

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber,
Extended Composition)

29 June 1995 *

In Case T-36/91,

Imperial Chemical Industries plc, a company incorporated under English law, established in London, represented by David Vaughan QC, Gerald Barling QC and David Anderson, Barrister, members of the Bar of England and Wales, instructed by Victor O. White and Richard J. Coles, Solicitors, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, and Nicholas Forwood QC, of the Bar of England and Wales, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of 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-ash — Solvay, ICI, OJ 1991 L 152, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber,
Extended Composition),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 and 7 December 1994,

gives the following

Judgment

Facts and procedure

Economic background

¹ Soda-ash, the product with which these proceedings are concerned, is used in the manufacture of glass (dense soda-ash) and also in the chemical industry and

metallurgy (light soda-ash). Natural (dense) soda-ash, produced mainly in the United States of America, should be distinguished from synthetic (dense and light) soda-ash, manufactured in Europe through a process invented by Solvay et Cie more than 100 years ago, the production costs of natural soda-ash being much lower than those of the synthetic product.

2 At the material time, the six Community producers of synthetic soda-ash were as follows:

- Solvay et Cie SA (hereafter ‘Solvay’), the largest producer in the world and in the Community, with a Community market share of almost 60% (and even 70% in the Community excluding the United Kingdom and Ireland);
- the applicant, the second largest Community producer, with over 90% of the United Kingdom market;
- the ‘small’ producers, Chemische Fabrik Kalk (hereafter ‘CFK’) and Matthes & Weber (Federal Republic of Germany), Akzo (Netherlands) and Rhône-Poulenc (France), with an aggregate share of approximately 26%.

3 Solvay operated plants in Belgium, France, Germany, Italy, Spain, Portugal and Austria and had sales organizations in those countries as well as in Switzerland, the Netherlands and Luxembourg. It was, moreover, the principal producer of salt in the Community and was therefore very favourably placed with respect to the supply of the main raw material for the manufacture of synthetic soda-ash. The applicant operated two plants in the United Kingdom, a third plant having been closed in 1985.

- 4 With regard to demand, the main customers in the Community were glass manufacturers. Approximately 70% of the production of western European undertakings was used in the manufacture of flat and hollow glass. Most glass producers operated continuous process plants and required an assured supply of soda-ash; in most cases, they had a relatively long-term contract with one major supplier for the main part of their requirements and, as a precaution, used another supplier as a 'secondary source'.
- 5 At the material time the Community market was characterized by separation along national lines, producers generally tending to concentrate their sales in the Member States where they had production facilities. In particular, there was no competition between the applicant and Solvay, each limiting its sales in the Community to its own traditional 'sphere of influence' (continental western Europe for Solvay and the United Kingdom and Ireland for the applicant). That sharing of the market goes back to 1870 when Solvay first granted patent licences to Brunner, Mond & Co, one of the applicant's original constituent companies. Moreover, Solvay was one of the main shareholders in Brunner, Mond & Co, and subsequently in the applicant, until it sold its shares in the 1960s. According to the applicant and Solvay, the successive market-sharing agreements, the most recent dating from 1945/1949, had become outdated in 1962 and were formally cancelled in 1972.

Administrative procedure

- 6 At the beginning of 1989 the Commission carried out investigations without warning at the premises of the Community's main soda-ash producers. At the end of those investigations the applicant, by letter of 13 April 1989, drew the Commission's attention to the fact that all the documents taken as copies from its premises were confidential in nature. By letter of 24 April 1989 the Commission stated that it was well aware of the confidential nature of the documents in question and that matters relating to genuine business secrets would not be disclosed. The above-

mentioned investigations were supplemented by requests for information. That information was supplied by the applicant in a letter of 14 September 1989, in which it pointed out the confidential nature of the documents sent. On the occasion of those same investigations and requests for information Solvay also stressed, by its letters of 27 April and 18 September 1989, the confidential nature of its own documents.

7 By letter of 13 March 1990 the Commission then sent to the applicant a statement of objections made up of several parts:

- the first part refers to the factual background to the proceedings;
- the second part concerns the alleged infringement of Article 85 of the EEC Treaty by the applicant and Solvay (to which the corresponding Appendices II.1 to II.42 were addressed);
- a third part (with appendices marked 'III'), which refers to an infringement of Article 85 alleged against Solvay and CFK, and a fourth part (with appendices marked 'IV') referring to an infringement of Article 86 of the EEC Treaty alleged against Solvay do not form part of the statement of objections sent to the applicant; in that regard, the letter of 13 March 1990 contains only the following indication: 'Parts III and IV of the statement of objections do not concern ICI';
- a fifth part concerns an infringement of Article 86 alleged against the applicant accompanied by the corresponding Appendices V.1 to V.123;
- the sixth part deals with the question of possible fines.

- 8 After having referred to the importance of maintaining the confidentiality of the documents obtained pursuant to Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereafter 'Regulation No 17'), the Commission stated in its letter of 13 March 1990 that the evidence contained in Appendices II.1 to II.42 had been sent to each of the undertakings concerned and 'passages which may possibly relate to secret or confidential matters and which do not relate directly to the suspected infringement have been deleted from the documents'. Finally, the Commission revealed to each undertaking the replies given by the other undertaking under Article 11 of Regulation No 17 and stated that 'information which might be commercially sensitive has [again] been blanked out'.
- 9 In a telephone call made on 14 May 1990 the applicant's lawyer requested access to the Commission's file in so far as it related to the infringements alleged against the applicant. That request was apparently rejected by Mr J, an official in the Commission's Directorate-General for Competition (DG IV).
- 10 By letter of 23 May 1990, the applicant's lawyer repeated his request and referred to the reaction of Mr J who, he claimed, had refused to grant him any access to the file, even to documents which were not confidential. According to the lawyer, there had also been a refusal to provide a list of documents in the file. The Commission had stated that it was prepared only to accept requests to see specific documents. That restrictive attitude on the Commission's part was alleged to have adversely affected the preparation of the applicant's defence.
- 11 By letter of 31 May 1990, signed by Mr R of DG IV, the Commission refused to grant the applicant access to the full file. It stated that the applicant was not entitled to peruse on a speculative basis the internal commercial documents of other producers that were not offered in evidence. The Commission added that it had itself re-examined all those documents in order to check whether they were of such a kind as to exculpate the applicant, but had not found any such document;

furthermore, it offered to examine the files again if the applicant established 'good cause' by reference to a specific factual or legal point.

- 12 On 31 May 1990 the applicant also submitted a 'defence'. In it the applicant protested against the refusal to grant access to the file and annexed several new documents as evidence.
- 13 On 26 and 27 June 1990 the Commission held a hearing concerning the infringements alleged against the applicant and Solvay. Only the applicant took part in it. At the hearing it submitted additional observations, the 'presentation of its case' ('Article 85 presentation'), to which other documents were annexed.
- 14 At the hearing, the competent Commission department produced certain documents (documents designated 'X 1 to X 11') which all came from the applicant and which, according to the Commission, showed — like the documents already produced — the true nature of the relationship between the applicant and Solvay and weakened its defence. According to the department concerned, the Commission had not used them against Solvay because they were confidential. It had nevertheless decided to introduce them at that stage of the procedure not because they contained additional evidence compared with the documents annexed to the statement of objections, but in order to reply to the applicant's argument based on the alleged lack of documentary evidence. The hearing officer stated that the question of access to the file was a difficult problem. No one knew what the word 'file' meant and one day the Community judicature would have to interpret it. The problem should not therefore be discussed at the hearing.
- 15 According to the documents before the Court, at the end of the abovementioned procedure the college of Commissioners adopted Decision 91/297/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-A: Soda-ash — Solvay, ICI, OJ 1991 L 152, p. 1, hereafter 'the decision') at its 1 040th meeting held on 17 and 19 December 1990. That decision finds in substance that the applicant and

Solvay had been participating since 1 January 1973 until the beginning of 1989 in a concerted practice to share the western European soda-ash market by reserving continental western Europe to Solvay, and the United Kingdom and Ireland for the applicant; consequently it imposes a fine of ECU 7 million on each party.

16 At the same meeting the Commission also adopted

- Decision 91/299/EEC, relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay, OJ 1991 L 152, p. 21), in which it found in substance that Solvay had abused the dominant position which it held on the continental western European market and imposed on it a fine of ECU 20 million. The main elements of the infringement found in the decision are that Solvay used long-term agreements under which customers obtained from it the whole or substantially the whole of their requirements for soda-ash, loyalty rebate schemes on marginal tonnage, and group discounts and competition clauses ('English clauses') providing a mechanism by which competing offers received by a customer were to be notified by the customer to Solvay so that it could adjust its prices accordingly. In that context, point 31 of Decision 91/299 states *inter alia* that up to 1978 the three major Belgian glass producers had always purchased almost all of their requirements from Solvay and that in January 1978 the Belgian Government intervened to prevent the three glass producers from entering into a contract with a United States producer to purchase soda-ash from the United States;
- Decision 91/300/EEC, relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-D: Soda-ash — ICI, OJ 1991 L 152, p. 40), in which the Commission found in substance that the applicant had abused the dominant position which it held in the United Kingdom and imposed on it a fine of ECU 10 million.

- 17 The Court of First Instance took formal note in the context of the present case of Decisions 91/299 and 91/300 of 19 December 1990. It introduced them of its own motion into the present proceedings.
- 18 The decision contested by the present action was notified to the applicant by registered letter dated 1 March 1991.
- 19 It is common ground that the text of the notified decision had not been previously authenticated by the signatures of the President of the Commission or its Executive Secretary in accordance with the first paragraph of Article 12 of the Commission's Rules of Procedure 63/41/EEC of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9) provisionally maintained in force by Article 1 of Commission Decision 67/426/EEC of 6 July 1967 (OJ 1967 147, p. 1), as last amended by Commission Decision 86/61/EEC, Euratom, ECSC of 8 January 1986 (OJ 1986 L 72, p. 34) which were then in force (hereafter 'the Rules of Procedure').

Procedure before the Court

- 20 Those are the circumstances in which the applicant brought this action, lodged at the Registry of the Court of First Instance on 14 May 1991. Solvay also brought an action against the decision (T-30/91).
- 21 The written procedure before the Court of First Instance followed the normal course. After lodging its reply on 23 December 1991 the applicant lodged a 'supplement to its reply' on 2 April 1992 in which it put forward a new plea in law to the effect that the contested decision should be declared non-existent. Referring to statements made by representatives of the Commission during the oral procedure, which terminated on 10 December 1991, in the cases which gave rise to the

judgment of the Court of First Instance in 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 (hereafter ‘the PVC judgment’) and to two press articles which had appeared in the *Wall Street Journal* of 28 February 1992 and in the *Financial Times* of 2 March 1992, it claimed *inter alia* that the Commission had publicly stated that for years the practice of the college of Commissioners was not to authenticate acts adopted by it and that no decision in the past 25 years had been authenticated. In accordance with Article 48(2) of the Rules of Procedure, the President of the First Chamber (Extended Composition) extended the time for lodging the rejoinder. In its rejoinder the Commission submitted its written observations on that ‘supplement to the applicant’s reply’.

22 By order of 14 July 1993 the President of the First Chamber ordered that the present case and Case T-30/91 should be joined for the purposes of the oral procedure.

23 During March 1993 the Court of First Instance (First Chamber) decided — as measures of organization of procedure — to put to the parties several questions concerning *inter alia* the applicant’s access to the Commission’s files. The parties replied to those questions in May 1993. After the Court of Justice had ruled on the appeal against the PVC judgment on 15 June 1994 in its judgment in Case C-137/92 *P Commission v BASF and Others* [1994] ECR I-2555, the Court of First Instance (First Chamber, Extended Composition) adopted other measures of organization of procedure which included a request that the Commission produce *inter alia* the text of Decision 91/297/EEC of 19 December 1990 as authenticated at the time in the languages in which they are authentic by the signatures of the President and the Secretary-General and annexed to the minutes.

24 The Commission stated in reply that it considered that as long as the Court had not ruled on the admissibility of the plea alleging a failure to authenticate the decision the correct course was to postpone consideration of the substance of that plea.

25 In those circumstances, the Court of First Instance (First Chamber, Extended Composition), by order of 25 October 1994, based on Article 65 of its Rules of Procedure, ordered the Commission to produce the abovementioned text.

26 Following that order the Commission produced on 11 November 1994 *inter alia* the text of Decision 91/297/EEC in French and English whose covering page bears an undated form of authentication signed by the President and the Executive Secretary of the Commission. It is agreed that that form was affixed only after a period of more than six months after the bringing of the present action.

27 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance decided to open the oral procedure. At the hearing on 6 and 7 December 1994 the parties presented oral arguments and replied to the questions put by the Court. At the end of the hearing the President declared that the oral procedure was closed.

Forms of order sought

28 The applicant claims that the Court should:

- declare the application admissible;
- annul the contested decision in so far as it concerns the applicant;
- annul the order to terminate the infringement in Article 2 of the decision in so far as it concerns the applicant;
- cancel or reduce the fine imposed on the applicant by Article 3 of the decision;

- in the alternative, order the Commission, by way of preparatory inquiry, to permit the applicant's advisers to examine the files;
- in the further alternative, itself examine the files in order to exonerate the applicant through additional documents;
- order the Commission to pay the costs.

29 In the supplement to its reply the applicant claims that the contested decision should be annulled or, if the Court considers it appropriate, declared non-existent.

30 The Commission contends that the Court should:

- reject the application as unfounded;
- reject the arguments raised in the supplement to the applicant's reply as inadmissible and, in any event, unfounded;
- order the applicant to pay the costs.

31 It should be noted that following delivery of the judgment of the Court of Justice in Case C-137/92 P *Commission v BASF*, cited above, and in reply to a written question put by the Court of First Instance, the applicant stated that it no longer claimed that the decision should be declared non-existent, but merely sought its annulment. It also requested the Court to consider its pleas put forward in support of the form of order sought only with regard to annulment of the decision.

The claim for annulment of the decision

32 In support of its claim for annulment, the applicant raises a series of pleas in law which are divided into two separate groups. In the first group of pleas relating to the regularity of the administrative procedure, the applicant, in the supplement to its reply, pleads infringements of essential procedural requirements on the grounds that, contrary to Article 12 of the Commission's Rules of Procedure, the notified decision was not authenticated in due time by the President and by the Secretary-General of the Commission and amendments were made to the decision between the time of its adoption and its notification to the applicant.

33 In its application the applicant refers to a plea in law raised by Solvay in Case T-30/91 and claims that the Commission also infringed the principle of collegiate responsibility, since, contrary to Article 4 of its Rules of Procedure, discussion of the draft decision was not deferred, even though at least one of its members had requested such deferment in order to enable him properly to consider the file which had been sent to him at a late stage. Furthermore, it complains that the Commission sent confidential documents to Solvay, which infringes the principle that business secrets should be protected. Finally, it puts forward three pleas alleging infringement of the rights of the defence: the first infringement is the refusal to grant it access to the complete file; the second alleges prejudging, lack of objectivity and the Commission's general failure to respect the rights of the defence, as shown by the questionable deletions in the appendices marked 'II'; the third infringement is said to be a failure to respect its right to be heard, shown by the presence in the decision of findings not supported by evidence communicated to the applicant.

34 In the second group of pleas the applicant advances several pleas contesting the Commission's findings of fact and its legal assessment of them in the contested decision. Finally, it disputes the legality of the order to terminate the alleged infringement, that order amounting to an obligation to export, and also claims that the fine imposed was excessive.

- 35 The Court considers it appropriate to examine first the plea of infringement of the rights of the defence alleging that the applicant's request to inspect the complete file of the Commission was unlawfully refused.

Infringement of the rights of the defence through refusal to grant access to the Commission's file

Arguments of the parties

- 36 The applicant complains that, contrary to its statements in the Twelfth and Fourteenth Reports on Competition Policy, which established a procedure allowing access to the file in competition cases, the Commission rejected its request made during the administrative procedure that it should be allowed to inspect the Commission's file in order to ascertain whether it contained documents which might be of use in its defence. The Commission did not even send to it a list of the documents in the file so that it had no means of knowing the broad categories to which the documents in the file belonged.

- 37 The applicant states that it has no direct evidence showing why Solvay and other producers did not export to the United Kingdom or of the prices and costs of other continental western European producers, even though that evidence would clearly be relevant to assessing their strategies. It therefore claims that certain documents could have been relevant to the exercise of its rights of defence, namely

— documents showing the actual prices charged by Solvay and other producers to their main customers,

- documents showing requests made for supply of soda-ash from United Kingdom consumers to continental producers and the responses to those requests,

- documents in which Solvay and other continental producers considered the possibility of entering the United Kingdom market or in which they set out their reasons for not doing so.

According to the applicant, the Commission's argument that the file did not contain documents helpful to the applicant's defence is not credible. Solvay's lawyers had advised it to the contrary. Similarly, a number of its own documents were useful for Solvay's defence, for example the documents concerning the proceeding initiated against it under Article 86 of the Treaty. The applicant therefore had a right of access to documents which might call into question the case made against it. That right was infringed.

38 Pursuant to its plea contesting the appraisal of the facts in the contested decision, the applicant claims that, taken as a whole, the file relating to the present case gives a different picture from that which the Commission found. It refers *inter alia* to several documents which the Commission did not rely on in the proceeding under Article 85 but relied on solely in the proceeding initiated against it under Article 86 of the Treaty. According to the applicant, those documents show that on many occasions between 1984 and 1985 it assessed the opportunities for imports being made from the continent, that it envisaged retaliation against any imports, but that it took the view that on account of the high transport costs and reduced margins its entry into the continental market would not have been profitable and that incursion by continental producers onto the United Kingdom market was unlikely, but that it remained vigilant because of its vulnerability having regard to exchange rates and to production costs in continental western Europe (pp. 68 to 70 of the application). The applicant is in no doubt that the Commission has in its possession many other documents supporting those contentions, either from Solvay or from other continental western European producers, which it has not been able to use.

- 39 The consequence of dividing documents, at the statement of objections stage, into those relevant under Article 85 and those relevant under Article 86 of the Treaty was that the latter documents were communicated only to the producers against which proceedings were initiated under Article 86, even if they were also relevant for the purposes of applying Article 85 to other producers. The applicant had therefore not been able to use any of the documents marked 'TV' annexed to the fourth part of the statement of objections concerning an infringement alleged against Solvay under Article 86, whereas some of them would have been of use in its defence in the context of the infringement alleged against it under Article 85. The same applied to Solvay with regard to the documents marked 'V' annexed to the fifth part of the statement of objections.
- 40 Pursuant to its plea challenging the amount of the fine imposed on it the applicant again states that the infringement of Article 86 of the Treaty which it is alleged to have committed ought to have been taken into consideration. It states that, despite there being a 'considerable overlap' in the alleged infringements, the Commission treated them as entirely distinct.
- 41 In its reply the applicant claims that in a case where a concerted practice between Solvay and itself was alleged to exist, a document used against Solvay or which might exculpate Solvay was clearly equally relevant to it and concerned it as much as the other party to the alleged concerted practice. Furthermore, the documents used by the Commission to establish an infringement under Article 86 were also relevant to a finding of a concerted practice under Article 85 of the Treaty.
- 42 The applicant does not dispute that the Commission examined all the documents taken during its investigation in order to determine whether they could be regarded as exonerating it. However, since the Commission already exercises the function of investigator, prosecutor, judge and jury, it ought not also to act as counsel for the defence. The Commission's offer, in its letter of 31 May 1990, to re-examine the files was of no practical value, since it was made subject to the condition that the applicant establish 'good cause' without having the relevant documents. A system in which it is the Commission's officials themselves who decide which documents are likely to help an undertaking implicated in a competition case cannot satisfy the

requirements which must be observed if the rights of the defence are to be respected. It is unlikely that that examination was carried out in as thorough a manner or with the same care for the applicant's interests as if it had been performed by the applicant.

43 Prior to the adoption of the contested decision, the applicant had not therefore had access to the following five categories of documents:

- the documents marked 'IV' annexed to the fourth part of the statement of objections concerning the allegations against Solvay under Article 86 of the Treaty;
- the actual text of Solvay's reply to the statement of objections and the documents on which Solvay relied in support of that reply;
- the reply of the German producer, CFK, to the statement of objections;
- the replies of other producers to the letters sent to them under Article 11 of Regulation No 17 (except for those annexed to the statement of objections);
- the documents in the file, other than those annexed to the statement of objections, which had been seized by the Commission in the course of its investigation at Solvay and at four other Community producers of soda-ash.

44 The applicant also claims that, before lodging its application but after the adoption of the contested decision, Solvay informed it that the Commission's files contained a number of documents emanating from Solvay which would be most useful to it in order to reply to the statement of objections. In that context, the applicant refers to documents which it claims show that Solvay quoted its prices on numerous occasions in order to obtain orders for soda-ash from undertakings established in the United Kingdom, and carried out a price study following a request to that effect from Rockware, a company established in the United Kingdom (Annexes 12 and 13 to Solvay's application in Case T-30/91, a copy of which Solvay sent to the applicant). Furthermore, the applicant produced, as Annex 1 to its reply, documents sent, after its reply had been lodged, on a strictly confidential basis by the German producer Matthes & Weber which, it claims, show that Matthes & Weber quoted prices in order to obtain orders for soda-ash from undertakings established in the United Kingdom and that transport costs were the main reason for potential customers' rejecting those offers.

45 In the applicant's opinion, recent case-law is not inconsistent with the position adopted by it in the present case. The judgment in Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, according to which there is no obligation on the Commission to divulge its files to the interested parties, was given in a case in which the Commission decision at issue had been made before the adoption of the Twelfth Report on Competition Policy. The judgment in Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 (*AKZO II*), in which the Court confirmed the approach adopted in *VBVB and VBBB v Commission* concerns a question which is totally different from the one at issue in these proceedings, namely the question of access to an internal document which is therefore protected from any disclosure even under the terms of the Twelfth Report on Competition Policy. Moreover, certain judgments of the Court of Justice are more favourable to the rights of the defence. The applicant refers in this regard to the judgment in Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125 which imposed on the Commission a wider obligation to supply the details necessary to the defence; Case 107/82 *AEG v Commission* [1983] ECR 3151; Case C-49/88 *Al-Jubail Fertilizer v Council* [1991] ECR I-3187 and to the Opinion of Advocate General Dorman and the judgment in Case 85/87 *Dow*

Benelux v Commission [1989] ECR 3137, Case 374/87 *Orkem v Commission* [1989] ECR 3283 and Case 27/88 *Solvay v Commission* [1989] ECR 3355.

- 46 In so far as the Commission relies on the confidentiality of certain documents, the applicant observes that the application of the principle that information concerning undertakings should be treated confidentially cannot be applied in any way to reduce the rights of defence (judgment of the Court of Justice in Case 264/82 *Timex v Council and Commission* [1985] ECR 849, paragraphs 29 and 30). In any event, granting to independent lawyers access to sensitive documents in the file would not prejudice confidentiality. Furthermore, non-confidential summaries could also have been prepared. According to the applicant, the need to protect business secrets cannot in any case justify the Commission's general refusal to grant it access to the file in the present case. Such a need would justify at most a refusal to grant access to genuinely secret documents, separately identified and the subject of a non-confidential summary.
- 47 In that context the applicant also criticizes the Commission for having deleted from the documents which emanated from it and which were annexed to the statement of objections — in particular in Appendices II.25 and II.34 — passages which could not be used to support the Commission's position. An examination of the documents to which the applicant has had access shows the highly selective approach which the Commission adopted generally to the documents and without doubt also to the documents of other producers. According to the applicant, the passages deleted from the documents in question were not in reality confidential.
- 48 In so far as the Commission considers that because of practical considerations it would have been sufficient for Solvay to use the documents exculpating the applicant in its own defence and to send them to the applicant for use in its defence, the applicant claims that such cooperation might be prevented by commercial rivalry. To suppose that competitors will always wish to cooperate in the face of the

Commission would be a dangerous hypothesis which would certainly not be likely to ensure protection of basic rights. Thus, when the applicant was present on the soda-ash market (which is no longer the case, since it has disposed of its business in that market), there was inevitably a certain reluctance to disclose commercial documents. Before the decision, Solvay did not permit the applicant to have access to the documents annexed to its application in Case T-30/91 showing that Solvay quoted prices in order to obtain orders from undertakings established in the United Kingdom.

49 In reply to a written question from the Court of First Instance, the applicant stated that the fact that the Commission had not even provided it with a list of documents constituting the Commission's file had had extremely serious consequences upon its ability to defend itself and its right to be heard. That omission had prevented it from identifying amongst the documents which would have been mentioned on the list those which might have been of use in its defence.

50 The Commission contends that it sent to the applicant all the documents on which it based its objections and its final decision. The applicant's contention to the contrary has no factual basis. Moreover, even if the Commission had in fact relied on a document not disclosed to the applicant, that would not necessarily result in the whole of the procedure being irregular, but merely in the document in question being disregarded, the only consequence of which would be to raise the question whether the other documents relied on by the Commission were sufficient evidence for its findings. Even if the Commission had really selected documents, that cannot constitute a procedural irregularity because the applicant has not adduced the slightest evidence to show bad faith on the part of the Commission's officials (judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 55).

51 In so far as the applicant complains that it was not allowed to examine the commercial documents on the file in order to ascertain whether any of those documents

might exculpate it, the Commission — referring to the case-law of the Court of Justice and of the Court of First Instance (*VBVB and VBBB v Commission*, *Akzo II* and *Hercules v Commission*) — rejects even the principle that there is an obligation to disclose its files. Even if such an obligation could follow from the rules which the Commission itself set out in its Twelfth Report on Competition Policy, any failure to observe that obligation — more limited in scope than that of the obligation to respect the rights of defence — cannot constitute an infringement of an ‘essential’ procedural requirement within the meaning of the first paragraph of Article 173 of the Treaty and accordingly would not justify annulment of the whole of the contested decision. Furthermore, as is apparent from the judgment of the Court of First Instance in Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 35, in order to have its complaint of ‘insufficient access to the file’ upheld, the undertaking concerned would have to show that there is sound evidence to support the belief that a document exists and that the Commission has in fact deliberately hidden that document.

52 Finally, it must be proved that the result of the administrative procedure could have been different if the applicant had had access to the file (judgment in *Hercules v Commission*, paragraph 56). In the present case, the documents which the applicant complains were withheld from it were not used by the Commission against any of the undertakings concerned; in that respect, the present case does not raise the question whether the documents used against one party to an alleged cartel must be made available to the other parties, so that each defendant has access to documents used against each of the others.

53 The Commission adds that the categories of documents cited by the applicant by way of examples were not relied on by the Commission in its objections against the applicant, that they do not contain any evidence of such a nature as to exculpate it, and that they essentially concern matters which by their very nature are both subject to an obligation of professional secrecy and are also business secrets. Those documents could therefore not have been disclosed without infringing the rights of third parties to the protection of their legitimate commercial secrets. The Court has pointed out on several occasions the importance of the confidential treatment of any information provided to the Commission under Regulation No 17 (Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 14, Case 145/83 *Adams v Commission* [1985] ECR 3539). In its judgment in Case 53/85

Akzo v Commission [1986] ECR 1965 ('Akzo I'), at paragraph 28, the Court refused a third-party complainant the right to have access to documents containing business secrets. The Commission considers that the applicant's interest in examining documents which the Commission has not relied on against it is even less than a complainant's interest in examining documents upon which the Commission has in fact relied in the procedure. Inasmuch as the applicant relies on the judgment of the Court of Justice in *Al-Jubail Fertilizer v Council*, cited above, the Commission contends that that case concerned a situation in which, unlike in the present case, the Community institution in question had in fact relied on material not disclosed to the undertaking concerned.

54 In the Commission's view, the necessary compromise between the interests in question is attained by limiting disclosure to third parties to that which is strictly necessary in the conduct of the investigation. That test does not require the disclosure of documents on which the Commission does not rely. The undertakings concerned have no right to peruse, on a wholly speculative basis, the internal documents of their competitors which are not used against them. In that context, the Commission, referring to paragraph 5 on page 3 of its letter of 31 May 1990, states that it itself carefully re-examined all the documents obtained from other producers.

55 In so far as the applicant refers to documents emanating from Solvay or Matthes & Weber, which it assumes would have been very useful for its defence to the statement of objections, the Commission contends that the Solvay documents, which are discussed in detail in Case T-30/91, in no way weaken the finding that a concerted practice existed between the applicant and Solvay. In the Commission's opinion, the Matthes & Weber documents do not provide even the slightest evidence to support the applicant's argument that high transport costs were the main reason for the refusal by potential customers in the United Kingdom to accept offers made by Matthes & Weber.

- 56 According to the Commission, the preparation of non-confidential summaries, to which the applicant refers in that context, would serve no purpose, since the information which the applicant asked to be communicated to it was the very information which is confidential (prices and actual costs of competitors, names of customers, explanations of their commercial policies). Moreover, in a letter of 14 September 1989 to the Commission, the applicant stressed that similar information provided by the applicant itself was strictly confidential. As regards the suggestion of disclosing commercially sensitive information to lawyers only, the Commission states that it does not see how such limited disclosure could assist an undertaking's defence, since the information would have to be discussed with its commercial services in order for its significance to be assessed.
- 57 Finally, the Commission states that practical considerations must also be taken into account. If the documents emanating from Solvay had in fact shown that Solvay was not party to the concerted practice alleged against it and the applicant, Solvay would certainly not have hesitated to refer to them in its defence to the statement of objections; it would, furthermore, have been greatly in its interest to send those documents to the applicant. In any event, it must be shown that the failure to disclose documents might have been of real importance for the applicant. In that regard, the central question for the applicant was to know why the applicant itself did not sell soda-ash in continental western Europe. It is difficult to see why other producers should be better informed than the applicant as to the actual reasons for its policy. As regards the reasons why other continental producers (besides Solvay) did not sell into the United Kingdom, the applicant itself stated during the procedure that documents of that type were irrelevant.
- 58 In reply to various written questions from the Court of First Instance, the Commission stated that the expression 'access to the file', which was not used in the relevant legislation, meant the right of the undertaking concerned to be heard in relation to the objections made against it, as followed from the judgment of the Court of First Instance in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, paragraph 38. The essential condition ought therefore to be that that undertaking has had sent to it the allegations against it and the evidence used by the Commission to support those allegations. A further point was whether it had seen other documents not

used as evidence. In *Hercules v Commission*, cited above, the Court had recognized that the Commission could be obliged to disclose certain other documents, subject to preserving confidentiality, and that reasoning had been based on the Commission's statements in its Twelfth Report on Competition Policy. Since the procedure in the present case had been initiated in March 1990, almost one year after publication of the Eighteenth Report on Competition Policy, the self-imposed rule applicable in the present case was no longer that resulting from the statements made in the Twelfth Report, but that provided for cases of that type in the Eighteenth Report. In those circumstances, no-one had had any reason to expect the Commission not to apply its more recent statements, which had referred specifically to the problems of disclosing documents in procedures involving several competing firms.

- 59 The Commission stated that it was not possible to start with the assumption that in each procedure instituted under Article 85 or Article 86 of the Treaty there was one physical file containing all the documents collected in the case and that 'access to the file' meant the right to read that 'file' and copy it from beginning to end (subject to recognized exceptions relating to confidential documents). Instead, there were two ways of approaching the question of defining the 'file':

— The first approach, which the Commission thought was the right one, was to take the expression 'the file' to mean the documents upon which the decision was to be taken. The vital question was then whether the undertaking had seen the whole of the file and therefore whether the Commission had placed in the file everything which allowed the undertaking to exercise its right to be heard. On that view, the file was made up, at the critical moment, of the statement of objections, the documents upon which the Commission relied in order to support the allegations against the undertaking in the statement of objections and anything on which the Commission did not rely but which was clearly exculpatory. All other material which the Commission might have obtained in the course of its investigations but which did not fall within one of those categories was not part of the file, so that it was not necessary to inquire whether the party had had access to it.

— The second approach was to say that ‘the file’ was everything which the Commission had obtained in the course of its investigations, even if it had not used it in drawing up the statement of objections. However, by virtue of Article 20 of Regulation No 17 and applying the *Hercules* case, there were documents which the undertaking concerned could not see because the Commission was required not to reveal them. The practical consequence was that the undertaking had access to the same documents as under the first approach.

60 The Commission then stated that there were two alternative methods of giving access to the file:

— It could first of all send the statement of objections and then fix the dates on which the undertaking could see the documents which were accessible to it. For that purpose, it might well be of use to have a list of documents with the statement of objections, so that the persons concerned could have an idea in advance of what they could (or could not) see. In *BPB Industries and British Gypsum v Commission* the Court of First Instance had referred to that method at paragraph 29 of its judgment citing the Commission’s Twelfth Report on Competition Policy.

— It was also possible to send the documents with the statement of objections. In that case there was no further need for the undertaking to have a list of the documents. It was already in possession of everything that it would be able to see. Providing a list of documents was therefore only a substitute for sending documents with the statement of objections.

61 As regards, more particularly, the present case, the Commission stated that the applicant immediately received the material on which the Commission had relied because it had chosen the method whereby the relevant documentary evidence was sent with the statement of objections. Consequently, the applicant had had ‘access to the file’. What the applicant and Solvay had not had was the opportunity to

examine the whole of the material collected by the Commission, either because it was not relevant or because it contained confidential information. Furthermore, the only basis on which a document other than the documents sent with the statement of objections could have been disclosed to the applicant was for it to show that that document was important for an aspect of the case, thereby giving the Commission an indication as to what it should look for. Finally, the applicant had never asked specifically to see the documents taken from Solvay; in particular, it had not put forward any arguments concerning the consequences of an abuse by Solvay of any dominant position held on the continental market as regards the assessment of the evidence relied on against the applicant.

62

The Commission added that in this instance documents seized from the premises of the applicant and other undertakings filled dozens of files, each one containing some 200 pages. Those documents were classified according to the place where they were found and not according to whether they were relevant to Article 85 or Article 86. The following 'files' were involved:

- (i) file 1: internal documents, such as drafts of the decision
- (ii) files 2-14: Solvay, Brussels,
- (iii) files 15-19: Rhône-Poulenc
- (iv) files 20-23: CFK

(v) files 24-27: Deutsche Solvay Werke

(vi) files 28-30: Matthes & Weber

(vii) files 31-38: Akzo

(viii) files 39-49: ICI

(ix) files 50-52: Solvay Spain

(x) files 53-58: 'Akzo II' (additional visit)

(xi) file 59: visit to Spanish producers and a further visit to Solvay Brussels

(xii) There were about ten further files containing the correspondence under Article 11 of Regulation No 17.

⁶³ The Commission conceded that it had not drawn up a list of all the documents concerning the applicant. However, it considered that the applicant had suffered no disadvantage as a result. Almost all the documents used in the proceedings under

Article 86 of the Treaty came from the applicant itself, which obviously had a set of its own documents to meet all eventualities.

64 In that context, the Commission pointed out that the lists of documents, when drawn up, were not detailed. If such a list were to have been drawn up in the present case, in the Commission's opinion, it would not have been of any use to the applicant: it would at most have contained a number of headings or page numbers with a very terse description of the corresponding document. Furthermore, the applicant had been aware of the content of files 39 to 49 since they were its own documents. The content of the other files had also been known to it, at least in so far as the Commission had relied on documents contained in them in order to substantiate its allegations against the applicant, and had therefore annexed them to the statement of objections. The remaining documents had been confidential pursuant to Article 20 of Regulation No 17 and had been the subject of an express request for confidential treatment in the applicant's letter of 13 April 1989 and by Solvay's letter of 27 April 1989. The applicant would therefore not have been able to see them, whether or not it had received a list of documents. Finally, since the Commission had indicated to the applicant, in its letter of 31 May 1990, which undertakings it had visited, nothing had prevented the applicant from approaching them directly, if it had considered that they had documents which might be of use to it.

Findings of the Court

Admissibility and scope of the plea

65 The Court finds, first of all, that the plea that access to the file was denied must be divided into three parts. The applicant claims, first, that it was not able to see the

documents marked 'IV' annexed to the fourth part of the statement of objections sent to Solvay under Article 86 of the Treaty, although the consequence of the relationship existing between the objections raised by the Commission under Article 86 and those raised under Article 85 is that the documents relating to the proceeding under Article 86 may be relevant for its defence in the present case, since the effects of the two alleged infringements overlap to a very considerable extent (see, in particular, paragraphs 8.9, 8.10 and 14.3.7 of the application). Secondly, the applicant claims that it has not had access to the parts of the file containing other documents emanating from Solvay which might have been useful in its defence (see paragraphs 2.8.3 and 2.8.7 of the application).

66 Finally, the applicant alleges that, just like Solvay, the other producers of soda-ash in the Community have never exported soda-ash to the United Kingdom. The documents emanating from those producers may reveal the reasons, relating to price or costs, for which they refrained from such trade. The applicant claims that those documents might therefore be relevant in its defence against the objection that it had participated with Solvay in a concerted practice by which they refrained from exporting their products to continental Europe and the United Kingdom respectively (see, in particular, paragraphs 2.8.3 and 2.8.7 of the application).

67 Pursuant to the second branch of the plea, the applicant submits that the Commission did not even disclose to it a list of the documents which were in the file (see paragraph 2.8.2 of the application).

68 The Court considers that, contrary to the doubts expressed by the Commission, those indications — which were developed and elaborated in the reply and at the hearing — satisfy the requirement for a summary of the pleas in law which must be contained in the originating application pursuant to the first paragraph of Article 19 of the Statute of the Court of Justice of the EC and Article 38(1)(c) of the Rules of Procedure of the Court of Justice, applicable when the action was brought.

Substance

69 The Court observes that the purpose of providing access to the file in competition cases is to enable the addressees of statements of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence (judgments of the Court of First Instance in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others v Commission* [1992] ECR II-2667, paragraph 38, and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 30). Respect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. The proper observance of that general principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraphs 9 and 11).

70 The Court considers that an infringement of the rights of the defence must therefore be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertaking concerned is alleged to have committed. In order to determine whether the plea in question, considered in its three parts, is well founded, it is therefore necessary to examine the burden of the substantive objections raised by the Commission in the statement of objections and in the contested decision.

— The Commission's objections and the evidence used to support them

71 In that regard, first, the complaint in the statement of objections can be summarized to the effect that from at least 1 January 1973 the applicant and Solvay participated in a concerted practice in that they continued, in concert, to observe a

previous arrangement defining their respective sales territories with respect to soda-ash by refraining from competing with each other. The Commission accepted that it did not have any direct evidence of the existence of an express agreement between the applicant and Solvay, but considers that there is ample evidence of collusion, from which it can be inferred that the original arrangement, namely an agreement called 'Page 1000' concluded in 1949, continued to be implemented in the form of a concerted practice. The documentary evidence is said to show that:

- the relationship between the applicant and Solvay continued to be one of complete cooperation, being one of partnership more than of competition, intended to coordinate their global strategy in the soda-ash sector and to avoid any conflict of interest between them;
- the basis for that continuous relationship was the maintenance of commercial policies adopted in the Brunner, Mond & Co era, namely the mutual recognition of exclusive spheres of activity. Although the previous arrangement was formally terminated by an exchange of letters of 12 October 1972, that relationship had continued, since neither of the parties had ever competed with the other on its market within the Community.

72 The Commission stated, again in the statement of objections, that it regarded the existence of 'joint production' agreements or 'purchase for resale' agreements whose purpose was to help the applicant to comply with its supply obligations during the period from 1983 to 1989 to be 'another important aspect of the close commercial relationship' between the applicant and Solvay. However, the Commission did not consider that those agreements constituted in themselves separate infringements.

73 It should be added that the Commission stated in the statement of objections that the western European soda-ash market was, at the material time, still characterized by separation along national lines, producers tending generally to concentrate their

sales in the Member States where they had production facilities. In particular, there were no imports by Solvay, or by another Community producer, which were capable of competing with the applicant in the United Kingdom. The principle involved in that instance was the so-called 'home market' principle. The statement of objections refers in that context to documents concerning a number of other producers or emanating from those producers (pp. 11 and 12, documents II.18 to II.24), from which it appears that for many years all soda-ash producers in the Community accepted that principle, which was, moreover, still in force for the applicant and Solvay in 1982. The Commission added that, although there are certain indications tending to show that in 1982 Solvay and Akzo concluded an agreement concerning Akzo's activities in the soda-ash sector in Germany (Appendix II.21 to the statement of objections), that evidence was not regarded as sufficient to justify the initiation of a proceeding under Article 85 of the Treaty against Solvay and Akzo.

74 In order to prove those objections the Commission annexed to the statement of objections sent to the applicant a series of documents marked 'II'. Only three of those documents (II.35, II.36 and II.38) are, at least in part, identical to the documents marked 'IV' used in the proceeding against Solvay under Article 86 (IV.28, IV.29 and IV.30). All the other documents marked 'IV' were therefore not communicated to the applicant.

75 Secondly, as regards the objections set out in the contested decision, it should be observed that, according to Article 1 of the decision, the concerted practice had existed from 1 January 1973 until at least the institution of the proceedings. In order to establish that concerted practice the decision bases itself, in point 58 of the recitals, in substance on a combination of seven factors. As is apparent from that passage from the decision, as explained by the Commission itself at the hearing before the Court of First Instance, those factors may be summarized in four elements as follows:

- the absence of any trade in soda-ash by the applicant and by Solvay across the English Channel throughout the period in question, namely for more than 16 years, which is said to be the result of each producer's policy;

- the precise coincidence of that lack of competition with the terms of the arrangements previously concluded between the applicant and Solvay, most recently in the so-called 'Page 1000' agreement of 1949, the formal termination of which did not result in any change in the practice of market separation;
- the conclusion and implementation of 'purchase for resale' agreements consisting of the delivery of soda-ash by Solvay to the applicant from 1983 to 1989, which are said to be 'indicative' (see footnote 1 to point 58 of the decision);
- frequent contacts between the applicant and Solvay designed to coordinate their strategy in the soda-ash sector.

It should be added that in order to prove observance of the 'home market' rule point 29 of the decision refers to documents seized at several producers.

— The applicant's defence

⁷⁶ In order to establish whether the applicant's opportunities for defending itself against those objections were affected, it should first be observed that a concerted practice is characterized by the fact that it substitutes for the risks of competition cooperation between undertakings, which lessens each undertaking's uncertainty as to the future attitude of its competitors. If that uncertainty is not lessened, there is no concerted practice (see the judgment of the Court of Justice in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraphs 62 to 65).

77 As to the applicant's defence, it should be observed that the applicant claimed in substance that its conduct was explained by its independent commercial policy and that consequently a concerted practice was not proven. That defence is set out in the reply to the statement of objections (see the 'defence' of 31 May 1990, p. 19 et seq., paragraph 12 above). The applicant repeated it in the observations submitted before the hearing ('Article 85 presentation', p. 3 et seq., paragraph 13 above) and at the hearing itself on 25 and 26 June 1990 (p. 9 et seq. of the minutes). That defence was repeated before this Court in its plea contesting the Commission's appraisal of the evidence in the contested decision.

78 Consequently, it is necessary to examine, in the light of the case-law of the Court of Justice on the concept of a concerted practice, whether that defence of the applicant was affected by the non-disclosure of the documents referred to in the three parts of the plea in question. In that context, it is not for the Court of First Instance to rule definitively on the evidential value of all the evidence used by the Commission to support the contested decision. In order to find that the rights of the defence have been infringed, it is sufficient for it to be established that the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such an influence can therefore be established if a provisional examination of some of the evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded. If it were proved that the rights of the defence were infringed, the administrative procedure and the appraisal of the facts in the decision would be defective.

79 In that context, the Commission stated in reply to a written question from the Court that it was necessary in particular to refer to the evidence from periods before 1973 annexed to the statement of objections, namely the old market-sharing agreements, in particular the so-called 'Page 1000' agreement; that evidence may be used to support the allegation of a subsequent infringement. It explained that it had not called into question the period from 1962 to 1973 mainly because the United Kingdom had not been a member of the Community during that period and because any finding of an infringement would have required a different analysis of the effects on intra-Community trade.

80 It follows that, in order briefly to assess the conclusiveness of the evidence used by the Commission to condemn the applicant, three separate periods must be distinguished. Up to the entry into force of the EEC Treaty and that of Regulation No 17 in 1962 the conduct of the applicant and Solvay must be regarded as lawful. With regard to the following period which terminated on 31 December 1972, the old market-sharing agreements have not been formally challenged by the Commission under the adversarial procedure provided for by Regulation No 17, neither on account of their objects or effects, nor even on account of the uncertainty as to whether they were terminated in 1972. Moreover, such a complaint cannot be presumed to be well founded, since the Commission itself states that it would have needed a specific economic analysis in addition to the one performed in the present case. The third period corresponds to the period of the infringement found in the decision.

81 In order to justify the use of the old agreements as evidence showing the existence of a subsequent infringement the Commission relies on the judgment in Case 51/75 *EMI Records v CBS United Kingdom* [1976] ECR 811, paragraph 30, in which the Court of Justice held that in order for Article 85 to apply to a case of agreements which are no longer in force it is sufficient that such agreements continue to produce their effects. The Commission adds that the *EMI Records* case involved an agreement which was lawful when concluded, whereas the present case involves agreements which were unlawful from the outset. Consequently, since the applicant and ICI continued to behave in accordance with their — now cancelled — market-sharing agreements after their formal termination, those agreements must be considered to have continued to produce their effects.

82 In that regard it should, however, be noted that the *EMI Records* case, which came before the Court of Justice pursuant to Article 177 of the Treaty, does not concern a procedure such as that which is the subject of the present case, which the Commission initiated under Regulation No 17 and at the end of which it imposed a fine. Furthermore, the *EMI Records* case is not characterized by the existence of a period of 10 years during which no objections were raised to the conduct otherwise objected to and for which the presumption of innocence therefore militates in favour of the undertaking concerned. On the contrary, it involved a dispute

pending before a national court between two owners of trademarks which related to the extent of their rights in the light of the competition rules and did not concern the imposition of a fine. Consequently, the Court of First Instance considers that the considerations underlying the EMI/CBS judgment invoked by the Commission cannot be applied in order to decide the outcome of these proceedings.

83 In the present case, the presumption of innocence militating in favour of the applicant requires that the Court assume that up to 31 December 1972 no infringement can be found to have been committed by the applicant. Accordingly, evidence dating from before 1962 referring to conduct which was lawful at that time cannot show that as from 1 January 1973 the applicant and Solvay unlawfully acted in concert. The contrary argument for which the Commission contends fails to take account of the possibility that the two undertakings wished to observe the Treaty and abandoned their previous cooperation, a possibility which is not excluded if the 'formal' termination of the previous agreements in 1972 is taken into consideration. In the absence of other evidence, the Commission's contention amounts to presuming that from a date fixed by the Commission the applicant and Solvay began to infringe the provisions of the Treaty by implementing a concerted practice. Such a way of proving an infringement is incompatible with the respect for the presumption of innocence.

84 As regards the evidence relating directly to the years during which, according to the Commission, the concerted practice was implemented, it must be held that the applicant's purchases for resale from Solvay took place between 1983 and 1989. However, the applicant disputed that those contracts showed unlawful contacts with Solvay, since it had had recourse to the same purchases from other producers like Akzo, to which the Commission had not objected. According to the applicant, they were therefore perfectly normal commercial transactions. Furthermore, the Commission itself stated that those purchases for resale did not constitute in themselves separate infringements (footnote 1 to point 58 of the decision). It should be added that documents show that meetings took place between the applicant and Solvay between 1985 and 1988 (see point 30 of the decision and the documents numbered II.30 to 11.42). There are no documents relating to meetings with regard to the period in which the Commission claims the infringement began. It is at least

questionable that in such a situation documents dating from a later period would prove that the infringement had already commenced almost 10 years before, especially since document II.5 of 10 September 1982 refers to a new balance in the relationship ('new arms length relationship') between the applicant and Solvay, which might weaken the assumption that a concerted practice existed.

85 Consequently, it would appear that — as in the *Ahlström Osakeyhtiö* case — the proving of parallel and passive conduct on the applicant's and Solvay's part is particularly important if any concerted practice is to be proved. In that context, the Court of Justice held that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation of such conduct. The Court concluded that it was necessary to ascertain whether the parallel conduct alleged by the Commission could not, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation, in other words whether the evidence of parallel conduct constituted a firm, precise and consistent body of evidence of prior concertation (see Case C-89/85 *Ahlström Osakeyhtiö and Others*, cited above, paragraphs 70 to 72).

86 On account of the weakness of the documentary evidence relating in particular to 1973 and the years immediately following it, the Commission should, in order to demonstrate to the requisite legal standard the concerted practice alleged against the applicant, have therefore been prompted to make, in the statement of objections, an overall and detailed economic assessment, in particular of the relevant market and the size and conduct of the undertakings active on that market. The Court considers that that assessment, if it was to be complete, objective and balanced, could not have left out of account either the strong positions held by the applicant and Solvay on the respective geographical markets, or the loyalty arrangements with their clients, for which they were criticized in the course of the proceedings initiated under Article 86 of the Treaty, or the conduct of the other Community soda-ash producers on the continental market.

— First part of the plea: non-disclosure to the applicant of the documents marked 'IV'

87 With regard to the first part of the plea, the Court considers that it follows from the foregoing that some of the documents marked 'IV' which were not communicated to the applicant were capable of substantiating its defence. The documents referring to the alleged loyalty arrangements with Solvay's customers might possibly help to provide an explanation for the applicant's alleged passive and parallel conduct other than one based on unlawful concertation. In the context of a market whose structures, in particular the setting up of production sites and neighbouring sites where soda-ash is used by customers, had developed since the last century and on which transport costs apparently played an important role, the documents showing that Solvay may have induced loyalty from its customers by an elaborate system of rebates could have been used by the applicant to rebut the contention that a concerted practice existed. Those documents could have shown that the passive conduct alleged against the applicant was based on its own independent decisions, motivated by the difficulty of penetrating a market, access to which was blocked by an undertaking in a dominant position. That analysis is reinforced by the consideration that some of the evidence on which the Commission relied might not have had the probative value or might, at least, have had weaker value than that which the Commission attributed to it (see paragraphs 79 and 81 above). In reply to a written question from the Court, which was therefore after the administrative procedure, the applicant argued in effect that Solvay's dominant position on the continental market 'was clearly an important factor in ICI's unilateral decision' not to engage in 'an active marketing strategy' towards that market.

88 It is true that the Commission alleges that Solvay abused a dominant position only as from 1983. However, the Commission itself considers that that dominant position of Solvay was a direct extension of the strong position which it had established through the pre-1973 market-sharing agreements; moreover, Decision 91/299/EEC refers explicitly to indications showing Solvay's economic power which date from the pre-1983 period, as for example Solvay's contractual

relationships with the large Belgian glass producers 'up to 1978' or the Belgian Government's intervention in January 1978 on behalf of Solvay (see paragraph 16 above).

89 Since the Commission states in reply to a written question from the Court that it is, rather, the fact that each of the two dominant undertakings kept out of the other's market which ensured the dominant position of each undertaking on 'its own market', it should be repeated that in the present context it is not a question of definitively ruling on that question of substance but of verifying whether the applicant's opportunities for defending itself were affected by the circumstances in which the statement of objections was sent to it and by the circumstances in which the Commission then examined the case.

90 It should be added, of course, that the applicant was aware of the strong position held by Solvay on the continental market (see the statement on page 10 of the minutes of the hearing: 'Solvay (is) by far the largest (producer) in the EEC') and also the existence of parallel proceedings against Solvay under Article 86. Point 3 of the summary of the objections at the beginning of the statement of objections refers to the initiation of those proceedings against Solvay and the objection to its loyalty rebate system and discounts. However, those factors do not invalidate the finding that at least some of the documents marked 'IV' might have been of use in its defence.

91 In that context the Commission, referring to its letter of 31 May 1990, observes that although its officials themselves examined and re-examined all the documents in its possession, they found no evidence which might exculpate the applicant, so that there was no point in disclosing them or supplying a list. In that regard, it should be stated that in the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are useful for the

defence. Where, as in the present case, difficult and complex economic appraisals are to be made, the Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed.

- 92 That is particularly true where parallel conduct is concerned, which is characterized by a set of *a priori* neutral actions, where documents may just as easily be interpreted in a way favourable to the undertakings concerned as in an unfavourable way. The Court considers that in such circumstances any error made by the Commission's officials in categorizing as 'neutral' a given document which, as an item of irrelevant evidence, will not then be disclosed to the undertakings, must not be allowed to impair their defence. The opposite view, for which the Commission contends, would mean that such an error could not be discovered in time, before adoption of the Commission's decision, except in the exceptional case where the undertakings concerned cooperated spontaneously, which would present unacceptable risks for the sound administration of justice (see paragraph 96 below).

- 93 Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, the Commission's view cannot be upheld. The Court considers that it is not acceptable for the Commission alone to have had available to it, when taking a decision on the infringement, the documents marked 'IV', and for it therefore to be able to decide on its own whether or not to use them against the applicant, when the applicant had no access to them and was therefore unable likewise to decide whether or not it would use them in its defence. In such a situation, the rights of defence which the applicant enjoys during the administrative procedure would be excessively restricted in relation to the powers of the Commission, which would then act as both the authority notifying the objections and the deciding authority, while having more detailed knowledge of the case-file than the defence.

- 94 Consequently, in the present case, the Commission was not entitled to separate the evidence — on the one hand, as regards the infringement alleged under Article 85 and, on the other hand, as regards that alleged under Article 86 — in the statement of objections, that separation continuing into the subsequent examination of the case and into the deliberations of the college of Commissioners with the result that separate decisions were adopted. That manner of proceeding prevented the applicant from examining the documents marked 'IV' which were used only against Solvay. Subject to the arguments considered below, it follows that as from notification of the statement of objections the Commission infringed the applicant's rights of defence by excluding from the proceeding documents which it possessed and which might have been of use in the applicant's defence. It should be added that such an infringement of the rights of the defence is objective in nature and does not depend upon whether or not the Commission's officials acted in good or bad faith.
- 95 To rebut a finding that the defendant's rights were infringed, the Commission contends, first, that Solvay could have sent to the applicant the documents emanating from it and which were useful in its own defence. However, such an approach does not take account of the fact that the defence of one undertaking cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations. Since the Commission is responsible for the proper investigation of a competition case, it may not delegate that task to the undertakings, whose economic and procedural interests often conflict. In the present case, the applicant might have tried to show that Solvay held a dominant position, whereas Solvay had every interest in denying that.
- 96 Consequently, in determining whether the rights of the defence were infringed it does not matter that the applicant and Solvay exchanged some documents, initially during the administrative procedure when the applicant sent documents to Solvay (see paragraph 12 of the judgment of this date in Case T-30/91 *Solvay v Commission* [1995] ECR II-1775), and above all from the time when the two companies were no longer competitors on the relevant market, namely at the end of 1991. Such cooperation between the undertakings, which was only haphazard, cannot in any case lessen the Commission's own duty to ensure that during the investigation of an infringement of competition law the rights of defence of the undertakings concerned are respected.

- 97 The Commission also referred to the confidentiality which it had to observe in order to protect the business secrets of third-party undertakings, in particular those of Solvay, which, in its letters of 27 April and 18 September 1989, had invoked the confidential nature of all documents emanating from it which had come into the Commission's possession. It adds that the applicant also claimed similar protection in its letters of 13 April and 14 September 1989.
- 98 In that regard, it must be observed first of all that, according to a general principle which applies during the course of the administrative procedure and which is expressed in Article 214 of the Treaty and various provisions of Regulation No 17, undertakings have a right to protection of their business secrets (see the judgments of the Court of Justice in *Akzo I*, cited above, paragraph 28, and in *Case C-36/92 P SEP v Commission* [1994] ECR I-1911, paragraph 36). However, the Court of First Instance considers that that right must be balanced against safeguarding the rights of the defence.
- 99 As the Commission indicated in reply to a question put to it by the Court, in such circumstances it had two possible courses. It could either annex to the statement of objections all the documents which it wished to use to demonstrate the objections raised, including evidence which might 'clearly' be considered to be evidence in favour of exculpating the undertaking concerned, or send that undertaking a list of relevant documents and grant it access 'to the file', that is to say, allow it to inspect the documents at the Commission's premises (see also the Commission's Eighteenth Report on Competition Policy published in 1989, p. 53).
- 100 In the present case, the Commission cannot justify its outright refusal to make disclosure by claiming that in the abovementioned letters the applicant and Solvay had themselves requested confidential treatment of their documents. Those letters are worded in very general terms which may be interpreted as meaning that only the confidentiality of certain sensitive information contained in those documents was

to be safeguarded, by, for example, deleting the relevant passages. Moreover, the Commission itself interpreted the applicant's letter in that sense, since in its reply of 24 April 1989 it expressly stated that if those documents were material in proving an infringement they would be disclosed to the undertakings concerned and only parts relating to true business secrets would be deleted.

101 The Commission in fact used the same documents, in their full form or in expurgated form, in the course of the three separate proceedings initiated under Articles 85 and 86 of the Treaty against the applicant and Solvay in the appendices common to both which were marked 'II', on the one hand, and the separate appendices marked 'IV' and 'V', on the other hand. That is shown, for example, by the partially identical nature of Appendices IV.19 and V.23, IV.24 and V.34, IV.29 and V.41, IV.28 and II.35, V.40 and II.34 and also V.32 and II.33. Thus, when it considered it to be necessary, the Commission took no account of the supposedly general confidentiality of the documents in question.

102 Consequently, the fact that the Commission excluded the documents marked 'IV' from the proceeding directed against the applicant can likewise not be justified by the need to protect Solvay's business secrets. The Commission could have protected those secrets by deleting the sensitive passages from the copies of the documents sent to the applicant, in accordance with DG IV's general practice in this area, which was even followed in part in the present cases.

103 If protecting Solvay's business secrets or other sensitive information by preparing non-confidential versions of all the documents in question proved difficult, the Commission could have used the second method, that of sending to the applicant a list of documents marked 'IV'. In that case, the applicant could have requested access to specific documents contained in the Commission's 'files'. Before granting

it access to documents which may have contained business secrets, the Commission could have contacted Solvay in order to ascertain which passages referred to sensitive information and was therefore to be kept from the applicant. It could then have had access to the documents with Solvay's business secrets deleted.

104 The purpose of having such a list meant that the information contained in it should provide to the applicant information sufficiently precise to enable it to ascertain, with knowledge of the facts, whether the documents described were likely to be relevant for its defence. As regards questions of confidentiality, the applicant had to be able to identify the specific document from Solvay which was claimed to be non-accessible in order to be able to discuss with Solvay whether it was prepared to waive confidentiality. Contrary to the Commission's claims, it was not therefore sufficient for the applicant to have known that Solvay had been the subject of an investigation by the Commission.

105 It follows from the foregoing considerations that the confidential treatment which documents and/or the list to be provided to the applicant may have required in no way justified the Commission's outright refusal to disclose them. Accordingly, since it failed, when notifying the statement of objections, to disclose the documents marked 'IV', either in the form of appendices or in the form of a list, the Commission infringed the applicant's rights of defence.

106 It must then be considered whether the existence of such an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure and whether that undertaking was obliged to request the Commission to grant it access to its file or have it send particular documents to it. In that context, it should be noted that neither Regulation No 17 nor Regulation No 99/63/EEC, on the hearings provided

for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), provide that such a request must be made beforehand or that the defendant's rights are time-barred if it is not made. In any event, in the present case the applicant made a request by letter of 23 May 1990, during the administrative procedure, for 'access to the file' and for a list to be supplied. That request was not considered at the hearing, since the hearing officer deferred it to the decision of this Court.

107 The Court's assessment does not conflict with the judgment in *AEG v Commission*, cited above. In that case the Court of Justice held that certain inculpatory documents used against an undertaking had to be annexed to the statement of objections and that because that obligation had not been observed the documents in question had to be excluded. However, according to the judgment in *AEG v Commission* the plea of infringement of the rights of the defence was not of general scope and did not therefore imply that the procedure as a whole was irregular. Consequently, the Court considered whether, after excluding the documents in question, the objections could still be regarded as having been proved (paragraph 30 of the judgment). Unlike in the *AEG* case, in the present case the applicant's defence was affected in a general way by the unlawful failure to disclose certain documents which, though not specifically inculpatory, might have been useful in its defence.

108 Moreover, any infringement of the rights of the defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure. 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. The Court cannot therefore rule out the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount.

109 Consequently, the first part of the plea must be upheld and the contested decision annulled in so far as it concerns the applicant (see *Cimenteries and Others v Commission*, cited above, paragraph 47).

— Second part of the plea: non-disclosure to the applicant of other documents emanating from Solvay

110 Unlike the situation pertaining to its examination of the first part of the plea, the Court does not know which are the Solvay documents other than those marked 'IV' which, following the Commission's refusal, were not made available to the applicant. However, the applicant rightly argues that if the Commission is bound to find that one of two undertakings acted independently without colluding with its alleged partner, no concerted practice between them can be proved. In the present case, if Solvay had been able to clear itself, the Commission would have been unable to maintain the objection that the applicant had been party to a concerted practice. Consequently, the documents referring to Solvay's conduct were also likely to be of use in the applicant's defence.

111 It should be repeated that it was not for the Commission to decide on its own whether the documents seized in the investigation of the present cases were exculpatory or not. The principle of equality of arms and its corollary in competition cases, namely the principle that the information available to the Commission and the defence should be the same, required that the applicant should be able to assess the probative value of the documents emanating from Solvay which the Commission had not annexed to the statement of objections. It is not acceptable to the Court that when the Commission investigated the infringement it was the only party which had the documents contained in 'files' 2-14 (Solvay, Brussels), 50-52 (Solvay Spain) and 59 and was therefore able to decide all by itself whether or not to use them in order to prove the infringement, whereas the applicant had no access to them and so could not likewise decide whether or not to use them in its defence. Consequently, the Commission ought at least to have drawn up a sufficiently

detailed list enabling the applicant to assess whether it was appropriate to request access to particular Solvay documents which might be useful in the defence of the two parties to the alleged concerted practice. Since the applicant cannot be required to show the probative value of particular documents which may exculpate Solvay — of which, in the absence of a list, it has no knowledge —, the possibility that such documents may exist must be a sufficient ground for finding that the rights of the defence have been infringed. It follows that a second infringement of the rights of the defence has been established.

112 The Court of First Instance is aware that, as the Commission stated at the hearing, the preparation of lists and the protection of business secrets which may be needed before granting 'access to the file' involves a considerable administrative burden for the Commission's departments. However, respect for the rights of the defence should not be allowed to conflict with technical and legal difficulties which an efficient administration can and must overcome.

113 It should be repeated that a defect affecting the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, in which judicial review is performed only in relation to the pleas raised and which cannot therefore be a substitute for a full investigation of the case by way of an administrative proceeding. If the applicant had discovered, by means of an appropriate list, documents of Solvay exculpating the two undertakings, it might have been able, during the administrative procedure, to influence the assessments made by the Commission. The second part of the plea should therefore be upheld.

— Third part of the plea: failure to disclose to the applicant documents of other Community producers of soda-ash

114 As regards access to the 'files' containing the documents from other continental producers of soda-ash (see paragraph 62 above), the Court observes that it is agreed

between the parties that those producers, just like Solvay, did not supply soda-ash across the English Channel, whilst the Commission has not alleged that they participated in a concerted practice, even though it found in both the statement of objections and points 28 and 29 of the decision that a so-called 'home market' principle existed which had been strictly observed by all producers until the 1970s. In the statement of objections and in the decision the Commission referred in that respect to documents obtained at 'several' producers.

115 Since the practices of the other producers were not called into question, the Court cannot exclude the possibility that those producers restricted to continental western Europe their sales of soda-ash for independent, objective and lawful economic reasons. The same reasoning enables the Court to find that it cannot be ruled out that Solvay's identical commercial strategy was guided by the same reasons. In that case, Solvay's parallel and passive conduct may, as held in the *Ahlström Osakeyhtiö* case, cited above, be explained otherwise than by previous concertation with the applicant. The allegation of concerted action could therefore no longer be maintained against the applicant either. When viewed in such a way, documents referring to the conduct of other producers might therefore also have been of use in the applicant's defence.

116 It follows from the considerations relating to the first and second parts of the plea that, in the specific circumstances of the present case, the Commission ought also to have drawn up a list of documents contained in the 'files' of the other producers mentioned in point 62. Once again, the Court finds that the Commission had those documents and, although it had taken the decision not to use them in order to prove the infringement, equality of arms nevertheless required that the applicant should have an opportunity likewise to decide whether or not to use them in its defence.

117 Furthermore, certain documents concerning other producers or emanating from them were used as evidence by the Commission. In those circumstances, the applicant had the right to request at least a list of the other documents contained in the

files in question, in order perhaps to establish their precise content and their usefulness for its defence. In particular, it had a right to have access to files 31 to 38 and 53 to 58 emanating from Akzo, since the relationship between Solvay and Akzo was considered at point 29 of the decision in order to show the observance of the 'home market' principle, which is one of the arguments relied on by the Commission in order to prove the infringement. By refusing to provide such a list, the Commission therefore impaired the applicant's rights of defence. Since the applicant cannot be required to show, on the basis of documents which in the absence of a list are unknown to it, that an undertaking such as Akzo or Matthes & Weber independently decided not to export to the United Kingdom, and since the economic context in which such an independent decision was made is capable of being applied to Solvay, the possibility that such documents exist must suffice for a finding that the rights of the defence were infringed. It follows that a third infringement of the rights of the defence has been proved.

- 118 Consequently, the three parts of the plea alleging infringement of the rights of the defence must be upheld and the contested decision annulled in so far as it concerns the applicant, without its being necessary to rule on the applicant's alternative claims seeking measures of inquiry allowing the files to be examined by its lawyers or by the Court itself. There is also no need to consider the other pleas raised in support of its claim for annulment, in particular the plea alleging lack of objectivity, shown by deletions in the documents annexed to the second part of the statement of objections, the plea alleging that the evidence relied on to support certain findings in the decision was not sent to the applicant and the plea alleging irregular authentication of the contested decision, which does not relate to all the administrative procedure before the Commission (see, with regard to the latter point, the judgment of even date in Case T-32/91 *Solvay v Commission* [1995] ECR II-1825).

Costs

- 119 Under the first paragraph of Article 87(2) 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 the Commission has been unsuccessful, it must be ordered to pay the costs, without its being necessary to take into account the applicant's partial withdrawal, namely of its claim that the decision be declared non-existent.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber,
Extended Composition)

hereby:

- 1. Annuls 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-ash — Solvay, ICI) in so far as it concerns the applicant;**
- 2. Orders the Commission to pay the costs.**

Cruz Vilaça

Barrington

Saggio

Kirschner

Kalogeropoulos

Delivered in open court in Luxembourg on 29 June 1995.

H. Jung

J. L. Cruz Vilaça

Registrar

President