³

²⁴¹ — Paragraphs 133 to 135 of the judgment under appeal.

²⁴² — See point 30 of this Opinion and the case-law cited in footnote 26.

²⁴³ — See in this regard the case-law cited in footnote 45.

²⁴⁰ — See point 35 and footnote 30 of this Opinion, above.

271. On closer examination, however, Solvay is complaining not so much that the General Court incorrectly assessed the facts as that it disregarded what, in Solvay's view, is a significant point: the General Court did not take into account the fact that the time which had elapsed since the beginning of the proceedings adversely affected Solvay's ability to defend itself *in the judicial proceedings*. In its contention, the General Court wrongly confined its examination of the impact of the passage of time to Solvay's ability to defend itself before the Commission (i.e. *in the administrative proceedings*).

272. That argument is well-founded.

273. When examining whether the allegedly excessive length of the proceedings has adversely affected the ability of the undertaking concerned to defend itself, the General Court must not restrict its examination exclusively to the defence at a particular stage of the proceedings. Rather, it must examine in a very general way whether the length of the proceedings might have adversely affected the undertaking in its *defence against the Commission's complaints*.²⁴⁴

274. It is true that that defence takes place first of all in the administrative procedure, during which the undertaking is given an opportunity to express its views on the statement

of objections. However, the defence is not confined to the administrative procedure. Rather, the undertaking concerned has a right of action before the EU courts to challenge a Commission decision imposing a fine (Article 263(4) TFEU, formerly Article 230(4) EC). In the context of those judicial proceedings, too, the undertaking must be able to defend itself effectively against the charges brought against it – now in the form of a formal decision – by the Commission.

275. The General Court was therefore wrong to confine itself to examining whether Solvay was able to defend itself effectively in the *administrative procedure*²⁴⁵ and whether the length of the *past* judicial proceedings – the proceedings in Case T-32/91, concerning the first decision imposing a fine (Decision 91/299) – had had an adverse impact.²⁴⁶ The General Court neglected to include in its considerations the undertaking's *present* ability to defend itself in the second set of judicial proceedings – the proceedings in Case T-57/01, concerning Decision 2003/6, at issue here.

276. The need to take into account Solvay's ability to defend itself before the General Court in Case T-57/01 should have been apparent in the present case for two reasons: first, the fact that Solvay had expressly asked the Court to take into account the length of the judicial proceedings at that time, and,

244 — The Court starts from a similar premiss in the judgments in *FEG* (cited in footnote 216, paragraphs 45 to 49) and *TUI* (cited in footnote 216, paragraphs 50 to 54), which make it clear that the General Court must take into account the impact of all stages of the administrative procedure on the ability of the undertaking concerned to defend itself.

245 — Paragraphs 134 and 135 of the contested judgment.

246 — Paragraphs 137 to 140 of the judgment under appeal (the fact that these paragraphs relate to the past judicial proceedings concerning Decision 91/299 becomes clear, in particular, in the introductory paragraph 137).

secondly, the fact that Solvay had not even been granted access to the file until those judicial proceedings (more precisely, in 2005). It was therefore of decisive importance to determine whether, in 2005, Solvay was still able to defend itself effectively against the Commission's accusations and findings.

277. The fundamental right to have a matter adjudicated upon within a reasonable time requires the Commission to adopt its decision imposing a fine in anti-trust proceedings in sufficient time for the undertaking concerned to be able to defend itself effectively against it before the EU courts.

278. As the General Court did not give any consideration to that legally significant fact, the judgment under appeal is vitiated by an error of law.

(iii) Some additional complaints

279. Finally, Solvay relies in this fourth part of the first plea in law on a distortion of facts and an infringement of Article 6 of the ECHR and Article 6(1) TEU.

280. These additional complaints do not require detailed discussion. No evidence to substantiate the alleged distortion of facts has been adduced²⁴⁷ and I cannot find any indication of such a distortion. As for Article 6 of the ECHR and Article 6(1) TEU, the former provision is not directly applicable and the latter provision does not in itself contain any guarantees of fundamental rights.²⁴⁸

(iv) Interim conclusion

281. The fourth part of the first plea in law is in part well-founded.

(c) Alleged waiving by Solvay of a reduction in the fine (fifth part of the first plea in law)

282. By the fifth and last part of the first plea in law, Solvay specifically attacks paragraph 141 of the judgment under appeal. In that paragraph, the General Court states

²⁴⁷ — See in this regard the case-law cited in footnote 35 above.

²⁴⁸ — On Article 6 of the ECHR and Article 6(1) TEU, see also point 160 of this Opinion.

that, 'in the application, [Solvay] expressly renounced the possibility of a reduction in the fine by way of compensation for the alleged breach of its right to be tried within a reasonable time.' Solvay regards this as constituting a distortion of its submissions in the proceedings at first instance.

283. As has already been stated in a different context, such a distortion may be assumed to exist where the party's submission was clearly misunderstood by the General Court or reproduced by it in such a way as to misrepresent its meaning.²⁴⁹

284. Unfortunately, in its contested assertion in the judgment under appeal, the General Court does not make clear to which part of Solvay's application it is referring. However, on appeal, the parties agreed that paragraphs 149 and 150 of the application could constitute the starting point for the General Court's statement criticised by Solvay. In paragraph 149 of that application, the undertaking claims in essence that, in its view, the infringement of the principle of a fair hearing can only be removed by annulling the contested decision; merely reducing the fine is not capable of removing the alleged infringement

of Article 6 of the ECHR. In paragraph 150 of the application, Solvay then concludes that the clear failure to adjudicate within a reasonable time which it alleges cannot but give rise to the annulment of the contested decision.²⁵⁰

285. I cannot see any waiving of a reduction of the fine on account of the length of the proceedings in the passage taken from the application. It is certainly not possible, as the General Court assumes, to infer from Solvay's written submissions an 'express renunciation' by that undertaking of a reduction in the fine on account of the excessive length of the proceedings.

286. Rather, in paragraphs 149 and 150 of its application at first instance, Solvay is simply making its legal opinion emphatically clear. It explains what it considers the legal consequence of the alleged infringement of the reasonable time principle should be: not a reduction in the fine but annulment of the contested decision.

287. There is a fundamental difference between the statement of a legal opinion and the express renunciation of the possibility of a reduction in the fine by way of compensation

250 — In the French original: 'La requérante estime dès lors que le dépassement manifeste du délai raisonnable dans la présente procédure ... ne peut qu'entraîner l'annulation pure et simple de la décision attaquée ...' (paragraph 150 of the application at first instance, cited in paragraph 50 of Solvay's appeal).

249 — See point 94 of this Opinion.

for an alleged infringement of a right. The General Court failed to appreciate that difference in paragraph 141 of the judgment under appeal.

3. Interim conclusion

291. The first plea in law is in part successful.

288. Paragraph 141 of the judgment under appeal shows that the General Court clearly misunderstood Solvay's submissions in the proceedings at first instance and, moreover, reproduced them in such a way as to misrepresent their meaning. This constitutes a distortion of the party's submissions.

E — *Setting aside of the judgment under appeal*

292. As is clear from the foregoing comments, the following pleas in law have no prospect of success: the second, sixth, seventh and eighth pleas in law.

289. That distortion is made abundantly clear by the fact that, elsewhere in its application at first instance, Solvay actually asks the General Court to reduce the fine and, in so doing, expressly refers to its 'submissions concerning the grounds for annulment', in other words, to its submissions on the excessive length of the proceedings.²⁵¹

293. The ninth plea in law is in part well-founded. However, it relates only to the particular point of discrimination under subparagraph (c) of the second paragraph of Article 82 EC. It has no bearing on the other aspects of Solvay's market conduct which the Commission considered to be abusive and in respect of which the General Court did not err in law. Accordingly, the partial success of the ninth plea in law does not, in itself, warrant the setting aside of the judgment under appeal.

290. Consequently, the fifth part of the first plea in law must be upheld.

294. The pleas in law concerned with the rights of the defence (third, fourth and fifth pleas) and the length of the proceedings (first plea), on the other hand, are mostly well-founded. The success of any one of those pleas in law is sufficient in itself to warrant the setting aside of the judgment under appeal in its entirety.

²⁵¹ — Paragraph 439 of the application at first instance (cited in extract in paragraph 52 of Solvay's appeal) reads: '[S]i, par impossible, le Tribunal devait rejeter l'ensemble des moyens d'annulation développés par la requérante, la requérante invite le Tribunal à prendre en compte ... l'ensemble des considérations présentées dans la présente requête au titre des moyens d'annulation dans son appréciation de la nécessité d'infliger une amende à la requérante et du montant de celle-ci ...'

F — *Decision on the action at first instance*

1. Right of access to the file

295. Under the first paragraph of Article 61 of its Statute, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

298. It is established that, before the contested decision was adopted, Solvay was not granted sufficient access to the file to meet the relevant legal requirements.²⁵²

296. That is the situation in the present case. All points of fact and law relevant to a decision on the action brought by Solvay have already been debated at first instance before the General Court, and the parties have had the opportunity to exchange their arguments. There is therefore no need to refer the case back to the General Court, the Court of Justice being able to give judgment itself on the action for annulment of the contested decision brought by Solvay. In view of the extraordinary length of the proceedings – 22 years from the Commission's investigations in April 1989 up to the present day – the Court of Justice should make good use of that possibility.

299. As has already been stated, it cannot be ruled out that Solvay might have found in the missing parts of the file, the contents of which are unknown, information which would have been useful for its defence. This is particularly true given that the Commission itself assumes that some of the missing binders 'contained the correspondence relating to Article 11 of Regulation No 17'; that is to say requests for information sent by the Commission to various undertakings and their replies to those requests.²⁵³ Such observations from third parties might have contained useful information on the question of Solvay's dominant position on the market (for example, on market shares, the strengths of Solvay's competitors and the extent of any countervailing market power held by its customers); they might also have contained indications as to the existence or otherwise of an objective economic justification for Solvay's market behaviour.²⁵⁴

297. I shall confine myself hereafter to a brief analysis of the legality of the contested decision from three selected points of view: access to the file (section (1) below), right to a hearing (section (2) below) and length of the proceedings (section (3) below).

252 — See points 154 and 157 of this Opinion.

253 — Paragraph 66 of the judgment under appeal.

254 — See points 202 and 203 of this Opinion.

300. There was therefore at least the possibility that, if access to the file had been duly granted, the outcome of the administrative procedure would have been different, if only in respect of the amount of the fine imposed.

301. Consequently, on the sole ground of the procedural defects that occurred in connection with access to the file (missing documents), the contested decision must be annulled in its entirety. (There is therefore no further need also to examine the usefulness for Solvay's defence of those parts of the file that were accessible before the General Court.)

2. Right to a hearing

302. It is also established that Solvay was not given a new hearing by the Commission before the contested decision was adopted in 2000.²⁵⁵ That procedural error is closely connected with the failure to grant access to the file.

303. It cannot be ruled out that the outcome of the administrative procedure would have been different if the Commission had given the undertaking the opportunity in

2000 – after duly granting it access to the file – to express its views again on the complaints which it had raised.²⁵⁶

304. For that reason also, the contested decision must be annulled in its entirety.

3. Right to have a matter adjudicated upon within a reasonable time

305. Finally, the length of the proceedings must be assessed in the light of all the circumstances of the individual case.²⁵⁷

306. In this case, it should be observed that the Commission was completely inactive in the period between the annulment of its first decision imposing a fine (Decision 91/299) and the first judgment of the Court of Justice in its appellate jurisdiction.²⁵⁸ This meant that a period of four years and seven months went by unused.²⁵⁹

307. That inactivity on the part of the Commission cannot be justified by reference to

²⁵⁵ — See points 154 and 222 of this Opinion.

²⁵⁶ — See points 211 to 227 of this Opinion.

²⁵⁷ — See point 237 and footnote 218 of this Opinion.

²⁵⁸ — *Commission v Solvay* (cited in footnote 11).

²⁵⁹ — See in this regard the chronological overview in point 11 of this Opinion.

the appeal which it had at that time lodged against the annulment of the first decision imposing a fine. The Commission is of course at liberty to exhaust all of the procedural remedies available to it and, in the event of its being unsuccessful at first instance, to have recourse to the Court of Justice in its appellate jurisdiction. However, this does not mean that the Commission can adjourn the administrative procedure while such appeal proceedings are taking place.²⁶⁰

308. The appeal does not have suspensory effect (first paragraph of Article 60 of the Statute of the Court of Justice). Consequently, from 29 June 1995, the day on which the judgment at first instance in Case T-32/91 was delivered, the Commission had an obligation under the first paragraph of Article 233 EC (now the first paragraph of Article 266 TFEU) to adopt the measures arising from the judgment of annulment given by the General Court. The principle of good administration would also have required the Commission either to work towards a new substantive decision or to discontinue the administrative procedure.

309. The Commission could easily have continued the administrative procedure from July

1995 instead of waiting until April 2000.²⁶¹ It would simply have had to make clear in its new decision imposing a fine that that decision would be obsolete in the event of its being successful in the appeal proceedings.

310. In those circumstances, I conclude that, in this case, the administrative procedure was excessively long for the sole reason that the Commission was inactive for almost five years from July 1995 to April 2000. As has already been stated,²⁶² there is therefore no need to examine any further the length of other stages of the proceedings or to conduct an overall assessment of the length of the proceedings.²⁶³

311. It is true that the infringement of the reasonable time principle established above warrants annulment of the contested decision only if the ability of the undertaking concerned to defend itself was adversely affected by the length of the proceedings.²⁶⁴ The burden of proving this lies with the undertaking.

260 — Solvay had already rightly pointed this out in the proceedings at first instance (see paragraph 112 of the judgment under appeal). In *PVC II* (cited in footnote 105, in particular paragraphs 204 and 205), the Court of Justice left this question open because the appellant had not raised any complaint in this regard.

261 — The Court of Justice delivered its judgment in *Commission v Solvay* (cited in footnote 11) in April 2000.

262 — See point 238 of this Opinion.

263 — On the length of the proceedings at first instance before the General Court in Case T-57/01 and the overall assessment of the length of the proceedings, see points 335 to 348 of this Opinion.

264 — See points 249 to 263 of this Opinion.

312. As a rule, the Court of Justice attaches strict conditions to the furnishing of such proof.²⁶⁵ The arguments put forward by the undertaking concerned must be supported by convincing evidence and must not be too abstract or imprecise.²⁶⁶ Where – as here – it is alleged, for example, that the appellant’s ability to defend itself was reduced by the departure of former members of staff, these must normally be identified by name and an indication given of their position and the date on which they left, the nature and scope of the information or details which they could be expected to provide and the circumstances that made it impossible to obtain the testimony of the persons concerned.²⁶⁷

313. There is no doubt that Solvay has not provided such detailed information in the current judicial proceedings before the EU courts.

314. In this case, however, it must be borne in mind that the period during which Solvay is accused of having abused its dominant position, 1983 to 1990, was already 10 to 17 years in the past at the time when the second decision imposing a fine was adopted. When Solvay finally gained access to the file before the General Court in 2005, 15 to 22 years had

already elapsed since the period of the infringements established by the Commission.

315. It goes without saying that the memories of an undertaking’s staff – and especially its former staff – fade after such a long time. Added to which, in this case, is the fact that some of Solvay’s establishments which produced sodium carbonate (soda ash) have since been closed down.²⁶⁸

316. In the proceedings at first instance, Solvay none the less offered to furnish to the General Court evidence reconstructing the composition of its ‘Carbonate’ department in the period at issue and giving the names of the management personnel at that time as well as the dates on which each of them left.

317. In the particular circumstances of this case, nothing more could reasonably have been expected from Solvay.

318. In particular, it must not operate to the appellant’s disadvantage that it did not give details of the events and evidence on which its former staff would have provided information. After all, the undertaking does not

265 — *FEG* (cited in footnote 216, paragraphs 56 to 60) and *TU* (cited in footnote 216, paragraphs 64, 67 and 69).

266 — *TU* (cited in footnote 216, paragraph 69) and *FEG* (cited in footnote 216, paragraph 56).

267 — *FEG* (cited in footnote 216, paragraphs 57 and 58) and *TU* (cited in footnote 216, paragraphs 64 to 69).

268 — Solvay refers in this regard to its establishments in Tavaux (France), Couillet (Belgium) and Heilbronn (Germany).

to this day have knowledge of all the parts of the file which it should in fact have been shown.²⁶⁹ Solvay cannot be expected to furnish evidence on whether and to what extent its former staff might have been able to provide information on missing parts of the file the content of which is unknown and which it has not been able to access at any point in the proceedings.

Commission. For that reason alone, the contested decision must be annulled.

4. Interim conclusion

319. Generally speaking, the bar in terms of the requirements for demonstrating that an undertaking's ability to defend itself has been adversely affected by the passage of time must not be placed so high as to make it practically impossible or excessively difficult for the undertaking concerned to furnish any evidence.

322. It is already apparent from consideration of some of the points of law raised by the appellant at first instance in connection with access to the file, the right to a hearing and the length of the proceedings that the contested Commission decision (Decision 2003/6) must be annulled in its entirety. It is not therefore necessary to examine the other pleas in law raised by Solvay at first instance.

320. In the light of the irretrievable loss of a part of the file which may have contained correspondence exchanged by the Commission with third undertakings,²⁷⁰ it cannot be ruled out that Solvay's former staff might have been helpful to the undertaking's defence if it had been possible to contact them. In particular, it cannot be ruled out that the aforementioned staff might have been able to provide background information which was not apparent from reliance on written records alone.

V — Application for a reduction of the fine

321. In the light of all the foregoing, there are sufficient indications that the excessive length of the proceedings adversely affected Solvay's ability to defend itself against the

323. In addition to the setting aside of the judgment under appeal and the annulment of the contested decision,²⁷¹ Solvay also seeks to have the fine – reimposed by the General Court – cancelled or reduced by way of compensation for the serious damage which it

²⁶⁹ — See points 154 and 186 to 206 of this Opinion.

²⁷⁰ — Paragraph 66 of the judgment under appeal.

²⁷¹ — See in this regard section IV (points 15 to 322) of this Opinion.

claims to have sustained as a result of the extraordinary length of the proceedings.

Article 340 TFEU (formerly Article 235 EC in conjunction with the second paragraph of Article 288 EC).²⁷⁵

324. Under the solution which I have proposed, to the effect that the judgment under appeal should be set aside²⁷² and the contested decision annulled,²⁷³ this separate application by Solvay is rendered obsolete. I shall none the less address it below in the alternative, for the sake of completeness.

326. At the hearing, the Commission expressed a preference for the latter approach, as illustrated by *Der Grüne Punkt*. It justified this by the need to implement competition law effectively. In its view, a reduction of the fine would adversely affect the effective implementation of the European competition rules.

327. That objection is unconvincing.

A — Preliminary remark

325. Two different approaches to the issue of excessively long proceedings can be inferred from the previous case-law of the Court of Justice. In *Baustahlgewebe*, in which a fine had been imposed on the undertaking concerned in anti-trust proceedings, the Court of Justice granted a reduction in the fine.²⁷⁴ In *Der Grüne Punkt*, on the other hand, in which no such fine had been imposed, the Court was able merely to alert the undertaking concerned to the possibility of bringing a claim for damages under Article 268 TFEU in conjunction with the second paragraph of

328. On the one hand, it is true that implementation of the European competition rules, which are essential for the functioning of the internal market,²⁷⁶ is without any doubt a fundamental aim of the Treaties.²⁷⁷ Effective and dissuasive penalties are indispensable to the achievement of that aim.

329. On the other hand, however, it is necessary in proceedings such as the administrative

²⁷² — See in this regard point 294 of this Opinion.

²⁷³ — See in this regard points 298 to 322 of this Opinion.

²⁷⁴ — *Baustahlgewebe* (cited in footnote 216, paragraphs 48, 141 and 142).

²⁷⁵ — *Der Grüne Punkt* (cited in footnote 216, paragraph 195).

²⁷⁶ — Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36, and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 20.

²⁷⁷ — See in this regard the case-law cited in footnote 236 above.

procedure in an anti-trust case, the characteristics of which are similar to those of criminal law, to have special regard to the basic procedural guarantees.²⁷⁸ Competition law may be implemented only by means which are irreproachable from the point of view of the rule of law. Where, therefore, a fundamental right such as the right to have a matter adjudicated upon in a reasonable time is infringed in anti-trust proceedings, the undertaking concerned is entitled to an effective remedy.

330. The search for a solution in a case involving a failure to adjudicate within a reasonable time must therefore necessarily strike a balance between the requirement to implement the competition rules, on the one hand, and the requirement to provide an effective remedy for infringement of the fundamental right, on the other.

331. In the interests of procedural economy and the need to provide the undertaking concerned with an immediate and effective remedy, the Court of Justice should, where possible (in other words, in cases involving fines) continue to adopt the approach which it outlined in *Baustahlgewebe*.²⁷⁹

332. In such a case, competition law is effectively implemented through the establishment of the infringement and the imposition of an obligation to bring it to an end on the undertaking concerned.²⁸⁰ The fine originally set by the Commission or the General Court has a deterrent effect on the other operators on the market. The Court of Justice does not call in question the appropriateness of the measure itself. The 'Baustahlgewebe method' simply involves a form of offsetting against the original fine of the amount considered to represent appropriate compensation for the excessive length of the proceedings.²⁸¹

278 — See in this regard the Opinion of Advocate General Sharpston in Case C-272/09 P *KME Germany and Others v Commission* [2011], the Opinion of Advocate General Bot in Joined Cases C-201/09 P and C-216/09 P *Arcelor v Mittal and Luxembourg v Commission and Others* [2010] ECR I-2239, in particular point 41, and Case C-325/09 P *ThyssenKrupp Nirosta v Commission* [2010] ECR I-2359, in particular point 49, as well as my Opinion in Case C-280/06 *ETI and Others* [2007] ECR I-10893, point 71, and in *Akzo Nobel and Others v Commission* (cited in footnote 86, point 39); see to the same effect my Opinion in *FEG* (cited in footnote 216, point 108) and *TU* (cited in footnote 216, point 100).

279 — *Baustahlgewebe* (cited in footnote 216, in particular, paragraph 48). I would point out merely in passing that the Commission itself sometimes opts to reduce the fine where it concludes that an administrative procedure which it conducted was excessively long (see in this regard *FEG* and *TU*, cited in footnote 216, paragraph 9 in each case).

280 — See in this regard points 261 and 262 of this Opinion.

281 — See to this effect *Baustahlgewebe* (cited in footnote 216, in particular, paragraph 141).

B — *Reduction of the fine*

conduct of the applicant and of the competent authorities.

333. The case-law in *Baustahlgewebe*²⁸² rests ultimately on the unlimited jurisdiction within the meaning of Article 261 TFEU which the Court of Justice has to review penalties imposed in competition proceedings, pursuant to Article 17 of Regulation No 17.²⁸³ This enables the Court of Justice to cancel, reduce or increase fines or periodic penalty payments at its discretion.

336. In this connection, while the individual stages of the proceedings must be examined separately, it is also necessary to carry out an overall assessment of the length of the administrative and judicial proceedings.²⁸⁵

334. Pursuant to the case-law in *Baustahlgewebe*, it is necessary, first, to assess the length of the proceedings (see section (1) below) and, then, to determine the extent of any reduction in the fine applicable (see section (2) below).

337. Of the various stages in the proceedings, two in particular are problematic from the point of view of the reasonable time principle: the period of the Commission's complete inactivity during the first appeal proceedings (proceedings in Joined Cases C-287/95 P and C-288/95 P), on the one hand, and the second set of proceedings before the General Court (proceedings in Case T-57/01), on the other.²⁸⁶

1. Excessive length of the administrative and judicial proceedings

335. As has already been stated,²⁸⁴ the reasonableness of the length of the proceedings is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the

338. It has already been stated²⁸⁷ that the *Commission's inactivity* for four years and seven months from July 1995 to April 2000 – that is to say, during the first appeal proceedings – infringed Solvay's fundamental right to have its case adjudicated upon within a reasonable time. For the purposes of the present proceedings, it may therefore be left open

282 — *Baustahlgewebe* (cited in footnote 216, paragraphs 48 and 142).

283 — For future cases, Article 31 of Regulation No 1/2003.

284 — See point 237 of this Opinion.

285 — See in particular points 238 to 241 of this Opinion.

286 — See in this regard the chronological overview in point 11 of this Opinion.

287 — See points 306 to 310 of this Opinion.

whether, in the same period, the Court of Justice, in its appellate jurisdiction, was also open to the charge of failure to adjudicate in reasonable time, the proceedings having lasted four years and seven months.

339. As regards the *second set of proceedings before the General Court* (Case T-57/01), at eight years and nine months, they immediately appear to be intolerably long.

340. As the appellant rightly points out, the length of time taken to process the proceedings in the present case cannot be justified by reference to any kind of complexity attaching to the case. The General Court had to deal with only two parties, translation took up almost no time at all,²⁸⁸ and the questions of fact and law raised by the parties to the proceedings did not present any exceptional difficulties. Although the case was connected with the parallel proceedings in Case T-58/01, pending, the fact that many of the heads of claim in the two cases were the same should have produced synergies when it came to processing the cases and should therefore have accelerated rather than delayed them.

341. It is true that the delay in the proceedings was due in no small measure to the need to allow Solvay to inspect the administrative file during the judicial proceedings.²⁸⁹ That this took one and a half years – two years, in fact, including the time for the submission of written observations by the parties –²⁹⁰ is completely unacceptable, however. This loss of time cannot operate to Solvay's detriment. Where appropriate, the General Court should have set the Commission clear deadlines and drawn the necessary conclusions to the detriment of the Commission if it had failed to meet those deadlines.

342. There are also some periods of extensive inactivity on the part of the General Court in the proceedings at first instance. Particularly notable, for example, are the 29 months that elapsed between the Commission's observations on the usefulness of certain documents for Solvay's defence and the opening of the oral procedure.²⁹¹ Mention must also be made of the period of almost 18 months that elapsed between the hearing on 26 June 2008

288 — As the language of the case is French, all the parties to the proceedings drafted their pleadings in the language in which the judgment under appeal was deliberated. A negligible amount of time was spent on translation at the beginning of the judicial proceedings for the purposes of publication in the *Official Journal of the European Communities* (see Article 24(6) of the Rules of Procedure of the General Court). The time required to translate the judgment under appeal for the purposes of its publication at the end of the proceedings at first instance did not prevent the General Court from delivering the version of the judgment in the language of the case and serving it on the parties as soon as it had been fully deliberated.

289 — Paragraphs 57 to 67 of the judgment under appeal.

290 — On 19 December 2003, the General Court invited the Commission to submit a detailed list of all the documents in the file relating to the administrative procedure; on 14 April 2005, Solvay was given access, in the Registry of the General Court, to the parts of the file which had been sent by the Commission (paragraphs 57 and 67 of the judgment under appeal). Including the period up to the submission of the Commission's observations of 18 November 2005 on the usefulness of the relevant parts of the file for Solvay's defence, almost two years had elapsed.

291 — The Commission submitted its observations on 18 November 2005 and the oral procedure was opened in May 2008 (paragraphs 68 and 72 of the judgment under appeal).

and delivery of the judgment under appeal on 17 December 2009.²⁹²

343. It goes without saying that issues relating to the internal organisation of the General Court, for example those connected with the regular partial replacement of judges or with judges being prevented from attending, must not operate to the detriment of the persons concerned.²⁹³

344. In those circumstances, both the administrative proceedings and the judicial proceedings in this case were excessively long.

345. That impression is reinforced when account is taken of the length of all the stages of the administrative and judicial proceedings in this case considered as a whole:

- In accordance with the case-law of the European Court of Human Rights concerning Article 6(1) of the ECHR, the

starting point for calculating the length of the proceedings must be regarded as the day on which Solvay was first affected by measures taken as a result of suspicions against it.²⁹⁴ In the present case, that starting point came long before the statement of objections (comparable to the bringing of formal ‘charges’): it occurred on the day when the Commission carried out its inspection at Solvay’s premises in April 1989.²⁹⁵

- At no point since then have the proceedings been discontinued.

- The expected end date must be regarded as the day on which the Court of Justice delivers its judgment in the present appeal proceedings.²⁹⁶

346. To date, the total length of the proceedings is 22 years. The question whether it is ever justifiable for proceedings to last so long can be left unanswered. Such justification would certainly have to be supported by exceptional circumstances, such as the particular complexity of the questions of fact and of law to

292 — By way of comparison, in *Baustahlgewebe*, in which 11 connected cases had been joined by the General Court for the purposes of the oral procedure, the Court of Justice held that there had been an infringement of the reasonable time principle because a period of 32 months had elapsed in the proceedings at first instance between the conclusion of the written procedure and the decision to open the oral procedure, and a period of 22 months had elapsed between the oral procedure and delivery of the General Court’s judgment (*Baustahlgewebe*, cited in footnote 216, paragraphs 45 and 46).

293 — See in this regard my Opinion in *Gogos v Commission* (cited in footnote 26, point 88).

294 — ECtHR, *Pedersen and Baadsgaard v. Denmark* (Grand Chamber), no. 49017/99, § 44, ECHR 2004-XI; see to the same effect ECtHR, *Ringeisen v. Austria*, judgment of 16 July 1971, § 110, Series A no 13, and *Hozee v. the Netherlands*, judgment of 22 May 1998, § 43, *Reports of Judgments and Decisions* 1998-III.

295 — *PVC II* (cited in footnote 105, paragraph 182); more generally, see also my Opinions in *FEG* (cited in footnote 216, points 108 to 112) and *TUI* (cited in footnote 216, points 100 to 104).

296 — ECtHR, *König v. Germany*, judgment of 28 June 1978, no. 6232/73, § 98, Series A no 27, and *Eckle v. Germany* (cited in footnote 222, § 22).

be considered or the fact that the undertaking itself shared much of the responsibility for some of the delays in the proceedings. There is no question of such circumstances obtaining here.

against them will end and what their outcome will be. In that situation, the principle that proceedings must be concluded within a reasonable time affords them an increased measure of protection which goes beyond that provided by the limitation of actions.²⁹⁸

347. I would point out merely in passing that the mere fact that the limitation period has not yet expired is not sufficient to justify the total length of the proceedings.²⁹⁷ The limitation period indicates only the latest time when measures imposing a fine for infringements of the European competition rules may be adopted. Within the limitation period, the reasonable time principle requires that investigations should be carried out and decisions made promptly and that any unjustifiable periods of inactivity should be avoided. The reason for this is that the undertakings concerned are under increased pressure while the proceedings are ongoing and face constant uncertainty as to when the proceedings

348. Taking everything into consideration, I therefore conclude that Solvay's fundamental right to have its case decided upon within a reasonable time was infringed.

349. Pursuant to the case-law in *Baustahlgewebe*,²⁹⁹ the judgment under appeal would have to be set aside on the ground of the excessive length of the proceedings, at least in so far as it sets the amount of the fine at EUR 19 million.

297 — The limitation period is five years, runs from the end of the infringement and is interrupted by any action taken for the purposes of investigation or prosecution. The absolute limitation period expires no later than the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty. However, the limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union. See, more generally, Articles 1 to 3 of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p.1); Article 25 of Regulation No 1/2003 will apply in future. Advocate General Bot examines various issues relating to limitation periods and their suspension during judicial proceedings in his Opinion in *ArcelorMittal Luxembourg v Commission and Others* (cited in footnote 278, in particular points 66 to 81 and 245 to 251) and in *ThyssenKrupp Nirosta v Commission* (cited in footnote 278, in particular points 177 to 212).

2. Extent of the reduction in the fine

350. When questioned at the hearing, the parties expressed widely differing views on the extent of any reduction to be applied to

298 — See my Opinions in *FEG* (cited in footnote 216, point 111) and *TEU* (cited in footnote 216, point 103).

299 — *Baustahlgewebe* (cited in footnote 216, paragraphs 48 and 142).

the fine in this case. Whereas Solvay seeks to have the fine reduced to such an extent that the penalty becomes merely symbolic, the Commission adopts the diametrically opposite point of view: in its opinion, it is not the fine but the reduction which should be symbolic.

Rights, must also be taken into account in EU law, it is the extent of the failure to adjudicate within a reasonable time which determines the redress applicable.³⁰¹

351. In *Baustahlgewebe*, the only example available to date, the extent of the reduction in the fine applied by the Court of Justice was marginal: a fine of ECU 3million imposed by the General Court was reduced by ECU 50 000;³⁰⁰ this amounts to a reduction of just 1.67 %.

353. In the present case, the length of the individual stages of the administrative and judicial proceedings, on the one hand, and the length of all the stages of the proceedings taken together, both represent a substantial failure to adjudicate within a reasonable time. In the absence of any exceptional circumstances, a period of inactivity of four years and seven months in the administrative proceedings,³⁰² judicial proceedings at first instance lasting eight years and nine months³⁰³ and a total duration for the proceedings to date of 22 years³⁰⁴ exceed any conceivable threshold for what constitutes reasonable time.

352. It is doubtful whether such a small reduction in the fine would still be appropriate today in the light of the provisions of the ECHR. Under the case-law of the ECtHR concerning Article 6(1) of the ECHR, which, in accordance with the first sentence of Article 52(3) of the Charter of Fundamental

354. In those circumstances, a relatively small reduction in the fine, such as that applied by the Court of Justice in *Baustahlgewebe* and that which the Commission appears to have in mind for this case too, would not be appropriate.

300 — *Baustahlgewebe* (cited in footnote 216, paragraphs 141 and 142).

301 — ECtHR, *Dželili v. Germany* (cited in footnote 232, § 103) and *Ommer v. Germany* (cited in footnote 231, § 50).

302 — See points 306 to 319 and point 338 of this Opinion.

303 — See points 339 to 343 of this Opinion.

304 — See points 345 and 346 of this Opinion.

355. The infringement of a fundamental right through failure to adjudicate in reasonable time requires an effective sanction. In this regard, it is necessary to take into account the seriousness of the infringement committed by the undertaking, on the one hand, and the seriousness of the infringement of the fundamental right resulting from failure to adjudicate in reasonable time, on the other.³⁰⁵

357. Accordingly, in the event that the Court of Justice does not set aside the judgment under appeal in full and does not annul the contested decision,³⁰⁷ I propose that the fine of EUR 19 million should at least be reduced by 50%.

VI — Costs

356. In this case, it must be assumed that there has been a serious infringement of the fundamental right to have a matter adjudicated upon within a reasonable time. This warrants an appreciable reduction in the fine. At the same time, however, it must be borne in mind that, according to the Commission's findings, Solvay's business practices constituted 'infringements of extreme gravity' of one of the fundamental provisions of the internal market (Article 82 EC).³⁰⁶ Having regard to all the circumstances of the individual case, I would therefore consider a reduction in the fine of 50% to be appropriate. The amount of the fine imposed by the General Court should be taken as the starting point for calculating that reduction.

358. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

359. Under Article 69(2) in conjunction with Article 118 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Solvay has claimed that the Commission should be ordered to pay the costs of both the appeal proceedings and the proceedings at first instance, and the Commission has been unsuccessful in its claims at both instances, the Commission must be ordered to pay the costs of both sets of proceedings.

305 — See to this effect ECtHR, *Eckle v. Germany* (Article 50) (cited in footnote 233, § 24).

306 — Recital 191 to the contested decision. The General Court confirmed the characterisation of Solvay's market behaviour as being 'of extreme gravity' and held that none of the arguments put forward by Solvay constituted grounds for considering that the Commission erred in assessing the gravity of the infringements (paragraphs 499 and 501 of the judgment under appeal). Solvay has not contested that part of the judgment under appeal in the appeal proceedings.

307 — See in this regard, in particular, points 294 and 322 of this Opinion.

VII — Conclusion

360. In the light of the foregoing considerations, I propose that the Court should:

- (1) set aside the judgment of the General Court of 17 December 2009 in Case T-57/01 *Solvay v Commission*;
- (2) annul Commission Decision 2003/6/EC of 13 December 2000;
- (3) order the Commission to pay the costs of both sets of proceedings.