JUDGMENT OF THE COURT (grand chamber)

25 October 2011 *

In Case C-109/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 February 2010,

Solvay SA, established in Brussels (Belgium), represented by P. Foriers, R. Jafferali, F. Louis and A. Vallery, avocats,

applicant,

the other party to the proceedings being:

European Commission, represented by J. Currall and F. Castillo de la Torre, acting as Agents, assisted by N. Coutrelis, avocate, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), R. Silva de Lapuerta, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, A. Arabadjiev and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2011,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2011,

gives the following

Judgment

1 By its appeal, Solvay SA ('Solvay') seeks to have set aside the judgment in Case T-57/01 *Solvay* v *Commission* [2009] ECR II-4621 ('the judgment under appeal'), by which the General Court of the European Union dismissed the action brought by Solvay for annulment of Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133-C: Soda-ash – Solvay)

(OJ 2003 L 10, p. 10; 'the contested decision') and, in the alternative, annulment or reduction of the fine imposed on it.

Background to the dispute

2 Solvay is a large chemical company. Its founder, Ernest Solvay, invented a process permitting the synthetic production of soda ash, a material principally used in the manufacture of glass. Soda ash is also used in the chemical industry, for the manufacture of detergents, and in metallurgy.

3 Around 1870, Solvay granted a manufacturing licence to Brunner, Mond & Co., one of the companies which originally made up Imperial Chemical Industries ('ICI'). Solvay and Brunner, Mond & Co split their spheres of influence between themselves ('Alkali Cartel'), Solvay being active in continental Europe and Brunner, Mond & Co in the British Isles, the British Commonwealth and other countries in Africa, Asia and South America. The initial agreement was renewed a number of times, in particular in 1945.

4 At the end of the 1980s, Solvay was the main producer of soda ash both in the European Community, where it represented 60% of the market, and worldwide. ICI was the second largest producer. Next largest were four small producers: Rhône-Poulenc, Akzo, Matthes & Weber and Chemische Fabrik Kalk ('CFK').

5 Natural soda ash was extracted in the United States. Its production cost was lower than that of synthetic soda ash, but to that figure transport costs had to be added. The Community undertakings were protected for some years by anti-dumping measures, but those measures were under review at the time when contentious proceedings were commenced by the Commission of the European Communities. It was possible that dumping would no longer be found to be established.

6 Producers in Eastern European countries were also competitors, but the quantities of soda ash involved were small. Imports from those countries had also been subject to anti-dumping measures.

7 On the Community market, spheres of influence were divided between Solvay and ICI and national markets were isolated, with considerable differences in price.

8 At the beginning of 1989, suspecting the existence of agreements between the various producer undertakings in the Community, the Commission carried out inspections at the premises of the main soda ash producers and requisitioned copies of numerous documents. Those inspections were supplemented by requests for information.

9 On 13 March 1990, the Commission sent a joint statement of objections to Solvay, ICI and CFK. The offences alleged consisted in the following:

— infringement of Article 85 of the EEC Treaty (later Article 85 of the EC Treaty and now Article 81 EC), by Solvay and by ICI,

— infringement of Article 85 of the Treaty, by Solvay and by CFK,

— infringement of Article 86 of the EEC Treaty (later Article 86 of the EC Treaty and now Article 82 EC), by Solvay,

— infringement of Article 86 of the Treaty, by ICI.

10 The Commission did not send each of the undertakings concerned all the documents, but only the documents relating to the infringement which the undertaking concerned was alleged to have committed. Furthermore, for reasons of confidentiality, a great number of documents or extracts were not sent to the undertakings concerned.

11 Those undertakings were invited to be heard. It appears that Solvay did not wish to participate in the hearings.

12 On 19 December 1990, the Commission adopted the following four decisions:

— Decision 91/297/EEC relating to a proceeding under Article [81 EC] (IV/33.133-A: Soda ash – Solvay, ICI) (OJ 1991 L 152, p. 1), by which (i) the Commission found that Solvay and ICI had, in essence, continued to share the soda ash market between themselves, despite the assurance given by those undertakings that the agreement concluded in 1945 had fallen into disuse, and (ii) in order to show that this was not a case of independent lines of conduct ('parallel conduct'), the Commission relied inter alia on the fact that, in certain circumstances, it was Solvay which supplied under ICI's name, and that there was frequent contact between the two undertakings;

— Decision 91/298/EEC relating to a proceeding under Article [81 EC] (IV/33/133-B: Soda ash – Solvay, CFK) (OJ 1991 L 152, p. 16), by which the Commission found that Solvay and CFK had entered into a pricing agreement, with CFK receiving in exchange a guaranteed minimum sales tonnage, reviewed annually;

— Decision 91/299/EEC relating to a proceeding under Article [82 EC] (IV/33.133-C: Soda ash – Solvay) (OJ 1991 L 152, p. 21), by which the Commission found that Solvay had abused its dominant position by applying a system of loyalty rebates and discounts by reference to marginal tonnage, with the intention of tying customers to Solvay in respect of all their requirements and of cutting out competitors;

— Decision 91/300/EEC relating to a proceeding under Article [82 EC] (IV/33.133-D: Soda ash – ICI) (OJ 1991 L 152, p. 40), by which the Commission found that ICI was guilty of similar conduct.

13 Those four decisions have been challenged before the Court of First Instance (now 'the General Court'). Solvay sought annulment of Decision 91/297 (Case T-30/91), Decision 91/298 (Case T-31/91) and Decision 91/299 (Case T-32/91). ICI sought annulment of Decision 91/297 (Case T-36/91) and Decision 91/300 (Case T-37/91). On the other hand, CFK paid the fine imposed on it under Decision 91/298.

14 In that regard, it should be borne in mind that, on 27 February 1992, the General Court declared that a Commission decision relating to a cartel between polyvinylchloride (PVC) manufacturers was non-existent because that decision had not been properly 'authenticated' (Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315). In the cases referred to in paragraph 13 above, in which it was the applicant, Solvay lodged 'supplementary applications' in

which it put forward a new plea in law to the effect that the decision, which it had initially sought to have annulled, should be declared non-existent, referring to two press articles from which it appeared that the Commission admitted that it had not authenticated a decision for 25 years.

15 Following the ruling of the Court of Justice in the appeal brought against that judgment in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, the General Court ordered other measures of organisation of procedure in the present case; for example, it called upon the Commission to produce, inter alia, the text of the decision challenged by the applicant, as authenticated at the time. The Commission stated in reply that, so long as the Court had not ruled on the admissibility of that plea, the correct course was to postpone consideration of its merits. Since, however, the General Court had directed the Commission, by order of 25 October 1994, to produce the text in question, the Commission complied and produced the text of that decision. At the hearing on 6 and 7 December 1994 the parties presented oral argument and replied to the questions put by the General Court.

16 The General Court delivered five judgments on 29 June 1995.

17 By the judgments in Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, Decision 91/297 was annulled for infringement of the rights of the defence on the ground that, during the administrative proceedings, the Commission had not granted sufficient access to the documents, notably to the documents which were likely to be helpful to the defence. In reaching the finding that the breach of administrative procedure could not be cured in the proceedings before the Court, the General Court pointed out in particular, in paragraph 98 of the judgment in Case T-30/91 *Solvay* v *Commission*, that, 'if during the administrative procedure the applicant had been able to rely on documents which might exculpate it, it might have been able to influence the assessment of the college of Commissioners, at least with regard to the conclusiveness of the evidence of its alleged passive and parallel conduct as regards the beginning and therefore the duration of the infringement'. Both in Case T-30/91 *Solvay* v *Commission* and in Case

T-36/91 *ICI* v *Commission*, the General Court held that, at the very least, the Commission should have supplied a list of documents coming from the other undertakings, in order to enable their exact content to be ascertained as well as their usefulness to the defence.

18 By judgment in Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, Decision 91/298 was annulled so far as Solvay was concerned on the ground that that Commission decision had not been properly authenticated.

19 By judgment in Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825, Decision 91/299 was annulled on the same grounds.

20 Decision 91/300 was at issue in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901. The General Court rejected the pleas and arguments alleging non-disclosure of documents coming from other undertakings, on the ground that those documents would not have been helpful to the applicant's defence, and non-disclosure of a list of the applicant's own documents. None the less, the General Court annulled the contested decision for lack of proper authentification.

21 The above judgments in Case T-31/91 *Solvay* v *Commission* and Case T-32/91 *Solvay* v *Commission* were the subject of appeals by the Commission which gave rise to the judgment in Joined Cases C-287/95 P and C-288/95 P *Commission* v *Solvay* [2000] ECR I-2391. Similarly, the judgment in Case T-37/91 *ICI* v *Commission* was the subject of an appeal which gave rise to the judgment in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341. Those appeals were dismissed by the Court.

22 With regard to Solvay, the Commission adopted two new decisions on 13 December 2000:

— the contested decision, which is the equivalent of Decision 91/299. The terms of those decisions are essentially the same. In addition, the contested decision contains a description of the proceeding. It is addressed to Solvay, the undertaking on which the Commission imposed a fine of EUR 20 million.

— Decision 2003/5/EC 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 is the equivalent of Decision 91/298 but which also contains a description of the proceeding. By that decision, the Commission imposed a fine of EUR 3 million on Solvay.

23 Solvay brought actions contesting those decisions. By the judgment in Case T-58/01 *Solvay* v *Commission* [2009] ECR II-4781 and the judgment under appeal, the General Court dismissed those actions.

The proceedings before the General Court

24 On 19 December 2003, in view of the fact that Solvay had raised a plea alleging breach of the right of access to the file, the General Court asked the Commission to produce, inter alia, a detailed enumerative list of all the documents in the file. After requesting an extension of the time-limits, the Commission provided a list, and then a second list. Solvay asked to see certain documents. It was during that period of inquiry that the Commission admitted that it had mislaid some files and was unable to draw up the list of the documents which they contained, because, according to the Commission, the indexes to those binders could not be found. On 15 July and 17 November

2005 respectively, Solvay and the Commission lodged their written observations on the usefulness for Solvay's defence of the documents which it had consulted. Various further questions were put to the parties during 2008. The hearing took place on 26 June 2008.

The judgment under appeal

The arguments in support of the claim that the contested decision should be annulled

25 Solvay raised four pleas in law, divided into parts, which contained a number of lines of argument.

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

— The incorrect application of the rules governing the time-barring of proceedings

26 Solvay argued that the time-barring of proceedings, calculated in accordance with Regulation (EEC) No 2988/74 of the Council 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), is not suspended during appeal proceedings. According to Solvay, the Commission could have adopted a new decision immediately after delivery of the judgment in Case T-31/91 *Solvay* v *Commission*. By bringing an appeal, the

Commission took a risk, particularly as it was aware of the judgment in *Commission* v *BASF and Others*, in which the Court had adopted a position on the question of failure to authenticate acts.

27 Referring to Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, concerning the 'PVC II' decision, the General Court found in the judgment under appeal that the period during which the appeal remained pending before the Court of Justice constituted a period during which the time-barring of proceedings is suspended (paragraphs 96 to 109). It pointed out the practical difficulties to which the approach proposed by Solvay would give rise – the possible co-existence of two decisions – in the event that the Court upheld the Commission's appeal.

— Breach of the principle of a reasonable period

28 The General Court examined each stage of the procedure, as well as the procedure as a whole. It also noted that, since the contested decision was identical in substance to Decision 91/299, the rights of the defence had not been infringed despite the length of time which had elapsed. It noted in particular, in paragraph 141 of the judgment under appeal, that Solvay had expressly renounced the possibility of a reduction in the fine by way of compensation and also that it was not claiming damages.

The second plea: breach of essential procedural requirements for the adoption and authentification of the contested decision

29 The General Court rejected the first two parts of this plea: (i) breach of the principle of collegiality and (ii) breach of the principle of legal certainty. As regards the alleged infringement of the applicant's right to be heard again, the General Court noted that the contested decision was framed in terms which were in substance identical to

those of Decision 91/299 and that, accordingly, the Commission was not required to hear the applicant again (paragraph 191 of the judgment under appeal). In addition, the General Court rejected a part of that plea, alleging failure to consult the Advisory Committee on Restrictive Practices and Monopolies again and irregular composition of that committee.

30 In paragraphs 218 to 230 of the judgment under appeal, the General Court rejected a part of that plea in law by which it was alleged that, in breach of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), use had been made of documents seized. Solvay argued that, since the decision of 5 April 1989 ordering the investigation referred to only one infringement of Article 81 EC, the Commission was not entitled to use the seized documents for the purposes of bringing an action against Solvay under Article 82 EC. The General Court held in that connection that, in the decision ordering the investigation, the Commission was not required to make a precise legal analysis of the infringement and that, in the circumstances, some of the facts complained of, as referred to in the decision ordering the investigation – namely, the 'implementation of exclusive purchase arrangements' – were the same as those which had been alleged in relation to the alleged abuse of a dominant position. Accordingly, the Commission had not gone beyond the legal framework constituted by the decision ordering the investigation.

31 The General Court also rejected a part of that plea alleging breach of the principles of impartiality, sound administration and proportionality.

The third plea in law: incorrect definition of the relevant geographical market

32 After examining that plea, the General Court concluded, in paragraph 256 of the judgment under appeal, that Solvay was in a dominant position, irrespective of whether the relevant geographic market was defined as the Community, with the exception of the United Kingdom and Ireland, or as each State in which Solvay was alleged to have committed the infringements of Article 82 EC on the market for soda ash.

The fourth plea in law: lack of dominant position

33 In paragraphs 275 to 279 of the judgment under appeal, the General Court recalled the case-law relating to the notion of dominant position. It stated the market shares held by Solvay and found, in paragraphs 286 to 304, that Solvay's arguments did not establish the existence of exceptional circumstances that would warrant calling into question the finding that Solvay was in a dominant position on the relevant market.

The fifth plea in law: lack of abuse of a dominant position

34 After confirming, in paragraphs 325, 327, 349, 368, 369, 376 and 388 of the judgment under appeal, that Solvay did not dispute the relevance of the evidence adduced against it, the General Court concluded that the practices complained of – rebates on marginal tonnages, fidelity rebates, the 'group' rebate to its principal customer and exclusivity agreements – constituted an abuse of dominant position. In particular, the General Court explained how the system of rebates on marginal tonnages led to discriminatory practices.

The sixth plea: breach of the right of access to the file

35 The General Court determined whether the lack of access to certain documents during the administrative proceeding had prevented Solvay from perusing documents likely to be useful for its defence. It concluded that this was not the case, after checking

whether the documents referred to could alter the determination of the relevant geographical market, or of the market of the product at issue, or the findings that Solvay held a dominant position and had abused that position. The General Court examined the part of the plea alleging lack of full consultation of the file. After attempting to ascertain the content of the files mislaid by the Commission, the General Court satisfied itself that the documents in the existing files contained proof of Solvay's alleged misconduct and concluded, in paragraph 479 of the judgment under appeal, that '[t]he possibility that [Solvay] might have found documents of use for its defence … in the missing "sub-files" can therefore be precluded'.

The arguments in support of the claims that the fine should be annulled or reduced

36 Solvay raised five pleas in law: (i) incorrect assessment of the gravity of the infringements; (ii) incorrect assessment of the duration of the infringements; (iii) the existence of attenuating circumstances; (iv) the disproportionate nature of the fine; and (v) failure to take the lapse of time into account.

37 In paragraphs 510 and 511 of the judgment under appeal, the General Court found that, in a decision concerning the application of Article 82 EC, it was not possible to take into account, by way of an aggravating circumstance, repeated infringements as attested by decisions finding that the undertaking in question had infringed Article 81 EC and, also, that the infringements for which Solvay had already been penalised were very different from the practices at issue. The General Court therefore reduced the fine by 5 %.

38 In response to the fifth plea, the General Court held that a fine retained its punitive and deterrent effect, even after a certain time had elapsed.

39 In conclusion, the General Court set the fine at EUR 19 million. It ordered Solvay to bear its own costs and to pay 95 % of the costs incurred by the Commission, and ordered the Commission to bear 5 % of its own costs.

The appeal

40 Solvay relies on nine grounds of appeal: (i) infringement of the right to have its case disposed of within a reasonable time; (ii) infringement of Articles 14 and 20 of Regulation No 17; (iii) infringement of the rights of the defence, arising from the fact that, after refusing Solvay access to the file during the administrative proceeding, the Commission mislaid part of the file; (iv) infringement of the rights of the defence as regards the exculpatory documents which could have been consulted at the Registry; (v) infringement of Solvay's right to be heard before the Commission adopted the contested decision; (vi) breach of the obligation to state reasons for judgments and of Article 82 EC as regards the definition of the relevant geographical market applied by the General Court in the judgment under appeal; (vii) breach of the obligation to state reasons for judgments and of Article 82 EC as regards the assessment of the dominant position in the judgment under appeal; (viii) breach of the obligation to state reasons for judgments and of Article 82 EC as regards the rebate granted to the Saint-Gobain group; and (ix) breach of the obligation to state reasons for judgments and of Article 82 EC as regards the existence of discrimination.

41 It is appropriate first to examine together the third and fifth grounds of appeal, both of which concern infringement of the rights of the defence.

Arguments of the parties

42 By the first part of the third ground of appeal, Solvay claims that, by requiring it to show that the lost documents could have been useful for its defence, the General Court required it to meet a standard of proof which was impossible to satisfy, since those documents could not be examined.

43 By the second part of that ground of appeal, Solvay claims that the General Court disregarded the principle that it was sufficient if those documents represented even a slight chance of influencing the contested decision.

44 By the third part of that ground of appeal, Solvay claims that the General Court did not confine itself to a preliminary examination of the file in order to determine whether the missing documents could have influenced that decision, but first ruled on the merits. As a first step, the General Court found that the substantive pleas raised by Solvay in support of its action for annulment of the contested decision had to be rejected and, on that basis, it went on to conclude that the documents not disclosed to Solvay could not have had any influence on that decision.

45 By the fourth part of that ground of appeal, Solvay takes issue with the finding made by the General Court, in paragraph 470 of the judgment under appeal, solely on the basis of market share, that 'there [was] no reason to presume that [Solvay] might have discovered in the missing "sub-files" documents casting doubt on the finding that it

held a dominant position' and claims that the General Court thus reversed the burden of proof and disregarded the presumption of innocence. At first instance, Solvay disputed the existence of a dominant position and it cannot be ruled out that other documents would have enabled it to substantiate its arguments.

46 By the fifth part of the third ground of appeal, Solvay claims that the General Court infringed the rights of the defence by finding, in paragraph 474 of the judgment under appeal, in relation to the 'group' rebate granted to Saint-Gobain, that Solvay 'ought to have endeavoured to indicate to what extent other evidence might have cast doubt on the content of the secret protocol or, at the very least, shed different light on it'.

47 By the sixth part of that ground of appeal, Solvay claims that the General Court infringed the rights of the defence by finding, in paragraph 471 of the judgment under appeal, that an error on the part of the Commission as to the definition of the geographical market 'could not have had a decisive influence on the outcome' and, accordingly, that Solvay could not have found any documents useful for its defence in the binders mislaid by the Commission.

48 By the first part of the fifth ground of appeal, Solvay claims that the General Court did not address Solvay's argument that it should have been heard before the contested decision was adopted, notwithstanding *Limburgse Vinyl Maatschappij and Others* v *Commission*, since the administrative proceeding had been affected by irregularities, stemming from the lack of access to the file at a stage prior to the decision's adoption, which affected the validity of the preparatory measures for the decision, and since those irregularities had been established by the General Court before the contested decision was adopted, in Case T-30/91 *Solvay* v *Commission*.

49 By the second part of that ground of appeal, Solvay claims that the General Court refused to acknowledge that, before adopting the contested decision, the Commission was under an obligation to hear the undertaking at issue, in view of the fact that a judgment of the General Court, albeit delivered in separate proceedings, had established the existence of a procedural irregularity which had affected the preparatory measures for the contested decision. Solvay refers, in that regard, to Case T-30/91 *Solvay* v *Commission*, and argues that, in the present case, the proceeding had been affected by the same procedural irregularities as those found in the case which gave rise to that judgment. Under Article 233 EC, the Commission was required to draw all the appropriate inferences from a judgment of the General Court. Even though Decision 91/299 had been annulled by the General Court for lack of authentification, the Commission should also have taken account of the judgment in Case T-30/91 *Solvay* v *Commission*, which had established beyond doubt another procedural irregularity. According to Solvay, the Commission was therefore required to rectify that procedural irregularity in order to return the proceeding to a lawful footing and, accordingly, to make it possible for Solvay to access the file and to permit it to submit all its written and oral observations, before the adoption of the contested decision.

50 The Commission contests both the admissibility and the merits of the grounds of appeal and the arguments thus relied on by Solvay.

Findings of the Court

51 Contrary to the arguments put forward by the Commission, by the ground of appeal relating to infringement of the right of access to the file, Solvay is not criticising the findings of fact made at first instance, but the rules applied by the General Court as regards the standard of proof relating to the usefulness of the documents, some of which have been mislaid. The question whether the General Court applied the correct legal standard when determining the usefulness of those documents for Solvay's defence is a question of law, which is amenable to review by the Court of Justice on appeal (see, to that effect, Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 40, and

Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 117).

52 The rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the Court ensures (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 64).

53 Observance of the rights of the defence in a proceeding before the Commission, the aim of which is to impose a fine on an undertaking for infringement of the competition rules requires that the undertaking under investigation must have been afforded the opportunity to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (*Aalborg Portland and Others* v *Commission*, paragraph 66). Those rights are referred to in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union.

54 As the General Court rightly pointed out in paragraph 405 of the judgment under appeal, the right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 315, and *Aalborg Portland and Others* v *Commission*, paragraph 68).

55 Infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 317).

56 In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 318). As the examination undertaken by the General Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking which has brought the action against the Commission decision to the situation in which it would have been if it had been able to rely on those documents in presenting its written and oral observations to the Commission (see *Aalborg Portland and Others* v *Commission*, paragraph 103 and the case-law cited).

57 Where access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to the non-disclosed documents, the Commission decision would have been different in content, but only that those documents could have been useful for its defence (Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraph 128; *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 318; and *Aalborg Portland and Others* v *Commission*, paragraph 131).

58 Although the General Court rightly referred to those principles, it none the less concluded, in paragraph 481 of the judgment under appeal, that 'although [Solvay had] not [had] access to all the documents in the investigation file, in the present case that

[had] not [prevented] it from defending itself against the substantive objections which the Commission raised in the statement of objections and in the contested decision'.

59 In order to reach that conclusion, the General Court examined, first of all, the objections raised in that decision and the material evidence submitted in support of those objections. Such a method of proceeding cannot be criticised since it is in the light of those elements that the usefulness for the defence of other documents must be assessed.

60 Nevertheless, the General Court based its conclusion, inter alia, on the findings that: (i) 'extremely large market shares constitute in themselves, save in exceptional circumstances, proof of the existence of a dominant position' and, on the assumption that such facts did exist, Solvay could not be unaware of them (paragraph 470 of the judgment under appeal); (ii) 'any error on the Commission's part [as regards the definition of the geographic market] could not have had a decisive influence on the outcome' (paragraph 471 of that judgment); and (iii) '[Solvay] ought to have endeavoured to indicate to what extent other evidence might have cast doubt on the content of the secret protocol or, at the very least, shed different light on it' (paragraph 474 of that judgment).

61 Such assertions ignore the inferences to be drawn from the loss of the files, in the circumstances, for Solvay's rights. By reasoning in that way, the General Court takes as a basis assumptions not only as regards the content of the documents mislaid, but also as regards the knowledge which Solvay ought to have had of that content. In particular, as the Advocate-General noted in point 202 of her Opinion, the General Court does not explain why Solvay itself should have been aware of any exceptional circumstances which could have helped to overturn the presumption, based on the data relating to market shares, of the existence of a dominant position.

62 In that regard, it should be borne in mind that, according to the Commission, the missing sub-files probably contained the replies to the requests for information made under Article 11 of Regulation No 17. Accordingly, it cannot be excluded that Solvay could have found in the sub-files evidence originating from other undertakings which would have enabled it to offer an interpretation of the facts different from the interpretation adopted by the Commission, which could have been of use for its defence.

63 Since Solvay had not had access to those documents and their content was neither certain nor capable of being ascertained, the General Court erred in law by requiring it, in paragraph 474 of the judgment under appeal, to state the arguments which it would have raised had those documents been available to it – something which was materially impossible for it to know.

64 It should be pointed out that the matter at issue in the present case is not that of a few missing documents, the content of which could have been reconstructed from other sources, but of whole sub-files which have been lost and which, if the suppositions of the Commission referred to in paragraph 62 above were correct, could have contained essential documents relating to the procedure before the Commission which may have been relevant to Solvay's defence.

65 It follows that, by concluding, in paragraph 481 of the judgment under appeal, that the fact that Solvay had not had access to all the documents in the investigation file had not prevented it from defending itself, the General Court erred in law as regards the infringement by the Commission of the rights of the defence and based its findings on a theory regarding the content of the missing documents which it was itself unable to test.

66 As regards the hearing of the undertaking concerned before adoption of the contested decision – an argument raised by Solvay in the third ground of appeal – it should be borne in mind that this forms part of the rights of the defence. An infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case.

67 In paragraph 184 of the judgment under appeal, the General Court rightly pointed out that where, following the annulment of a decision penalising undertakings which have infringed Article 81(1) EC because of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraphs 83 to 111).

68 In the present case, however, the question of the hearing of Solvay cannot be separated from the issue of access to the file. Although the content of the contested decision is substantially identical to, and based on the same objections as those set out in, the first decision annulled by the General Court because of a procedural irregularity which occurred at the final stage in the procedure – lack of proper authentification by the College of Commissioners – the fact remains that the adoption of that first decision was also affected by a defect which arose well before that procedural irregularity. As is apparent from paragraph 17 above, it is common ground that, during the administrative proceeding which led to adoption of the first decision, the Commission had not granted Solvay access to all the documents in its file, in particular, to the exculpatory documents.

69 As was recalled in paragraph 17 above, in Case T-30/91 *Solvay* v *Commission* and Case T-36/91 *ICI* v *Commission*, the General Court found, with regard to Decision 91/297 (referred in paragraph 12 above), which is linked to the contested decision and which was the subject of the same statement of objections, that that administrative proceeding was vitiated by an infringement of the rights of the defence, since

the Commission had not given the undertaking concerned sufficient access to the documents and, in particular, to those likely to be useful to its defence. Accordingly, the General Court annulled those decisions, stating, in particular, that access to the file in competition cases is one of the procedural safeguards intended to protect the rights of the defence and that it was necessary to draw up a sufficiently detailed list of the documents in the file to enable the undertaking concerned to assess whether it was appropriate to request access to particular documents which might be useful for its defence (Case T-30/91 *Solvay* v *Commission*, paragraphs 59 and 101, and Case T-36/91 *ICI* v *Commission*, paragraphs 69 and 111).

70 Despite those circumstances and notwithstanding the case-law of the Court confirming the importance of access to the file and, more specifically, to exculpatory documents (see, inter alia, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235), the Commission adopted a decision which was the same as the decision which had been annulled owing to the lack of proper authentification, without opening a new administrative proceeding in which it would have heard Solvay after granting it access to the file.

71 It follows that, by failing to take account of the specific circumstances of the case and, in particular, by basing its findings on the fact that the first decision had been annulled owing to the lack of proper authentification and that the second contained the same objections, the General Court wrongly found that it was unnecessary to hear Solvay. The General Court accordingly erred in law in holding that the Commission had not infringed the rights of the defence by failing to hear Solvay before the adoption of the contested decision.

72 It follows from those considerations that the third and fifth grounds of appeal are well founded and that the judgment under appeal must be set aside in so far as, by that judgment, the General Court failed to annul the contested decision for infringement of the rights of the defence.

73 Since the finding that the third and fifth grounds of appeal are well founded means that the judgment under appeal must be set aside, it is not necessary to examine the other grounds of appeal.

The action challenging the contested decision

74 In accordance with Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court must quash the decision of the General Court. The Court may then itself give final judgment in the matter, where the state of the proceedings so permits. That is the position in the present case.

75 It follows from paragraphs 51 to 72 above that the appeal is well founded and that the contested decision must be annulled for infringement of the rights of the defence.

Costs

76 Under 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. Under Article 69(2) of those Rules, applicable to the procedure on appeal pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As Solvay has applied for costs against the Commission, and the latter has been unsuccessful, the

Commission must be ordered to bear its own costs and to pay those incurred by Solvay both at first instance and on appeal.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 17 December 2009 in Case T-57/01 *Solvay* v *Commission*;**

2. **Annuls Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133-C: Soda-ash – Solvay);**

3. **Orders the European Commission to pay the costs at first instance and on appeal.**

[Signatures]