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## Legislation

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## II

- (Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 of the EEC Treaty

IV/33.133-A: Soda-ash — Solvay, ICI

(Only the French and English texts are authentic)

(91/297/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## PART I

## THE FACTS

Having regard to the Treaty establishing the European Economic Community,

## A. Summary of the infringement

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

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

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 <sup>(2)</sup>,

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

- (1) 1. The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14 (3) of Regulation No 17 at the premises of Community producers of soda-ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing that an infringement of Article 85 of the EEC Treaty had been committed by the following undertakings:
- Solvey et Cie, Brussels (Solvay),
  - Imperial Chemical Industries plc, London (ICI).
2. The infringement can be summarized as follows:

*Infringement of Article 85 by Solvay and ICI*

- (2) From at least 1 January 1973 Solvay and ICI, the two major producers of soda-ash in the Community, participated in a concerted practice contrary to

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

Article 85 of the EEC Treaty by knowingly continuing in concert and complicity to observe and apply the essential terms of 'Page 1000', a restrictive market-sharing agreement dating from 1945 or earlier and which they had purported to terminate in 1972, by coordinating their respective commercial activities, by avoiding all competition with each other and by confining their soda-ash activities in the Community to their traditional home markets namely continental western Europe for Solvay and the United Kingdom for ICI.

## B. The soda-ash market

### 1. The product

- (3) The present procedure concerns soda-ash (sodium carbonate), an alkaline chemical commodity which is mainly used as a raw material in the manufacture of glass. Soda-ash is the primary source of sodium oxide which acts as a flux in the glass-melting process. Soda-ash is also used in the chemical industry for making detergents and in metallurgy.
- (4) In Europe, soda-ash is manufactured from common salt and limestone by the 'ammonia-soda' process invented by Solvay in 1865. The Solvay process initially produces light ash which requires a further stage of densification to produce the dense form. The two forms are chemically identical but dense ash is the preferred form for glass manufacture.
- (5) In the United States, so-called 'natural' soda-ash is mined from trona ore deposits found mainly in Wyoming. After mining, the trona ore is purified and calcinated in refineries. Natural soda-ash is produced only in dense form. Natural ash is also found in Africa and Australia.

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

### 2. The producers

- (6) The six Community producers of synthetic soda-ash are:
- Solvay,
  - ICI,

- Rhone-Poulenc,
- AKZO,
- Matthes & Weber (M & W),
- Chemische Fabrik Kalk (CFK).

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

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

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

ICI is the second largest Community producer of soda-ash with two manufacturing sites in Northwich, Cheshire, but it confines its sales in the Community almost exclusively to the United Kingdom and Ireland and holds over 90 % of the UK market.

The present decision is not concerned with Rhone-Poulenc (France), AKZO (Netherlands), Chemische Fabrik Kalk or Matthes & Weber (Germany).

### 3. The market worldwide

- (7) Worldwide demand for soda-ash during the 1980s has been growing at around 1 % per annum, although there are substantial regional divergences. In the developed countries demand was static from 1980 until 1987, since which date there has been a considerable upturn in the market. Over half the soda-ash produced worldwide is consumed by the glass industry.

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

- (8) The six United States natural ash producers have total nominal capacity of 9,5 million tonnes per year and a domestic market demand in 1989 of some 6,5 million.

Natural ash production in the United States in 1989 was almost 9 million tonnes. The United States producers supply the whole of their home market and export the balance of production. Costs of production of natural ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

The United States producers of dense ash are viewed by the European manufacturers as the major competitive threat in their home markets. At current exchange rates it is possible for these producers to sell in Europe at prices substantially below the local market price levels without dumping.

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

In recent years there has been a marked increase in demand and soda-ash has been fully sold worldwide. Plants are now running at maximum output. In the period 1990 to 1992 Chinese manufacture is expected to increase by some 500 Kt per annum and production in Botswana (for South Africa) will produce another 300 Kt, developments likely to result in the displacement of imports from other production areas.

#### 4. *The Community*

- (10) Solvay is the market leader with almost 60 % of the total Community market and sales in all Member States except for the United Kingdom and Ireland.

After three years of stagnant demand in the mid-1980s, sales of soda-ash in western Europe began to increase substantially in 1987. In 1988 and 1989 producers worked at full capacity.

- (11) The west European market for soda-ash is still characterized by separation along national lines. The producers tend to concentrate their sales on those Member States where they possess production facilities, although since about 1981 or 1982 the smaller producers — CFK, M & W and AKZO — have increased their sales outside their 'home' markets.

There is no competition between Solvay and ICI, each limiting its Community sales to its traditional 'spheres

of influence' in continental western Europe and the British Isles respectively. Both ICI and Solvay have substantial export business to non-European overseas markets which are supplied from the EEC. A large part of ICI's exports in fact consist of material supplied to it by Solvay for this purpose.

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

In Belgium Solvay's market share is in excess of 80 %, in France [ $> 50\%$ ] and in Germany [ $> 50\%$ ]. ICI has over 90 % of the UK market, the only alternative sources of supply being the United States and Poland.

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

#### 5. *United States natural ash*

- (13) The United States market has since the development of natural ash mining in the 1960s shown a substantial excess of capacity over domestic demand and a surplus of some 2,5 million tonnes is now available annually for export.

Given the over-supply and the presence of a number of producers with similar costs, the US domestic market has been marked by strong price competition. The product has in recent years been sold in the US at a substantial discount off 'list' price (\$ 93/short ton fob Wyoming) the net ex-works price at the end of 1989 being around \$ 73/short ton, to which must be added transport costs by rail to the East Coast industrial centres. List prices were raised by most producers to \$ 98/short ton effective on 1 July 1990 and the effective price went up to around \$ 85.

- (14) The pressure to export led to the United States producers attempting to penetrate the European and

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

- (15) The most recent measures granting anti-dumping protection against United States dense ash involved:

- (a) for the two producers then in the market, Allied (now General Chemical) and Texas Gulf, minimum price undertakings of £ 112,26/tonne ex store (Commission Regulation (EEC) No 2253/84 <sup>(1)</sup>);
- (b) for those producers not in the market, Tenneco, KMG, FMC and Stauffer, a definitive anti-dumping duty of ECU 67,49/tonne (Council Regulation (EEC) No 3337/84 <sup>(2)</sup>).

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

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

[...]<sup>(3)</sup>. Texas Gulf has also sold some tonnage in Belgium. In both cases the imports have been made free of anti-dumping duties under special rules relating to 'inward-processing'.

- (17) A number of large Community customers in the glass sector have indicated their intention to take a substantial part of their business away from the Community producers and to buy from the United States. So far however a total of only about 40 000 tonnes has been supplied in continental western

Europe (as opposed to the United Kingdom and Ireland) by the United States producers, almost all of it under the inward-processing rules.

The anti-dumping measures provided for by Council Regulation (EEC) No 3337/84 expired in November 1989. A review of the measures had been requested by certain United States producers and by representatives of the Community glassmaking industry in 1988. On 7 September 1990 the review was terminated without protective measures being imposed (Commission Decision 90/507/EEC <sup>(4)</sup>).

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

The function of Ansac is to act as a joint sales agency for the marketing and distribution of United States soda-ash exports outside the Americas. Its sales are around \$ 250 million annually. With the objective of extending its activities to the west European market (to replace sales by individual producers), Ansac notified its arrangements to the Commission with a request for negative clearance or exemption under Article 85 (3).

The application of Ansac is the subject of Commission Decision 91/301/EEC <sup>(5)</sup>, under which an exemption was refused.

### C. The market division arrangement between Solvay and ICI

#### 1. Separation of markets

- (19) Solvay and ICI, the two largest producers in western Europe and traditionally regarded as the industry leaders, do not sell in each others' 'home markets' and have never done so.

Solvay currently operates nine soda-ash plants, all located in western Europe. In the Community it has manufacturing facilities in Belgium, France, Germany, Italy, Portugal and Spain. In the last three markets it has a virtual monopoly. In the Community as a whole Solvay has a market share of 60%. If the United Kingdom and Ireland are excluded, as Solvay

<sup>(1)</sup> OJ No L 206, 2. 8. 1984, p. 15.

<sup>(2)</sup> OJ No L 311, 29. 11. 1984, p. 26.

<sup>(3)</sup> In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

<sup>(4)</sup> OJ No L 283, 16. 10. 1990, p. 38.

<sup>(5)</sup> See page 54 of this Official Journal.

does not sell there, Solvay's share of the market rises to 70%.

- (20) ICI is Europe's second largest soda-ash producer with two production units located near Northwich in Cheshire. (A third unit was closed in 1985.) Until the appearance of eastern European material in the United Kingdom in 1978, ICI had the market entirely to itself. In 1988 ICI had some [ $>90\%$ ] of the soda-ash market in the United Kingdom.

ICI also operates synthetic plants in Pakistan and (until 1990) in Australia and owns a 300 000 tpa natural soda-ash plant at Lake Magadi in Kenya. Material is not imported from these sources to Europe.

Up to about 1980, ICI's list price in the United Kingdom was lower than in adjacent markets. Since that date however United Kingdom prices have been considerably higher than those in continental western Europe, sometimes involving a premium of up to 20% over neighbouring markets.

- (21) In spite of these price differences, there have been no significant movements of soda-ash in either direction between the United Kingdom and the Member States in continental western Europe, the only exception being tonnages shipped by Solvay as 'co-producer' deliveries to ICI. No material has been sold by Solvay (or indeed any other Community producer) to customers in the United Kingdom, although price calculations found at the producers themselves show that even after the relatively high cost of transport from locations in continental western Europe the final delivered price to major customers (particularly in the south-east and east of England) would have been comparable to or even lower over a considerable period than ICI's price.

The only markets in continental western Europe in which ICI has ever supplied soda-ash in any appreciable quantity are the Scandinavian countries in which there is no domestic producer. It is significant that despite the transport costs involved in importing all the soda-ash consumed, price levels are considerably lower in Scandinavia than in those markets where there is an established soda-ash manufacturer.

## 2. *The Alkali Cartel*

- (22) Solvay and ICI have enjoyed close commercial links in the field of soda-ash and other chlorine-related products which go back to the 1870s when Brunner, Mond and Co., one of ICI's original constituent companies, became the first licensee of Solvay's ammonia-soda process and developed the manufacturing facilities in Cheshire which now constitute ICI Soda Ash Products.

The relationship between Solvay and Brunner, Mond included agreement upon their respective spheres of influence. The original market division was effected by means of the so-called 'Alkali Cartel', an arrangement in respect of which the producers have not provided any information. It is not known exactly what commercial arrangements were made when the Solvay process was first licensed to Brunner, Mond. It appears however that new international market-sharing arrangements in the alkali field (including soda-ash and caustic soda) were made on a worldwide basis between ICI and Solvay in 1928 (soon after ICI was formed from Brunner, Mond and three other companies) and in 1935 and in 1938 between ICI, Solvay and I.G. Farben. Other cartel agreements were made in 1933 between ICI and Alkasso (the United States Alkali Export Association) and in 1936 between ICI, Solvay and Alkasso. These arrangements involved the allocation of exclusive markets to one or other party, the assignment of quotas in some other markets and the fixing of prices on a worldwide scale. The domestic market of each of the cartel members was considered vested in the home producer. (See: *United States v. United States Alkali Export Association and Others*, 86 F Supp. 559; 1948-49 Trade Cases No 62 474).

## 3. *'Page 1000'*

- (23) In a new ICI/Solvay agreement made in 1945, the terms of which were set out in a document discovered at ICI and headed 'Page 1000', Solvay and ICI placed on the record their belief that 'the pre-war cooperation between them (which had gone on for nearly 70 years) in the technical and commercial development of the alkali business has been of benefit to both of them ...'

They stipulated that as in the past each would continue to pursue a commercial policy designed to encourage a steadily increasing overall consumption of alkalis:

'Each party intends to increase the volume of its sales by this means and not to increase them simply at the expense of the other party.'

'Page 1000' recorded that Solvay's manufacturing and selling organization was almost wholly within the continent of Europe while that of ICI was mainly within the British Commonwealth and other countries of Asia, Africa and South America.

The agreement substantially repeats and incorporates a statement of each of the two parties of their commercial policy towards each other in the alkali sector.

(24) ICI's declaration of its policy reads as follows:

'Acknowledging these common fundamental policies, and this geographical division of the respective organizations, ICI proposes, until this declaration of policy is rescinded, to conduct its commercial policy on the following broad lines:

- (a) in those countries where local manufacture of alkali is already well developed, and where imports consequently provide but a small proportion of the demand, ICI will (as between ICI and Solvay) regard the responsibility for the development of the business as resting entirely with the organization already established in that country;
- (b) in countries where local manufacture of alkali is not well developed and which import most of their requirements, ICI will (as between ICI and Solvay) regard the organization already established in that country as having the major responsibility for the development of the business, but will, in cases where ICI is the organization already established there, favourably consider any application by Solvay to participate in the import business and/or in the development of local manufacture;
- (c) paragraph (b) will be operated in such a way as to promote the consumption of alkali to the greatest possible extent, by developing local manufacture where it is demonstrably sound and economic as rapidly as circumstances permit and by arranging imports from those countries which can most suitably supply;
- (d) in the interpretation of paragraphs (a), (b) and (c), ICI will pay due regard to the prior commitments of Solvay to organizations other than ICI.

ICI understands that Solvay will conduct their policy on corresponding lines.'

Solvay's declaration of policy is in the same terms (*mutatis mutandis*) as that of ICI.

(25) In the 1949 version of their statement of commercial policy each party declared that the 'Page 1000' arrangements would not apply to their activities in the United States affecting the domestic or foreign trade of the United States.

With this exception, no doubt the result of the judgment of the United States District Court in the Alkasso case, the parties had agreed the broad lines of a policy of complete cooperation aimed at avoiding competition between them in any part of the world.

(26) On the occasion of the accession of the United Kingdom to the Community Solvay and ICI formally terminated the 'Page 1000' agreement with effect from 31 December 1972. According to the parties, a review of their contractual arrangements had shown that the agreement — which they say had already been considered out of date in 1962 — had never been formally cancelled. A letter of 12 October 1972 from Solvay to ICI is in those terms. An ICI board meeting of 26 October 1972 resolved that the 1949 minute confirming 'Page 1000' be cancelled. There is however some conflict between this minute, which repeats the statement contained in the Solvay letter that the arrangement had for a long time been considered 'outdated', and a later ICI board minute of 26 July 1973 which states that letters of termination had been sent to Solvay 'after both companies' legal advisers had advised that the agreements contravened Article 85 of the Treaty of Rome and, *if continued* <sup>(1)</sup>, would have to be notified to the EEC Commission'.

#### 4. *The continued market separation in soda-ash between Solvay and ICI*

(27) The alleged desuetude of the 'Page 1000' arrangement did not however manifest itself in any significant change in the commercial policy of Solvay or ICI in the soda-ash sector, either in 1962 or at any later stage. Neither ever competed with the other in their respective home markets in the Community. Similarly in overseas export markets each continued to respect the other's sphere of influence. Indeed since 1984 Solvay has provided substantial tonnages to ICI by means of co-producer deliveries to enable it to maintain its position in South Africa, traditionally ICI's major deep-sea market and one in which Solvay does not itself market the product. (See recitals 36-38, *post*). ICI has also kept Solvay informed of its sales policy and intentions in Sweden, the one market of any importance where both producers are present. To all intents and purposes the respective commercial policies of the two producers in soda-ash have been maintained exactly as they were set out in 'Page 1000'.

The rigid market division in soda-ash may be contrasted with that now pertaining in caustic soda which was also the subject of 'Page 1000'. There are now a large number of caustic-soda producers in the Community and despite the handling risks it is freely transported across national borders. ICI now produces caustic soda in Germany as well as in the United Kingdom and operates stock tanks in France and the Netherlands from which it supplies customers throughout the Community. Solvay for its part operates a stock tank on Merseyside from which it supplies customers in the United Kingdom.

(1) Emphasis added.

### 5. *The home market principle*

- (28) Over many years all the soda-ash producers in Europe accepted and acted upon the 'home market' principle as the basis on which their commercial operations were determined.

Under this principle each producer limited its sales to (a) the country or countries in which it had established production facilities, (b) export markets in which there was no domestic producer. The other producers reciprocated by not selling into the 'home market' of that producer. In the event of incursions by an outsider into what a producer considered its home market, it was entitled and expected to 'retaliate' by selling an equivalent tonnage on the intruder's home market.

- (29) The documents obtained at several producers show that the protection of home markets by this means was for many years the subject of a general consensus in the soda-ash industry. Indeed the concept of 'retaliation' as a means of defending the home market was expressly provided for in a market-sharing agreement made between Solvay and Nederlandse Soda Industrie (now AKZO) in 1956 (which is not the subject of any proceedings under Article 85). The 'home market' rule was strictly observed by all producers until the 1970s when declining demand and the appearance in continental western Europe of United States natural ash and east European material provided some element of competition. AKZO also began selling in the German market in the late 1970s since the Netherlands was too small a market to fill its available production capacity. Solvay had apparently indicated to AKZO its acceptance of this development without first obtaining the agreement of the smaller German producers. One of those affected therefore indicated to AKZO that it would begin to sell in the Netherlands and continue to do so as long as AKZO sold in Germany. In general, however, deliveries to customers across national borders (as opposed to co-producer sales) are still apparently considered by producers as an exception.

### 6. *The continuing Solvay-ICI relationship*

- (30) Solvay and ICI have continued to maintain a close commercial relationship in the soda-ash sector. As the 'traditional industry leaders' in Europe they share an interest in maintaining the stability of the market. The two producers have maintained frequent contacts and meet each other to discuss matters of mutual concern in the soda-ash market. Up to the mid-1970s they exchanged detailed information on their production costs. The precise regularity and frequency of the

meetings is not known but since 1985 they appear to have been held about every two months.

- (31) During the administrative proceedings the two producers claimed that no discussions took place on any matters of significant commercial sensitivity. ICI says that the matters covered in these meetings related only to subjects for legitimate discussion, namely:

- (a) purchase for resale arrangements in the United Kingdom and South Africa;
- (b) anti-dumping measures by the European producers against United States and east European imports;
- (c) general market trends in demand;
- (d) exchange of information as to the extent of substitution of caustic soda and 'cullet' (broken glass) for soda-ash in certain industries.

- (32) According to ICI, the meetings with Solvay were fully minuted and no 'secret' discussions occurred. The detailed notes of several of these meetings in fact show that the two producers did indeed discuss subjects which were crucially important to their global strategy in the soda-ash sector. The two producers clearly consider themselves to have a shared interest in price stability. Solvay informed ICI of general price trends and planned price increases in continental western Europe, matters which ICI itself (in another context) stated during the oral hearing to be of vital importance to its commercial policy in the United Kingdom. They were also anxious to avoid any friction between their respective soda-ash operations and informed each other on possible areas where their interests might conflict. Thus ICI informed Solvay of its intention to re-enter the Scandinavian market in the second half of 1986. There was also some complaint from ICI (passed on from its Kenyan operation at Lake Magadi) about Solvay having caused it annoyance by increasing sales in Indonesia. On another occasion Solvay was 'upset' because ICI had bought some PFR tonnage from AKZO. It is also significant that ICI considered it necessary to explain to Solvay in July 1986 the underlying principles of its formation of Soda Ash Products as a separate business within the ICI structure.

- (33) ICI's declared business strategy for soda-ash is to maintain its position as the dominant and controlling supplier of soda-ash in the United Kingdom.

The 'long-standing' relationship with Solvay is clearly of vital importance in this connection. It is made clear in ICI documents that the basis of the continuing relationship is a mutual abstention from competition. ICI was particularly anxious that this relationship

should not be put at risk. In a document relating to a possible modification of ICI's soda-ash strategy (a proposal which might have altered the *status quo* and was not in fact adopted) the question is asked 'How will Solvay see us? Will they continue to see no United Kingdom competition?' The policy of Solvay itself in relation to the United Kingdom is described as 'benign'.

- (34) In other documents dating from 1988 ICI perceives its present relationship with Solvay in terms of historical values dating from the 'Brunner, Mond' days:

'Our relationship with Solvay is crucial as to volume, price and "limiting the intrusion of others into our market". Relationship/behaviour is largely determined by historical values associated with the Brunner, Mond era.'

Another note found at ICI states that Solvay 'view SAP <sup>(1)</sup> as the inheritors of the Brunner, Mond position'.

- (35) Other ICI documents specifically make the point that ICI should consult Solvay before taking commercial decisions which might alter the balance between their respective soda-ash operations. One note mentions the need to 'test' Solvay's reaction to a possible structural change in the business 'through the appropriate channels', a phrase which suggests that the opportunities for dialogue on such matters already existed. Another note on the same subject foresees that Solvay might 'react aggressively' if the change were implemented, but goes on: 'Talk with Solvay. Treat them kindly. Tell them in advance.'

There was also a reference to the need in the context of the 'long-standing relationship' with Solvay to pay a 'courtesy call' on Solvay before taking the step under discussion. During the oral hearing, the Business Manager of ICI Soda Ash Products, while asserting that he had never seen 'Page 1000', admitted that he knew of its existence. He also stated that the 'traditions which existed in the past with Brunner, Mond' were something which ICI had to consider and that Solvay as the major European producer would have 'concerns' if the structure of ICI's soda-ash business were to be changed, hence the need to inform Solvay in advance.

#### 7. Solvay's 'PFR' sales to ICI

- (36) An important aspect of the close ICI-Solvay relationship was ICI's practice of purchasing

substantial tonnages of soda-ash from Solvay in order to meet medium- and long-term commitments in its traditional markets.

These arrangements — referred to as 'purchase for resale' or 'PFR' — followed ICI's closure of its Womersley works in 1984. The reduction in capacity meant that for several years ICI was unable to meet the whole domestic demand in the United Kingdom and Ireland, let alone continue to supply its major export market in South Africa. One of the basic tenets of ICI's commercial policy being the maintenance of its control over the United Kingdom market, it was prepared neither to see any other producer take up the shortfall on its home market nor to allow customers to begin importing directly themselves.

- (37) For several years ICI purchased substantial tonnages from Solvay for resale to United Kingdom customers (who were not apparently aware of the origin of the material):

(in 1 000 tonnes)

| 1985 | 1986 | 1987 | 1988 | 1989 |
|------|------|------|------|------|
| 40,2 | 29,4 | 5,8  | 3,0  | —    |

Solvay is also the principal source of soda-ash sold in South Africa by ICI, which does not itself procure any of the material it sells in that market.

(in 1 000 tonnes)

| 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989<br>(six months) |
|------|------|------|------|------|------|----------------------|
| 16,0 | 53,4 | 65,8 | 99,5 | 92,6 | 78,9 | 26,0                 |

- (38) The vital significance of the PFR arrangements in terms of maintaining the rigid division between Solvay's and ICI's respective 'spheres of influence' is apparent from an ICI memorandum of 17 September 1982. Capacity reduction to a point where ICI could not cover United Kingdom demand was seen as bound to lead to a change in the perceptions both of customers and other producers. ICI's concern was to maintain its control over the United Kingdom market and prevent any perception that its 'sovereignty' had been weakened by the planned capacity reduction. Under the heading 'Market Control' the memorandum continues:

'Opportunities could be developed to "manage" capacity reduction in such a way as to maintain market control. For example, a purchase for resale (PFR) deal might be struck with a co-producer to meet the deficit or export markets such as South Africa might be traded off against the expectation of orderly behaviour in the United Kingdom.'

(1) 'SAP' = ICI Soda Ash Products.

Judged in the light of the above document, the importance of the PFR arrangements with Solvay becomes clear. The '*status quo*' (in particular ICI's dominance of, and Solvay's abstention from, its United Kingdom 'home market') is maintained while in return Solvay under the 'trade off' has the commercial benefit of substantial PFR sales to ICI on a long-term basis.

- (39) For its part Solvay appears, following Commission Decision 85/74/EEC <sup>(1)</sup> 'Peroxides', to have been 'acutely sensitive to the perceptions of the market-place to any business relationship between chemical producers', including PFR arrangements (ICI note of 15 February 1985). According to this note, Solvay was in general reluctant to supply on a direct basis to ICI either to markets where both producers were present or where the customer in question was a division of a pan-European group. Solvay was however prepared to make a number of 'compromises' or 'exceptions' particularly as regards markets such as South Africa and Ireland where it had no sales structure itself.

Although ICI seems originally to have presented these arrangements to Solvay as intended simply to overcome short-term production problems, it must soon have been apparent to Solvay that their purpose was to support ICI's long-term position in particular countries and thereby preserve the existing separation of markets between the two groups.

#### 8. *The defence of Solvay and ICI*

- (40) Neither Solvay nor ICI dispute (a) that in the Community there is little or no competition between them, (b) that in each case this phenomenon is the result of a considered and conscious decision by management.

They both assert however that their respective decisions not to compete were reached independently by each undertaking on purely commercial considerations and without any element of collusion or concertation.

- (41) According to ICI and Solvay, the cancellation of the 'Page 1000' agreement in 1972 was made in complete good faith and indeed was no more than a formal recognition that the arrangements had been a dead letter since 1962. There was therefore no question of their continuing to respect in practice the spirit of the old market allocation agreements dating back to the 'Brunner, Mond' era. ICI claims that the competition in the caustic-soda sector between Solvay and ICI shows that 'Page 1000' has no longer any application whatever.

- (42) The reasons for the continuing separation of markets as between Solvay and ICI in soda-ash are said to be purely commercial considerations. It makes sense (it is said) for each producer to concentrate its sales on its natural 'home market' within which it has a natural competitive advantage. Transport costs for soda-ash are relatively high in relation to the final selling price, and this factor, combined with customer preference for a local source with long-term security of supply, has led to a natural separation of markets along geographical lines. In the case of the United Kingdom in particular the requirement for a sea-crossing accounts for the insulation of the market in both directions.

Since 1980 the price of soda-ash in the United Kingdom has been higher than in continental western Europe. It would be absurd (says ICI) for it to offer the product to customers in continental western Europe markets where not only is the market price lower but it would have to undercut the existing supplier. The transport costs from the United Kingdom would be prohibitive: in support of this proposition ICI has provided freight tables in which the cost of road transport to northern France is estimated at some £ 40/tonne, almost 40 % of the net selling price. (During the oral hearing however ICI admitted that this cost would be halved if a depot were established in France and supplied by coaster.)

- (43) In addition ICI and Solvay point to the risk of 'retaliation' in the event of a competitive incursion by one into the market of the other. If one producer displaced the other at a particular customer, the affected supplier would have no alternative but to seek to place the lost tonnage elsewhere, the most likely market being the aggressor's own home market; ultimately each would end up selling the same tonnage but both would incur greater costs and generate lower profits. The reason the two producers do not aggressively market in each other's home markets is thus said to be an awareness that such an exercise would generate a price war from which neither would gain.

According to ICI and Solvay, theirs is purely an 'arm's-length' relationship. While ICI insists that their meetings were concerned only with legitimate matters, Solvay does however acknowledge that on occasions executives on both sides may have attempted to go further and obtain information of a more confidential nature but this, it is said, does not point to concertation.

#### 9. *The economic survey produced by ICI*

- (44) An economics expert commissioned by ICI to produce a report for the purposes of the proceedings concluded

<sup>(1)</sup> OJ No L 35, 7. 2. 1985, p. 1.

that, given the structure and conditions of the soda-ash industry, the producers could be expected to concentrate on their home markets and refrain from competition with one another without any collusion. This market equilibrium is explained by reference to the 'Cournot' model which is characterized by the expectation of undertakings in an industry that other undertakings will maintain output whatever change the individual makes <sup>(1)</sup>. ICI also sought to explain oligopolistic behaviour in the industry in terms of the 'theory of games' <sup>(2)</sup>. According to ICI the rigidity of the market is the result of a 'non-cooperative game' in which each producer recognizes the risk of retaliation and to avoid the risk becoming a reality tries to maintain a stable market position. The 'alternative solution' in theory that margins could be improved still further by the undertakings acting together as a monopolist, is dismissed by ICI on the grounds that (a) it would not work in an industry with falling sales, and (b) the potential rewards were not sufficient to overcome the difficulties involved in cooperation. A theoretical model is however only as useful as the information it is used to analyse. The economics expert admitted during the oral hearing that she had not even seen the documentary evidence annexed to the statement of objections. Given the express terms of 'Page 1000', it is wholly inapt to explain the historical separation of markets in terms of a 'non-collaborative game'. Similarly the documentary evidence of consultation between ICI and Solvay so as to reduce uncertainty as to their responses to the other's behaviour, which is inconsistent with the theory of 'non-collaboration', was also ignored. The conclusion of the report that the structure of the industry and the conduct of the producers was referable to a non-collaborative strategy was thus reached without consideration of the relevant evidence.

#### 10. Factual assessment

- (45) On the basis of the above factual and economic evidence, the Commission does not accept that the strict market division between Solvay and ICI which is a characteristic of the soda-ash market in the Community results from the operation of natural market forces or the independent commercial judgment of the two producers.

It considers on the contrary that the market separation is the subject of a continued understanding between

the two producers and based on the mutual recognition of each other's exclusive sphere of influence or zone of operations.

- (46) The argument that their policy of mutual abstention in the market is the result of 'individual business judgment' might be more persuasive had there never been any agreement between them. This is not a case where two large competitors had fought each other to a standstill and had entirely without any contact decided that intensive rivalry brought no benefit to either one.

It has never been satisfactorily explained why, if the division of markets is entirely the result of natural competitive and geographic conditions, the two producers should ever have thought it necessary to conclude agreements such as the 'Alkali Cartel' and 'Page 1000'.

- (47) As far as soda-ash is concerned the statements by Solvay and ICI in 'Page 1000' of their commercial policy *vis-à-vis* the other in 1945 remained an accurate description of their policy up to the date of the present proceedings. Neither competed on the 'home market' of the other and each did so in the expectation that the other would apply the same policy. ICI's characterization of the present relationship of non-competition in terms of the 'historical values of association from Brunner, Mond days' is clearly indicative of a long-standing and continuing understanding between the two producers. Solvay or ICI are unable to point to any alteration in their commercial policies in relation to soda-ash (as opposed to caustic soda) which might support the assertion that 'Page 1000' had become a 'dead letter' by 1962. The formal cancellation of the agreement 10 years later likewise did not result in any change.

Nor is this a case where the two producers concerned have no contact with each other. The frequent contacts, even if their immediate purpose was to discuss the 'purchase for resale' arrangements, were not conducive to an atmosphere of commercial rivalry. Indeed, contrary to ICI's assertions, the subjects discussed were not limited to 'technical' matters but included exchanges of information on global commercial strategy and on matters regarded as being of crucial importance to ICI's continuing control of the United Kingdom market. It is inconceivable that two undertakings would have conducted discussions of such a nature unless it were clearly understood between them that they were not potential competitors. It was also clearly envisaged that the two producers would contact and consult each other so as to remove any uncertainty as to their reactions to the other's conduct.

<sup>(1)</sup> See A. Cournot, *Researches into the Mathematical Principles of the Theory of Wealth* (1938).

<sup>(2)</sup> J. Von Neumann and O. Morgenstern, *Theory of Games and Economic Behaviour* (1944).

(48) The long-term use by the two largest Community producers of product for resale arrangements is also indicative of a shared interest and intention to maintain the *status quo*, in particular the geographic separation of their respective spheres of influence. ICI's own documentation emphasizes that its relationship with Solvay is 'crucial to volume, price and limiting the intrusion of others into our market'. The ICI-Solvay arrangements relating to South Africa are as important in this connection as the direct deliveries by Solvay to the United Kingdom. In the light of the reference to a 'trade-off' in ICI's own documentation (see recital 38) it cannot be seriously disputed that the *quid pro quo* was Solvay's continued abstention from the United Kingdom market.

(49) The fact that ICI for some time apparently attempted to conceal from Solvay the full extent of its production difficulties in the United Kingdom does not, as ICI argues, disprove the existence of any collusive arrangement between them. The understanding between them as to their respective spheres of influence in the United Kingdom and continental western Europe respectively was not the result of any altruism on Solvay's part but depended upon a complex interplay of interests. In the event of any perceived long-term inability on the part of ICI to balance production with United Kingdom demand, Solvay could hardly be expected to stand by while other west European producers took advantage. The whole object of the arrangement was the maintenance of the *status quo* in the interests of the two producers. Given also that any collusive agreement would be unenforceable and would only be respected so long as it was in both parties' interests, ICI may well have been prudent not to trust Solvay entirely on this occasion.

Similarly, the possibility of 'retaliation' which Solvay and ICI claim as the reason for their respective abstention from each other's 'home market' in no way excludes the existence of any understanding between them. On the contrary, it was generally accepted by the industry that 'retaliation' was the normal sanction for any breach of the 'home market' principle: the threat of retaliation thus served to encourage continued cooperation.

In summary, the documentation obtained from the producers shows that far from considering themselves as business rivals Solvay and ICI saw each other as close partners.

(50) The Commission does not accept the argument that high transport costs and customer preference for a local supplier are the reasons for the complete absence of cross-Channel trade.

Before 1980 the United Kingdom price was lower than price levels in continental western Europe but ICI did not sell the product to other Member States. Even if United Kingdom prices increased from that time ICI

would normally have had every incentive to develop sales in western Europe in order to maintain full loading of its plant. In any event ICI overstated the cost of transport from the United Kingdom to neighbouring Member States by producing estimated figures for transport by road tanker. Any realistic marketing programme in continental western Europe would have entailed establishing a depot and supplying it by sea, which would probably have halved the delivery costs quoted by ICI.

(51) As regards the possibility of trade in the opposite direction, the major container glass customers in the United Kingdom are relatively favourably located in terms of access from continental western Europe. The pricing comparisons obtained at the producers themselves show that it would have been perfectly feasible for Solvay to have delivered to customers particularly in the east and south-east of England.

The absence of trade in soda-ash is in direct contrast with the present competitive environment in caustic soda, a product which is comparable in price but more expensive and more hazardous to ship.

Nor is the argument about 'customer preference' for a local supplier persuasive. It is difficult to accept that glass manufacturers in the United Kingdom 'preferred' to pay 15 to 20 % more for their major raw material than their competitors in continental western Europe. There is also abundant evidence that ICI was concerned that its container glass customers in the United Kingdom might be driven to seek sources of cheap ash in continental western Europe.

It is significant that since the institution of the proceedings in the present case, Solvay has started quoting to customers for delivering in the United Kingdom from Germany at prices which are competitive with those of ICI.

## PART II

### LEGAL ASSESSMENT

#### A. Article 85 of the EEC Treaty

##### 1. Article 85 (1)

(52) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction

or distortion of competition, and in particular those which directly or indirectly fix purchase prices or any other trading conditions and share markets or sources of supply.

## 2. Agreement/concerted practice

- (53) The main issue for present purposes is whether the rigid market separation and absence of competition between Solvay and ICI is the result of express or tacit collusion between them or whether it is the result of their independent business judgment.

The market separation has its origins in an express agreement (the 'Alkali cartel', 'Page 1000', etc.). Although that agreement has formally been terminated, the factual separation envisaged therein has continued up to the present: Solvay and ICI do not compete with each other in any Community market.

- (54) The Court of Justice has held (Case 51/75: *EMI Records v. CBS United Kingdom* <sup>(1)</sup>) that:

'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 after they have formally ceased to be in force.' (Paragraph 30)

However as the Court went on to observe at Paragraph 31:

'An agreement is only to be regarded as continuing to produce its effects if from the behaviour of the parties concerned there may be inferred the existence of elements of concerted practice and of coordination peculiar to the agreement and producing the same result as that envisaged by the agreement.'

- (55) The Commission fully accepts that there is no direct evidence of an express agreement between Solvay and ICI to continue to respect the 'Page 1000' cartel in practice.

However there is no need for an express agreement in order for Article 85 to apply. A tacit agreement would also fall under Community competition law. Given the express prohibition in Article 85 against concerted practices, it is however unnecessary in the present case

to determine whether there was any actual 'agreement' at all, whether express or tacit. The object of the Treaty in creating a separate concept of concerted practice is to forestall the possibility of undertakings evading the application of Article 85 (1) by colluding in an anti-competitive manner falling short of a definite agreement by (for example) informing each other in advance of the attitude each intends to adopt, so that each may regulate its commercial conduct in the knowledge that its competitors will behave in the same way: Judgment of the Court of Justice in Case 48/69 *Imperial Chemical Industries Ltd v. Commission* <sup>(2)</sup>.

- (56) In its later Judgment in relation to the European Sugar Cartel — Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others v. Commission* <sup>(3)</sup> — the Court of Justice in expanding upon the above definition of a concerted practice held that the criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept, inherent in the provisions of the Treaty relating to competition, that each economic operator must determine independently the commercial policy which he intends to adopt in the market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors but it does strictly preclude any direct or indirect contact between them the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

- (57) It is not disputed by either of the two major Community producers that they each follow a deliberate policy of non-competition by not marketing soda-ash in the territory of the other. Nor do they deny that for both of them the whole point of the policy is that it is dependent upon the other producer making the same decision. The only question is whether the deliberate — and reciprocated — policy of abstention is referable to unlawful concertation or is the result of the independent commercial judgment of the two producers.

In this connection it is not necessary, as ICI argues, that in order for an infringement to be found it has to be proved that but for the alleged collusion there would have been a substantial trade between the United Kingdom and the Member States where Solvay is established. What has to be demonstrated is that the two producers in fact substituted practical

<sup>(1)</sup> [1976] ECR 811.

<sup>(2)</sup> [1972] ECR 619.

<sup>(3)</sup> [1975] ECR 1663.

cooperation for the risks of competition which might otherwise develop. While any assessment of the volume of trade which might have occurred is speculative, what is shown is that such trade was commercially feasible in both directions.

(58) In the present case the Commission considers that the documentary evidence shows that:

- (a) the original separation of markets between Solvay and ICI was the result of a long-standing and express agreement between them, the latest known version of which was 'Page 1000';
- (b) the formal termination of the 'Page 1000' agreement in 1972 did not result in or reflect any alteration in practice of the strict market separation between Solvay and ICI;
- (c) both Solvay and ICI were well aware that the other was continuing to follow a deliberate commercial policy of reciprocal abstention from which each derived an anti-competitive benefit, i.e. dominance and control of their respective markets;
- (d) the policy of each producer of abstaining from the other's markets depended upon the other respecting the same policy;
- (e) Solvay and ICI continued to have a relationship of complete cooperation<sup>(1)</sup> indicative of partnership rather than of competition;
- (f) there were frequent contacts between the two producers designed to coordinate their global strategy in soda-ash and avoid any conflict between their respective interests;
- (g) the whole basis of this continued partnership was the shared understanding that the commercial policies dating from the 'Brunner, Mond' era, i.e. reciprocal recognition of exclusive spheres of operation, would be maintained.

(59) It is indeed extremely unlikely that, given the well-known legal risks, any written resolution would nowadays be made recording the details of such an

<sup>(1)</sup> For the purposes of the present case, the Commission does not consider the Solvay/ICI 'PFR' arrangements as constituting *per se* infringements of Article 85: rather they are indicative of (a) the close commercial relationship between the two producers in the soda-ash field, and (b) a shared concern to maintain the status quo, and are part and parcel of a wider concertation to eliminate competition between them: (e.g. *Suiker Unie v. Commission*, at recital 182; Joined Cases 29 and 30/83 *Cram and Rheinzink v. Commission* [1984] ECR 1679.

understanding. There are many forms and degrees of collusion and it does not require the making of a formal agreement. An infringement of Article 85 may well exist where the parties have not even spelled out an agreement in terms but each infers commitment from the other on the basis of conduct.

The definition of the Court of Justice of a concerted practice as set out in its judgment in *Suiker Unie* is thus entirely apt to cover the commercial behaviour of ICI and Solvay.

The Commission therefore finds that the continued division of national markets between Solvay and ICI results from and is referable at least to a concerted practice.

### 3. Restrictions of competition/effect on trade between Member States

- (60) Arrangements between producers which have the object or effect of protecting national markets are expressly prohibited by subparagraph (c) of Article 85 (1). Such protection is in fundamental conflict with one of the basic objectives of the Treaty, namely the creation of a common market. Given the size of the two undertakings concerned and their importance in the market for soda-ash, there can be no doubt that the arrangement had an appreciable effect upon trade between Member States.

## B. Remedies and sanctions

### 1. Article 3 of Regulation No 17

- (61) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

The arrangements in the present case were conceived and implemented in secret and both undertakings have continued to deny the existence of any infringement of Article 85. As a result, it is uncertain whether or not they have definitively put an end to the collusion. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require ICI and Solvay to bring the infringement to an immediate end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect.

## 2. Article 15 (2) of Regulation No 17

- (62) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

## (a) Gravity

- (63) In the present case the Commission considers that the infringement was of considerable gravity. Over a long period of time the two major producers of soda-ash in the Community have knowingly concerted their commercial policies so as to avoid all competition between them in an important industrial product and a market worth some ECU 900 million annually. But for the discovery of the relevant evidence by the Commission, there is every likelihood that they would have continued their anti-competitive cooperation in some form for an indefinite period.
- (64) The division of markets on national lines by means of collusive arrangements constitutes an infringement which is contrary to the most fundamental objectives of the EEC Treaty, namely the creation of a single market between Member States.

The protection of home markets allows the producers involved to pursue a commercial policy in their own market which is insulated from competition from other Member States. The complete absence of imports to the United Kingdom from other Member States has undoubtedly contributed to the maintenance of ICI's dominant position (over 90% market share). Solvay was also protected from any competitive pressure from the second largest Community producer. The absence of competition between the two major Community producers to a large extent ensured that the market for soda-ash was partitioned along national boundaries. It must also have been an important factor in the maintenance of the substantial price differences which exist between the United Kingdom and the Member States in continental western Europe for this product.

- (65) The infringement was deliberate and both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.

Both Solvay and ICI have been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry:

69/243/EEC Dyestuffs (ICI) <sup>(1)</sup>; 85/74/EEC Peroxides (Solvay); 86/398/EEC Polypropylene (Solvay, ICI) <sup>(2)</sup>; 89/190/EEC PVC (Solvay, ICI) <sup>(3)</sup>; 89/191/EEC LdPE (ICI) <sup>(4)</sup>.

- (66) Furthermore, the activities of both producers in the soda-ash sector itself were the subject of scrutiny by the Commission between 1980 and 1982. Although at that time the Commission was more particularly concerned with the producers' exclusive supply agreements with customers, those responsible for the soda-ash activities cannot have been ignorant of the need to comply with Community law.

## (b) Duration

- (67) The ICI-Solvay arrangement dates from before the establishment of the common market. It would have been legitimate for the Commission to assess any fine on the basis that it has constituted an infringement since at least the date on which Regulation No 17 came into effect, namely 6 February 1962: the fact that ICI has its head office outside the Community would not prevent the application of Article 85 if trade between Member States had been affected. For the purposes of the present case the Commission will however assess fines on the basis that it commenced from the date of United Kingdom accession to the Communities on 1 January 1973 and has continued at least up to the institution of the proceedings in the present case.
- (68) The Commission therefore considers that substantial fines should be imposed on both Solvay and ICI in respect of this infringement. Solvay's sales of soda-ash in the Community in 1988 came to ECU [...] million while ICI's were ECU [...] million. The Commission does not however consider it appropriate in the present case to distinguish between the two producers as regards the amount of the fine. Each producer derived a considerable benefit from the infringement. Both are large multinational concerns and while ICI's soda-ash sales are less than one-third those of Solvay's, its turnover for all products is three times greater than that of Solvay,

HAS ADOPTED THIS DECISION:

## Article 1

Solvay et Cie SA ('Solvay') and Imperial Chemical Industries plc ('ICI') infringe Article 85 of the EEC Treaty by

<sup>(1)</sup> OJ No L 195, 7. 8. 1969, p. 11.

<sup>(2)</sup> OJ No L 230, 18. 8. 1986, p. 1.

<sup>(3)</sup> OJ No L 74, 17. 3. 1989, p. 1.

<sup>(4)</sup> OJ No L 74, 17. 3. 1989, p. 21.

participating since 1 January 1973 until at least the institution of the present proceedings in a concerted practice by which they confined their soda-ash sales in the Community to their respective home markets, namely continental western Europe for Solvay and the United Kingdom and Ireland for ICI.

#### *Article 2*

Solvay and ICI shall forthwith bring the infringement to an end (if they have not done so already) and shall in the future refrain from any agreement or concerted practice which may have the same or the equivalent object or effect.

#### *Article 3*

The following fines are imposed upon the undertakings named herein in respect of the infringement found in Article 1:

- (a) Solvay et Cie, Brussels, a fine of ECU 7 million;
- (b) Imperial Chemical Industries plc, London, a fine of ECU 7 million.

#### *Article 4*

The fines imposed under Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,  
Banque Bruxelles Lambert,  
Agence Européenne,  
Rond Point Schuman, 5,  
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 14 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceeding payment.

#### *Article 5*

This Decision is addressed to:

- Solvay et Cie SA, rue du Prince Albert 33, B-1050 Brussels;
- Imperial Chemical Industries plc, Millbank, UK-London SW1P 3JF.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

*For the Commission*

Leon BRITTAN

*Vice-President*

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 of the EEC Treaty

IV/33.133-B: Soda-ash — Solvay, CFK

(Only the French and German texts are authentic)

(91/298/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

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

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 <sup>(2)</sup>,

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

— Solvay et Cie SA, Brussels (Solvay),

— Chemische Fabrik Kalk, Cologne (CFK).

2. The infringement can be summarized as follows:

*Infringement of Article 85 by Solvay and CFK*

From a date unknown in about 1987 to at least 1989 Solvay and CFK have participated in an agreement and/or concerted practice contrary to Article 85 of the EEC Treaty by which, for each of the years 1987, 1988 and 1989, Solvay guaranteed CFK a minimum sales tonnage calculated by reference to a formula based on CFK's achieved sales in Germany during 1986 of 179 Kt and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

**B. The infringement of Article 85 by Solvay and CFK****PART I****THE FACTS****A. Summary of the infringement**

- (1) 1. The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14 (3) of Regulation No 17 at the premises of Community producers of soda-ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing (*inter alia*) that an infringement of Article 85 of the EEC Treaty had been committed by the following undertakings:

**1. Background**

- (2) For details of the product and the soda-ash market, reference is made to Part 1. B of Commission Decision 91/297/EEC (Solvay-ICI) <sup>(3)</sup>.
- (3) CFK is a subsidiary of Kali & Salz AG (BASF Group) and is one of three producers of synthetic soda-ash located in Germany. It currently has a production capacity of around 260 Kt. CFK's market share in Germany is around 15 %.

Solvay is by far the largest producer supplying the Germany market and has a market share of over 50 %. At all material times it conducted its soda-ash business

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

<sup>(3)</sup> See page 1 of this Official Journal.

in Germany through its subsidiary Deutsche Solvay Werke (DSW). Until 1985 another Solvay subsidiary, Kali Chemie (KC) was also active in the soda-ash sector but its operations were then fully integrated in those of DSW.

In November 1989 Solvay announced plans to re-organize its activities in Germany by setting up a new wholly-owned holding company Solvay Deutschland GmbH controlling KC and holding 59,7% of the shares in Deutsche Solvay Werke. The arrangements do not affect the responsibility of Solvay for the infringement.

- (4) In 1985 DSW attempted to weaken the position of CFK in the German market by taking the business of some of its major customers, but the smaller producer compensated for the lost business by itself taking customers from Matthes & Weber, the other German producer.

During 1986 Solvay realized that CFK was applying a policy of price cutting in order to retain or regain market share. In a telephone conversation between DSW and Solvay's headquarters in Brussels on 24 October 1986, the possibility of an 'armistice' between Solvay and CFK was discussed. According to DSW, an 'armistice' with CFK would be impossible unless there was talk of a price increase in 1987. The position of Solvay Brussels was that CFK should be told that after a trial period of the 'armistice', perhaps in the second quarter of 1987, there might be discussions about a price increase.

Both Solvay and CFK insist that no 'armistice' was ever agreed (replies pursuant to Article 11). This denial has however to be judged in the light of the documentary evidence referred to in the following paragraphs.

## 2. The 'guarantee' agreement

- (5) An assessment of the soda-ash market prepared by DSW in March 1988, shows that the problems with CFK had by that time 'calmed down'. The documentary evidence discovered by the Commission shows that an agreement or arrangement had been made between Solvay and CFK by which Solvay 'guaranteed' CFK an annual minimum sales tonnage on the German market.

If CFK's sales in Germany fell below the guaranteed minimum, Solvay would buy the shortfall from CFK.

- (6) Originally, CFK's guarantee was set at 179 Kt, a figure apparently based on CFK's achieved sales in Germany during 1986. At the time, the parties did not

foresee that there would be any real growth in the German soda-ash market which in 1986 and 1987 was about 1 080 Kt in total.

For both 1987 and 1988, CFK's achieved sales were somewhat over its guaranteed minimum of 179 Kt (183 Kt and 180 Kt respectively). Indeed demand in Germany had started to increase beyond earlier expectations and by the end of 1988 it had become apparent that the total sales for that year would come to some 1 170 Kt, an increase of some 8,3% over the previous year.

As a result of the growth in demand, CFK demanded a minimum guarantee for 1988 and 1989 of 194 Kt. CFK was thus claiming retrospective 'compensation' for 1988 of 14 Kt (194-180) which after taking account of the credit for 1987 left 11 Kt. CFK's internal forecasts for 1989, as revised in January of that year, confirm that it had altered its original planning so as to provide for 'co-producer' sales in 1989 of 11 Kt.

Solvay had in fact purchased 2,5 Kt at the end of December 1988 leaving a balance of 8,5 Kt which CFK wanted it to buy during 1989.

- (7) In response to CFK's claim, Solvay offered maximum compensation for 1988 of 4 Kt instead of the 8,5 Kt. For 1989, it proposed that the guarantee be increased by only 5,3% instead of 8,3% by taking account of a 'neutral zone' of 3%. The guarantee for 1989 would thus be 190 Kt instead of the 194 Kt which CFK had originally demanded.

A meeting was held on 14 March 1989 attended by senior representatives of CFK and its parent company Kali & Salz on the one side and DSW on the other. It is highly significant that no official record or minute was made of this meeting and indeed no trace of it whatever exists at either CFK or Kali & Salz. However a brief handwritten note of this meeting was found at DSW. It is clear that the object was to resolve the one outstanding point, namely whether the compensation was to be made retrospective. There was no dispute about the basic machinery: the Solvay note reads 'Verständnis System: i.o.' ('Agreement system: OK'). Solvay, while proposing some changes, was satisfied with the way the scheme was working ('Schiff laufen lassen und nach vorn orientieren.'). It appears from the note that both sides had agreed that for the next eight months Solvay would purchase from CFK at the rate of 1 000 tonnes per month.

The compensatory mechanism was put into practice with Solvay buying in from CFK during the first half of 1989 the additional 8,5 Kt which had been claimed by CFK.

### 3. Arguments in defence

- (8) Both Solvay and CFK deny that any collusive agreement or arrangement was made between them. The incriminating documentary evidence found at DSW is explained by Solvay as referable to a scheme which was conceived on a wholly unilateral basis when it was considering acquiring CFK's business in about 1988. In order to maintain CFK as a going concern pending the negotiations (says Solvay), it calculated (again without any contact with CFK) the tonnage which that undertaking would need to sell on the German market in order to load its plant at a level that would guarantee its survival. (It is not however explained by Solvay why it should follow a policy that would lead it to pay a higher price for CFK's business than would otherwise be the case, nor, if it were only a matter of ensuring an optimal plant utilization rate for CFK, it should need to refer specifically to its sales on the German market.) This 'survival tonnage' Solvay assessed at 179 Kt for 1986. The frequent references in the documents to a 'claim' or 'demand' by CFK, and the very detailed calculations on this question do not, Solvay asserts, imply any contact with that undertaking any more than do the references to an 'offer' by Solvay or to a 'compromise'. As for the meeting between DSW and CFK and Kali & Salz on 14 March 1989 its purpose was simply to discuss the possible acquisition by Solvay of an interest in CFK's soda activities: only during this meeting did Solvay for the first time give an indication to CFK that it was considering helping that company to survive, but nothing concrete was agreed and nothing ever resulted from the meeting.

Solvay did not consider it necessary to propose that the persons involved be found in order to corroborate its factual arguments, nor did it request an oral hearing.

CFK for its part denied any involvement in collusion: it could give no explanation for the documents discovered at DSW, arguing that they were a matter for Solvay and not itself: there was nothing in its own documentation which could connect it with any collusive scheme.

- (9) The Commission rejects as entirely unbelievable the explanations advanced by Solvay which are in any case in complete contradiction with the terms of its own documents. It is also significant that some of the documents concerned were transmitted by telefax from DSW to Solvay headquarters in Brussels but no trace exists of their having been received. As for the arguments of CFK, it is well settled that documents found at one undertaking which incriminate another may constitute evidence against it as well as against the maker (Judgment of the Court of Justice in Cases 40-48, 50, 54-56, 111, 113 and 114/73, *Suiker Unie*

and others v. Commission <sup>(1)</sup>). In any case, there are several examples of detailed references in CFK's own documents which are echoed in the documents found at Solvay and which information could not have been known to Solvay unless it had been communicated to it. CFK was unable to provide any explanation for the coincidence of references in its documents and those of another producer.

## PART II

### LEGAL ASSESSMENT

#### A. Article 85 of the EEC Treaty

##### 1. Article 85 (1)

- (10) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Article 85 (1) specifically includes as examples of prohibited agreements those which directly or indirectly fix selling prices, limit or control markets, or share markets between producers.

##### 2. Agreements/concerted practices

- (11) Article 85 (1) prohibits both agreements and concerted practices. In the present case, although nothing turns on the distinction between the two forms of prohibited collusion, the Commission considers that the arrangement between Solvay and CFK can most accurately be categorized as an 'agreement' within the meaning of Article 85 (1).

An 'agreement' may exist when the parties have reached consensus on a plan which limits or is likely to limit their commercial freedom by determining the

<sup>(1)</sup> [1975] ECR 1663, paragraph 164.

lines of their mutual action or abstention from action in the market. It is not necessary that the parties should consider it legally binding, and indeed where they are well aware of the illegality of their arrangement they clearly cannot intend it to have contractual force. No enforcement procedures are required; nor is it necessary for such an agreement to be made in writing.

### 3. *Restriction of competition*

- (12) In the present case it is self-evident that the agreement has the object and effect of restricting competition.

The purpose was clearly to achieve conditions of artificial market stability. In exchange for returning to pricing behaviour which was not considered by Solvay as disruptive, CFK was guaranteed a minimum share of the German market. By removing from the market the tonnage which CFK could not sell, Solvay ensured that price levels were not brought down by competition. It is clear from the documentary evidence that the arrangements were put into practice and had the intended effect. Such classic cartel-type arrangements by their very nature restrict competition within the meaning of Article 85 (1).

### 4. *Effect upon trade between Member States*

- (13) The fact that the minimum guaranteed tonnage related only to sales on the German market in no way excludes the application of Article 85. It is clear from the involvement of Solvay in Brussels that the arrangement was part of its overall policy for controlling the soda-ash market in the Community. The Solvay/CFK arrangement was intended not only to reduce competition in a major part of the Community but also to maintain the rigidity of the existing market structure and its separation along national lines. It is also quite possible that the tonnage taken by Solvay under the guarantee would otherwise have been placed by CFK in other Community markets.

### 5. *Conclusion*

- (14) The Commission therefore considers that Solvay and CFK have infringed Article 85 of the EEC Treaty by participating from about 1986 to the present time in an agreement by which Solvay guaranteed to CFK a certain minimum annual tonnage in Germany and purchased from it the quantities required to reach that minimum.

## B. Remedies and sanctions

### 1. *Article 3 of Regulation No 17*

- (15) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

The arrangements in the present case were conducted in secret and despite the overwhelming documentary evidence both Solvay and CFK have continued to deny that any collusive arrangements were made between them. As a result, it is uncertain whether or not they have taken any steps to put an end to the collusion. It is therefore necessary, pursuant to Article 3 of Regulation No 17, to require Solvay and CFK to bring the infringement to an immediate end.

The parties must also be prohibited from any agreement or concerted practice having equivalent effect.

### 2. *Article 15 (2) of Regulation No 17*

- (16) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) or Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

#### (a) *Gravity*

- (17) In the present case the Commission considers that the infringement was a serious one. Market-sharing agreements are by their very nature considerable restrictions on competition. In the present case the parties restricted competition between them by means of a device intended to create artificial conditions of market stability. CFK's volume ambitions were accommodated without the tonnage in question having to be placed on the consumer market at competitive prices. The arrangements were also conducted in conditions of considerable secrecy.

#### (b) *Duration*

- (18) It is not possible, given the refusal of the undertakings to provide any information, to determine exactly when the guarantee agreement was made. The arrangements were first applied to CFK's sales for the year 1987. It is therefore appropriate to assess fines on

the basis that the agreement was concluded at some time during that year.

In determining the amount of the fine to be imposed on each producer, the Commission bears in mind Solvay's dominant market position as the leading producer in Germany and in the Community. Solvay considers that as such it has a particular responsibility for ensuring the 'stability' of the market. CFK is a relatively small producer of soda-ash but it was a willing partner in the collusive venture.

- (19) The infringement was deliberate and both parties must have been well aware of the obvious incompatibility of their arrangements with Community law.

Solvay has been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry: Decision No 85/74/EEC, Peroxides <sup>(1)</sup>; Decision No 86/398/EEC, Polypropylene <sup>(2)</sup>; Decision No 89/190/EEC, PVC <sup>(3)</sup>. Its activities in soda-ash have been the subject of scrutiny by the Commission in 1980 and 1982. Although at that time the Commission was more particularly concerned with Solvay's exclusive supply arrangements with customers, those responsible for the soda-ash activities cannot have been ignorant of the need to comply with Community law,

HAS ADOPTED THIS DECISION:

#### Article 1

Solvay et Cie (SA ('Solvay') and Chemische Fabrik Kalk GmbH ('CFK') infringed Article 85 of the EEC Treaty by participating from about 1987 until the present time in a market-sharing agreement by which Solvay guaranteed to CFK a minimum annual sales tonnage of soda-ash in Germany calculated by reference to CFK's achieved sales in 1986, and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

#### Article 2

Solvay and CFK shall forthwith bring the infringement to an end (if they have not already done so) and shall in the future refrain from any agreement or concerted practice which may have the same or the equivalent object or effect.

#### Article 3

The following fines are imposed upon the undertakings named herein in respect of the infringement found in Article 1 hereof:

- (a) Solvay et Cie, Brussels a fine of ECU 3 million,
- (b) Chemische Fabrik Kalk, of Cologne, a fine of ECU 1 million.

#### Article 4

The fines imposed by Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,  
Banque Bruxelles Lambert,  
Agence Européenne,  
Rond Point Schuman 5,  
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 14 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceeding payment.

#### Article 5

This Decision is addressed to:

- Solvay et Cie SA, 33 rue du Prince Albert, B-1050 Brussels;
- Chemische Fabrik Kalk GmbH, Kalker Hauptstrasse 22, D-5000 Cologne 91.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

For the Commission  
Leon BRITTAN  
Vice-President

<sup>(1)</sup> OJ No L 35, 7. 2. 1985, p. 1.

<sup>(2)</sup> OJ No L 230, 18. 8. 1986, p. 1.

<sup>(3)</sup> OJ No L 74, 17. 3. 1989, p. 1.

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 86 of the EEC Treaty

IV/33.133-C: Soda-ash — Solvay

(Only the French text is authentic)

(91/299/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

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

Having given the undertaking concerned the opportunity to make known its view on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (62) of Council Regulation No 17 <sup>(2)</sup>,

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

## PART I

## THE FACTS

## A. Summary of the infringement

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

2. The infringement can be summarized as follows:

*Infringement of Article 86 by Solvay*

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

## B. Background

## 1. Solvay's position in the EEC soda-ash market

- (2) Details of the product and the soda-ash market are set out in Part 1.B of Commission Decision 91/297/EEC (Solvay-ICI) <sup>(3)</sup>.

Solvay is by far the largest producer of soda-ash both worldwide and in the EEC. In the Community it operates plant in Belgium, France, Germany, Italy, Spain, and Portugal and supplies the product to consumers throughout the EEC with the exception of the United Kingdom and Ireland.

- (3) In the nine west European national markets in which Solvay has its own sales organization (the nine 'Directions nationales' or 'DN' which include Austria and Switzerland) it has had a stable market share of around 70 %. Its four EEC competitors together have only 26 %. In the EEC excluding the British Isles (where ICI has a near-monopoly as a result of the 'home market' rule: see Decision . . . (ICI)) Solvay's market share has also historically been around 70 %. With the sole exception of the Netherlands (left largely to NSI and then AKZO as a result of a market-sharing agreement made in 1955 which is not the subject of

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

<sup>(3)</sup> See page 1 of this Official Journal.

proceedings) Solvay is the largest, or in some cases the exclusive, supplier of soda-ash in each of the Member States in which it sells.

Solvay as the largest producer of salt in the EEC is very favourably placed as regards the supply of the principal raw material for soda-ash.

## 2. Solvay's competitors

- (4) The only other producer in Europe comparable in strength to Solvay is ICI which does not compete in any of Solvay's markets. With the possible exception of AKZO, which by virtue of its location on the North Dutch coast claims as its 'natural backyard' not only the Netherlands but also North Germany and Denmark, the other producers tend to concentrate their EEC sales on their respective national markets. Thus Rhone-Poulenc conducts 95 % of its EEC soda-ash business in France; Chemische Fabrik Kalk (CFK) and Matthes & Weber send some exports to the Netherlands, France and Luxembourg but again their main effort is on their local market. Compared with Solvay's 70 %, the other producers' market shares in the continental EEC Member States range from 4 % to 11 %.

The main danger seen by Solvay to its position in its European market comes not from other EEC producers but from United States natural ash. The east European producers supply mainly light ash which is not normally used by the glass industry. The anti-dumping measures which have been in place since 1983 have provided Solvay with a substantial degree of protection against such imports: see *post*, recital (10).

## 3. Solvay's customers

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

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

- (6) Solvay's largest customer is the St Gobain Group with 'evergreen' contracts in the different Member States terminable on 24 months' notice, covering an offtake

in western Europe of over 500 000 tonnes per year. There is also a secret 'protocol' providing for a 'group rebate' of 1,5 % per year on all sales in Europe. Prices and other contractual terms are however negotiated on a national basis between the appropriate Solvay 'DN' and the St Gobain company in the Member State in question. Many other customers also have an 'evergreen' contract providing for a 24-month notice period.

## 4. Solvay's sales organization

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

## 5. Solvay's total requirements contracts up to 1981

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

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

The Commission however informed Solvay by letter that the tonnages which the customer was required to purchase each year should not correspond with or be close to the customer's total requirements of soda-ash. Further, while confirming that it was permissible for Solvay to grant rebates and discounts off list price, the

Commission insisted that any rebates adopted by Solvay should constitute neither a disguised method of ensuring the continuance of the abandoned 'total requirements' contracts nor operate as loyalty rebates.

- (9) Solvay informed the Commission at the end of 1980 that it was instructing its various 'DN' to amend their supply agreements and attached a copy of a draft circular letter to be sent to its various national sales offices in which it stressed — in two places — that under no circumstances should any price arrangement constitute an inducement to ensure the 'loyalty' of the customer. The customer was also to be free to choose the tonnages it wished to purchase, and the sales offices were expressly prohibited from attempting to discover from the customer the proportion of its total requirements which the nominated tonnage represented.

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

#### 6. Anti-dumping protection

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

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

- (11) The anti-dumping duties on United States imports were under review at the time of the present proceedings and Solvay was pressing hard for their renewal, as well as the extension of anti-dumping duties to material imported under inward-processing arrangements. [. . .] <sup>(1)</sup>.

<sup>(1)</sup> In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

It is significant that in the anti-dumping procedure Solvay was arguing for a new minimum price cleared at EEC border of ECU 163 per tonne to be imposed on dense ash from the East and the United States (= ± ECU 170 — ECU 180 delivered) while (as it well knew) in several countries its own average delivered price was under DM 300 (= ECU 150).

#### C. Exclusionary conduct

##### 1. Solvay's commercial strategy since 1982

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

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

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

'Solvay's primary concern — to defend its major commercial position particularly in Europe (it is this market which pays well and is profitable).

This entails:

- a policy of being present for every customer + good market coverage . . .
- a policy favouring customers prepared to agree to long-term commitments = contracts which provide for significant discounts.'

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

'Defensive strategy consists, and will continue to consist, in:

- continuing to "tie in" customers with bigger and bigger contractual discounts.'

## 2. Solvay's rebate system in Germany

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

- excluding all imports from the United States and preventing any further growth in imports from AKZO and Eastern European producers,
- maintaining its 'dominant position' as soda-ash supplier to the flat glass and container glass industry.

Besides the usual quantity rebates on basic tonnage for major customers, Solvay has since 1982 granted two additional forms of rebate in Germany:

- a rebate on marginal tonnage (called 'Spitzenrabatt'), almost invariably of 20 % off list price,
- a special annual payment by cheque (up to DM 3,4 million in one case) dependent upon the customer's obtaining most or all of its requirement from Solvay.

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

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

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

- 1) on the basic contractual tonnage of [...] tonnes, a rebate of 10 %;
- 2) for the 'marginal' tonnage of [...] tonnes, a rebate of 20 %;
- 3) a cheque attributable to the marginal tonnage of DM 3 349 000.

Solvay's ex-works price for Germany was DM 403 per tonne. The average net price per tonne paid by large customers in Germany over the last few years has been around DM 340 to DM 360 per tonne. What is not

apparent is that on the *marginal* tonnage the price per tonne may go down to DM 250 per tonne or even lower.

To take again the example of Vegla in 1989:

|                                                      |                                  |
|------------------------------------------------------|----------------------------------|
| — List price ex-works                                | DM 403                           |
| — Basic tonnage (rebate 10 %)                        | [...]                            |
| — Marginal tonnage (rebate 20 %)                     | [...]                            |
| — Discount price of last tranche (list price - 20 %) | DM 322,40                        |
| — Special cheque payment                             | DM 3 349 000<br>= DM [...] tonne |
| — Net price per tonne for marginal tonnage           | DM 245,24                        |

- (17) In each case where the special top-slice/cheque rebates are given, Solvay is the sole or the principal supplier of the customer. It is apparent from the documents that in each case Solvay has an accurate idea of each customer's total requirements and can calculate its price offer accordingly. The marginal tonnage to which the financial inducements are referable corresponds with the tonnage which the customer might otherwise consider obtaining from a competing supplier.

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

To put it another way, if the competing supplier is to hope to obtain marginal business from Solvay, he will have to compensate the customer for the loss of the financial advantage which is foregone by not purchasing it from Solvay. In the example given the value of this benefit is some DM 6 850 000. The second supplier would have to absorb the cost of granting this rebate on just over [...] tonnes while Solvay can average the rebate over three times that quantity.

The customer thus has little incentive to seek a second supplier given the favourable price offered by Solvay

for marginal tonnage, and the second supplier has no incentive to quote for the customer's marginal requirements given the unprofitable price at which he will have to offer.

- (18) In most cases, such as that of Vegla, the rebate system ensures that Solvay is secure in the position of exclusive supplier. The rebate system also operates however to ensure that where customers do have a policy of splitting their business between two suppliers the dominant share of Solvay is maintained. Flachglas, Solvay's second largest customer in Germany, divides its business roughly 70:30 between Solvay and Matthes & Weber. Since 1983, Solvay's pricing conditions to Flachglas involve an 8,5 % quantity rebate for tonnage up to [...] Kt, 20 % on any marginal tonnage, and a cheque for DM 500 000 to DM 750 000. The additional 'cheque rebate' meant that the real price for any marginal tonnage taken over [...] Kt was (depending on the quantity) as low as DM 250 or DM 260 per tonne. It is extremely difficult for the second supplier to break into Solvay's 'core' share of the business which (as Solvay's own documents show) is protected by the rebate 'barrier'. While the second supplier might be able to match the invoiced price of DM 322,40 (list price — 20 %) it is highly unlikely that the customer would risk losing the substantial cheque payment which is clearly dependent upon its purchasing an appropriate tonnage from Solvay in addition to the basic contractual tonnage. Documentation obtained from Matthes & Weber confirms that it was impossible for that company to make any inroads on Solvay's share of the Flachglas business.

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

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

Other DSW documents dating from early 1988 emphasize that Vegla must be made aware that the 'preferential treatment' accorded it by Solvay depended upon its taking the whole of its requirements from DSW. In the event that Vegla did not do so, the cheque rebate would be withdrawn. The documents also stress the fact that Solvay's

two-step price system involves a significant subsidy for marginal tonnages in order to exclude competition. One note of 1 February 1988 makes the point particularly clear:

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

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

### 3. Solvay's rebate system in France

- (20) In France Solvay applies a system of rebates on marginal tonnage similar to that operated in Germany.

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

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

- (21) Durand (Cristalleries d'Arques) has an annual offtake of [...] tonnes. Up to 1987, Durand received a rebate of 5 % for tonnage over [...] tonnes. For 1988, the arrangement included not only the 5 % rebate but also a supplementary rebate of FF 100 per tonne on purchases over [...] tonnes. For 1989 having ascertained that Durand's total requirements of soda-ash would be [...] tonnes, Solvay increased the

rebate on tonnages from [...] to FF 140 per tonne with FF 175 on the last tranche, i.e. anything over [...].

- (22) Perrier consumes around [...] tonnes of soda-ash per year, all purchased from Solvay. Under its 'evergreen' supply contract dating from 1981, it is required to take [...] tonnes  $\pm$  10% from Solvay. From 1987 onwards, Perrier received a basic 4% tonnage rebate but if its offtake exceeded [...] tonnes, the rebate was increased to 4,75% on the whole of the tonnage purchased. Thus if Perrier goes to another supplier for marginal tonnage i.e. anything over [...] tonnes, the second supplier would have to compensate it for the loss of the additional 0,75% rebate on the whole of the [...] tonnes already purchased from Solvay.

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

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

The effective price per tonne of the last [...] tonne tranche from Solvay is as follows:

The effective price per tonne of the last [...] tonne tranche from Solvay is as follows:

|                                 |           |                        |
|---------------------------------|-----------|------------------------|
| — Ex-works list price per tonne |           | FF 1 125               |
| — Delivered price per tonne     |           | FF 1 223               |
| — Less: 5%                      | FF 56,25  |                        |
| — Additional rebate             | FF 175,00 | FF 231,25              |
| — Net delivered price per tonne |           | FF 991,75              |
|                                 |           | (= FF 893,75 ex-works) |

Solvay's average delivered price per tonne if it supplies the whole [...] tonnes is much higher: FF 1 136. A competitor wishing to supply the marginal [...] tonnes would however have to offer a delivered price of FF 991,75 or better. The second supplier would

have to compensate the customer for moving its business by offering an inducement of FF [...] ([...]  $\times$  FF 231,25). On the assumption that its ex-works list price is the same as Solvay's (FF 1 125), it would have to absorb the whole FF [...] million on business worth only FF [...] at list price, i.e. give an effective discount of over 20%.

#### 4. St Gobain

- (24) The St Gobain group, which operates almost 30 glassworks across Europe — in France, Germany, Italy, Spain, Belgium and Portugal — is Solvay's largest customer with purchases of over [...] tonnes of soda-ash in 1988.

St Gobain produces both flat and container glass. Out of its total consumption of soda-ash in western Europe of [...] tonnes (1988) Solvay supplied [...] % (1987: [...] %).

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

There are substantial price variations between the different Member States but St Gobain (to Solvay's apparent dissatisfaction) uses its presence in several countries to exercise downward pressure on Solvay's differential pricing.

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

By Clause 2 of the Protocol:

'On European markets other than France St Gobain will continue to give priority to Solvay for supplies of soda-ash, for quantities of at least [...] tonnes per annum, based on St Gobain's glass production in 1981; in France St Gobain will progressively increase purchases from Solvay to

bring them to the level of [...] to [...] tonnes per annum.'

In addition to provisions under which St Gobain is to receive the lowest prices offered by Solvay in each country for comparable glass-making usages, Clause 4 provides for a special group rebate on St Gobain's total purchases from Solvay:

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

The Protocol also contains a 'competition clause' under which:

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

- (26) The 'super group rebate' granted to St Gobain amounts to some BFRs [...] million annually.

The internal documentation of Solvay leaves little doubt about the purpose of this special arrangement with St Gobain:

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

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

##### 5. Exclusivity arrangements in Germany

- (27) Quite apart from the secret 'Protocol' with the St Gobain group, DSW also has a long-standing, if

unofficial, arrangement (referred to as a 'gentleman's agreement') with Vegla, the German St Gobain subsidiary, by which it is understood that this customer takes all its requirements of soda-ash from Solvay. With an eye presumably on the letter of EEC competition rules, the Vegla agreement had however been formally expressed as a 'tonnage' contract. Vegla, in common with most of Solvay's large customers in Germany, has an 'evergreen' contract dating from 1981, i.e. one of undetermined duration subject to termination on 24 months' notice. The exact quantities are the subject of annual negotiation.

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

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

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

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

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

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

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

##### 6. Exclusivity arrangements in France

- (29) In addition to the fidelity rebates given to several major customers in France, the tie of exclusivity with

Solvay was reinforced by the device of concluding long-term delivery agreements which, although formulated as 'tonnage' contracts, in fact stipulate for a tonnage which corresponds closely with the customer's total requirements. The Commission had warned Solvay against such a practice in December 1980.

The 'evergreen' supply contract with BSN which dates from 18 June 1981 requires BSN to purchase from Solvay annually a quantity of [...] tonnes  $\pm 15\%$  for its glass factories in France. BSN's total soda-ash requirement from 1982 to 1984 was in reality some [...] tonnes falling from 1985 onwards to around [...] tonnes annually. The minimum tonnage which BSN is obliged to purchase from Solvay under the terms of the 1981 agreement is [...] tonnes, a tonnage which is not far short of its total requirements. The contract is of indeterminate duration and continues for a period of two years after notice of termination either side. Solvay has been the virtually exclusive supplier of soda-ash to BS since 1982, supplying each year some 98% of its requirements.

- (30) The supply contracts with a number of other major glassmaking customers in France — for example Perrier, Verrerie d'Albi — also require the customer to take a tonnage close to its actual requirements:

Perrier: contractual tonnage [...] tonnes  $\pm 10\%$ ; annual requirements since 1982,  $\pm$  [...] tonnes, all supplied by Solvay.

Verrerie d'Albi: contractual tonnage [...] tonnes  $\pm 5\,000$  tonnes; annual requirement since 1982, [...] tonnes, all supplied by Solvay.

Again both these contracts require two years' notice of termination.

#### 7. The Belgian glassmaker contracts

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

On 7 February 1978 agreements were signed between the Belgian glassmakers and Solvay under which they were required to purchase the totality of their requirements from Solvay for a period of five years.

The Commission insisted in the course of the discussions with Solvay between 1980 and 1981 that these contracts would also have to be modified.

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

|           |   |                  |
|-----------|---|------------------|
| St Roch   | : | [...] $\pm 15\%$ |
| Glaverbel | : | [...] $\pm 15\%$ |
| Verlipack | : | [...] $\pm 15\%$ |

(Since the failure of Verlipack and its restructuring in 1985 its annual consumption has halved and it now purchases under an annual contract.)

The agreements were to be of an unspecified duration subject to termination at 24 months' notice.

Before 1 November of each year, the customer has to inform Solvay of the tonnages which it intends to take during the following year: there are also special provisions dealing with the eventuality of the customer taking more or less than the contractual tonnage.

- (33) In practice, the basic contractual tonnages were a reasonably close approximation of the total annual consumption of the customers at the time. Since 1983 the three customers have in fact taken virtually all of their requirements from Solvay<sup>(1)</sup>. An exception was the [...] tonnes imported by St Roch in early 1988 under inward-processing arrangements. This business was the subject of intensive negotiations between Solvay and St Gobain and has now been regained by Solvay for 1989.

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

#### 8. Other exclusivity arrangements in Belgium

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

<sup>(1)</sup> Glaverbel (to Solvay's knowledge) has to purchase some [...] tonnes per annum from East Germany to offset its exports of glass to that country. Apart from this tonnage it is supplied only by Solvay.

Durobur of Soignies has since 1983 had a series of annual or biennial delivery contracts with Solvay with an annual offtake of some [...] tonnes.

The contracts made on each occasion contained a clause which effectively ensured that Durobur does not change to another supplier at the end of the contractual period. The agreements provide that Solvay and Durobur will meet at the end of the period to negotiate the conditions of the next contract, and then stipulate:

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

Similar provisions appear in the Solvay contract with Pittsburg Corning (approximately [...] tonnes per year).

There is also one example at least where the agreements provide for a total requirements clause and a special fidelity rebate. From mid-1986 the agreements with Owens Corning ([...] tonnes per year) have provided expressly for an 'exceptional' rebate based on a total requirements contract:

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

#### 9. 'Competition' clauses

- (35) A number of the supply agreements contain particular forms of 'competition clause' which reinforce the tie of the customer with Solvay and make it difficult or impossible for a competitor to obtain business from Solvay.

##### (a) Competition Clauses

A considerable number of Solvay's 'evergreen' contracts with major customers contain variants of the 'competition clause' or 'English clause' (see Case 85/76, *Hoffmann-La Roche v. Commission* <sup>(1)</sup>, points 102 to 108. These clauses provide for a machinery by which competing offers received during the contract term are to be notified to Solvay so that it can — if it wishes — adjust its prices accordingly. The competition clauses are found in a number of different forms.

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

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

##### *Competition clause*

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

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

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

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

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

<sup>(1)</sup> [1979] ECR 461.

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

The St Gobain 'Protocol' provides for a joint examination by Solvay and St Gobain of any competing offer in order to arrive at a solution acceptable to both. In this case, there is not even the limited concession to 'anonymity' which is contained in the German agreements. The provision allows Solvay to be completely informed of the details of the commercial conduct of its competitors and potential competitors so that it may, if it considers it necessary, negotiate with St Gobain changes in prices and conditions which would maintain the relationship of reciprocal exclusivity.

As Solvay itself observed, the main purpose of the whole arrangement is to oblige St Gobain to reveal itself in the case of any significant purchases from a competitor.

The concrete examples of the proposed purchase by Vegla of [...] Kt of American soda and by St Roch of [...] Kt in 1988 show exactly how Solvay was able either to prevent the competitors entering at all or to restrict the quantity purchased.

The amendments of 30 December 1983 to the BSN supply agreement require the customer to advise Solvay of competing offers (although the identity of the competitor is not to be disclosed) so that the parties can 'concert' in order to find a solution ('Les parties se concerteraient alors dans les meilleurs délais (trois mois maximum) pour trouver une solution.'). Like the St Gobain clause, this mechanism gives Solvay the option of adapting its price and conditions with perfect knowledge of the competing offer (apart from the identity of the supplier). It is extremely likely in practice that the operation of the clause will permit Solvay to maintain its effective exclusivity with the customer.

#### (b) Safeguard clauses

- (38) A number of supply contracts which clearly envisage the maintenance of long-term relations between Solvay and the customer (e.g. Glaverbel, Perrier) provide for a concertation procedure in case of a change in economic circumstances, in particular if competing offers are more advantageous than those of Solvay. While such provisions may not be objectionable *per se*, in the context of the present case

it is clear that Solvay is particularly concerned to prevent any competing supplier from entering the market. While the safeguard clauses allow the customer the opportunity to use competing offers to bring down Solvay's price, it is unlikely that the competitor will ever actually succeed in obtaining (or if he does, retaining) a share of the business.

## PART II

### LEGAL ASSESSMENT

#### A. Article 86 of the EEC Treaty

##### 1. The terms of Article 86

- (39) Under Article 86, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States. Special rebates or other financial inducements granted to customers by dominant undertakings in order to secure the whole or a substantial part of their business may be prohibited by Article 86 as an exclusionary practice.

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

- whether Solvay holds a dominant position within the meaning of Article 86,
- whether the conduct alleged constitutes an abuse of such a dominant position,
- whether there is an appreciable effect upon trade between Member States.

##### 2. Dominant position

###### (a) Definition

- (40) The term 'dominant position' is not defined in Article 86. The Court of Justice has however described a dominant position under that Article as 'a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers

and ultimately of consumers. Such a position does not preclude some competition but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment.' (Judgment in Case 85/76, *Hoffmann-La Roche v. Commission*, paragraphs 38-39.)

- (41) 'Dominance' is therefore the power to hinder effective competition. Such power may involve the ability to eliminate or seriously weaken existing competition or to prevent potential competitors from entering the market. As the Court stated, the existence of a dominant position does not however require the producer enjoying it to have eliminated all possibility of competition (see also Case 27/76, *United Brands v. Commission* <sup>(1)</sup>, paragraph 113).

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

#### (b) Relevant market

- (42) In order to determine whether an undertaking holds a dominant position, it is necessary first of all to identify the area of business in which conditions of competition and the market power of the allegedly dominant undertaking fall to be assessed. This examination enables the Commission to identify the actual and potential competitors of the undertaking in question and other constraints which may exist on the exercise of its supposed market power. Account has to be taken of the nature of the abuse which is being alleged and of the particular manner in which competition is impaired in the case in question: see Judgment in Case 22/78, *Hugin v. Commission* <sup>(2)</sup>.

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

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

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

While there is no other producer which like Solvay sells in all the countries of continental western Europe, CFK, M & W and AKZO have all increased their export operations since 1982 and there is no overwhelming reason why they should not make their product available throughout the Community. Similarly the United States producers of natural ash, which Solvay regards as probably the major competitive threat, are aiming to market the product throughout continental western Europe.

It is also significant that Solvay itself supplies a particular market as occasion demands from a plant in a different Member State and a large proportion of reported inter-State trade thus consists of 'Solvay balancing'.

From the demand side, the larger customers operate in several Member States and — as Solvay itself observes — their spread of operations has tended to increase the pressure for price equalization.

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

#### (c) Market power

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

<sup>(1)</sup> [1978] ECR 207.

<sup>(2)</sup> [1979] ECR 1869.

- (45) To assess market power for the purposes of the present case, the Commission takes into account all the relevant economic evidence, including the following elements:
- (i) Solvay's position as the only soda-ash producer operating throughout the Community (with the exception of the United Kingdom and Ireland);
  - (ii) Solvay's manufacturing strength with plant in Belgium, France, Germany, Italy, Spain and Portugal;
  - (iii) Solvay's 'upstream' integration in raw materials as the largest producer of salt in the Community;
  - (iv) The absence of any competition from ICI, the only other Community producer of comparable market strength to Solvay;
  - (v) Solvay's high market share in the Benelux countries, France and Germany and its monopoly or near-monopoly position in Italy, Spain and Portugal;
  - (vi) Solvay's excellent 'market coverage' as the exclusive or near-exclusive supplier to almost all the major customers in the Community;
  - (vii) The improbability of any new producer of synthetic ash entering the market and setting up manufacturing facilities in the Community;
  - (viii) The protection against non-Community producers afforded by the anti-dumping duties;
  - (ix) Solvay's traditional role of price leader;
  - (x) The perception of Solvay by other Community producers as the dominant producer and their reluctance to compete aggressively for Solvay's traditional customers.
- (46) In assessing the extent of Solvay's market power, the Commission takes account of the possible substitutability of caustic soda for soda-ash. Caustic soda (sodium hydroxide) is largely used for the production of paper and aluminium and may also in theory replace soda-ash for certain manufacturing applications as a source of alkali, particularly in the manufacture of detergents and in metallurgical processes. (The reverse is also true: soda-ash is in theory also an alternative for caustic soda in some processes.) In practice however the possible availability of caustic soda does not constitute a substantial limitation on Solvay's market power in the Community which is principally based on supply to glass manufacturers, few if any of which are prepared to substitute caustic soda for soda-ash.
- Caustic soda is a co-product in the production of chlorine, a basic raw material in the manufacture of PVC. Since long-term storage is not feasible, production of chlorine is tailored to current PVC demand. The supply of caustic soda inevitably fluctuates in line with that of chlorine. Demand for caustic soda on the other hand depends largely on the requirements of its main customer, the paper industry. The price of caustic soda — unlike that of soda-ash — is therefore subject to considerable fluctuation.
- At the present time caustic soda is 'short', i.e. the growth in demand for caustic soda exceeds that for chlorine: the product is in short supply and is likely to remain so for the foreseeable future. It is also considerably more expensive than the equivalent in soda-ash. There is thus no incentive for soda-ash users to switch to caustic soda. Further, conversion from soda-ash to caustic soda requires a capital investment. Even if caustic soda is 'long' at a particular time the cyclical nature of the alkali market and uncertainty as to future pricing acts as a deterrent to switching.
- (47) In the glass sector, the main consumer of soda-ash, accounting for two-thirds of Solvay's sales, caustic-soda substitution is even less likely than in metallurgical and detergent applications. In theory up to 15 % of the alkali requirement of glassmakers may be provided by caustic soda. Again, capital investment in plant modification is required. In practice, only one of the glassmakers has ever converted to caustic soda. It is significant that Solvay itself in its meetings with ICI invariably discounted the potential threat from caustic soda.
- It should also be noted that the major soda-ash producers (Solvay, ICI, AKZO) between them also make some one-third of the caustic soda produced in the Community.
- (48) Solvay has also argued that the availability of 'cullet' (recycled broken glass) excludes its having a dominant position. A customer's requirements of soda-ash in glass container manufacture can be reduced by up to 15 % by using cullet and with appropriate technology the proportion may be higher. It may well be that the use of cullet reduces the dependence of customers upon soda-ash suppliers generally. It does not, however, reduce the ability of a powerful soda-ash producer to exclude smaller producers of that product.
- The possibilities of substitution do not therefore act as a significant constraint on the exercise of Solvay's market power *vis-à-vis* the other producers of soda-ash.

- (49) The Commission has assessed Solvay's market power in relation to the whole of the geographic area within which it operates, which for present purposes consists of those Member States in which it has production facilities. Solvay's own internal documentation shows that it tends to consider the nine 'Directions nationales' as forming a homogeneous market. (This market delineation includes two non-member countries, namely Switzerland and Austria, and excludes the United Kingdom and Ireland which are traditional 'ICI' markets and Denmark and Greece which are 'non-producer' markets.)

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

On the basis of the above considerations the Commission concludes that at all material times Solvay occupied a dominant position within the meaning of Article 86.

### 3. Abuse of dominant position

#### (a) Exclusionary practices and fidelity rebates

- (50) As the Court of Justice has observed in several cases, conduct by a dominant undertaking which undermines the objectives of Article 3 (f) of the EEC Treaty by endangering the structure of competition may constitute an infringement of Article 86. Exclusionary behaviour which hinders existing competition or the development of new competition has been condemned by the Court. Practices designed to block the access of competitors to customers by tying the latter to the dominant supplier have been particularly identified as abusive in leading cases: Case 40/73, *Suiker Unie v. Commission* <sup>(1)</sup>; Case 85/76, *Hoffmann-La Roche v. Commission*; Case 322/81, *Nederlandsche Banden Industrie — Michelin v. Commission* <sup>(2)</sup>. (See also Commission Decision 89/22/EEC *British Gypsum/BPB Industries* <sup>(3)</sup>.)

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

#### (i) Rebates on marginal tonnage

- (51) The assessment under this heading relates to the following:
- the 20 % 'Spitzenrabatt' system in Germany,
  - the giving of 'fidelity' cheques in Germany,
  - rebates on marginal tonnage in France (BSN, Durand, Perrier, etc.).

In contrast to a quantity discount, which is linked solely to the volume of purchases from the manufacturer concerned, a fidelity rebate involves offering customers financial advantages in order to prevent them from obtaining their supplies from competing producers and when practised by a dominant undertaking may fall under Article 86.

There is no need, in order for fidelity rebates to fall under Article 86, for a contractual obligation or express stipulation that the customer obtain its supplies exclusively from the dominant undertaking. What is important is that the terms of sale of the dominant supplier make it financially attractive for the customer to take its supplies exclusively or mainly from it. The precise means by which this result is achieved are immaterial.

- (52) Solvay has since 1982 adopted a system of progressive rebates which according to its own internal documentation is specifically intended to ensure the loyalty of the customer and exclude or limit competition:
- granting customers substantial financial inducements to obtain from Solvay all or the major part of the marginal tonnage which might otherwise have been obtained from a competitor,
  - making it difficult or impossible for an existing or potential supplier to enter as second supplier for the marginal tonnage, since in order to match the substantial pecuniary advantages offered by Solvay and obtain the order for the top 'tranche' of business, they would have to sell at unprofitable or at 'dumping' prices,
  - tying the customer to Solvay for an indefinite period and thereby contributing to the rigidity of the market,
  - removing any interest on the part of the customer to canvass Solvay's competitors for some of its requirements.

- (53) As an example, any supplier attempting to obtain a share of the business of Vegla in Germany would have

<sup>(1)</sup> [1975] ECR 1663.

<sup>(2)</sup> [1983] ECR 3465.

<sup>(3)</sup> OJ No L 10, 13. 1. 1989, p. 50.

had to match an effective 'ex-works' price/tonne for the top [...] Kt of DM 245 per tonne, compared with a 'list price' of DM 403 per tonne and an 'average' price in Germany of DM 360 per tonne.

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

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

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

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

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

(ii) The St Gobain group rebate

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

The provision by which St Gobain benefits from Solvay's 'best conditions' in each country for

comparable usages is not necessarily anti-competitive on its own. However in addition to this stipulation St Gobain receives a 'group rebate' of 1,5 % on the whole of its purchases across Europe. It is implicit in the agreement that payment is dependent upon St Gobain continuing to give Solvay 'priority' as its supplier. Solvay in its own documentation recognizes that this rebate, although not an 'absolute weapon', contributes to ensuring the loyalty of the group. The remark that 'it requires SG to "come clean" if it buys significant quantities from competitors' demonstrates also that Solvay has to be satisfied that it has been given 'priority'.

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

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

The assessment of the 'competition' clause in the St Gobain protocol in the light of Article 86 is made under (iv) below.

(iii) Exclusivity agreements

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

- Vegla
- Oberland
- Owens Corning
- BSN
- St Roch
- Verreries d'Albi
- Perrier
- Glaverbel
- Verlipack.

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

In a number of cases however it is apparent that:

- even if the supply agreement was expressed in the form of a 'tonnage' contract the clear

understanding was that the customer obtained all or substantially the whole of its requirement from Solvay, or

- the stipulated tonnage corresponded to the customer's total requirements, or
- the customer was informed that the payment of any rebate was dependent upon its taking 100 % from Solvay.

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

In some cases (Vegla, Oberlandglas, Owens Corning), the express understanding was that the customer would obtain all its requirements from Solvay. Any such arrangement is clearly intended to bind the customer to Solvay for its total requirement and is exclusionary under Article 86.

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

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

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

The purpose of the clause is to ensure that Solvay remains the preponderant supplier.

Secondly, it is clear that Solvay makes it its business to obtain full details of any competitive offers and any

intention on the part of the customer to look for other sources of supply (e.g. St Gobain's United States imports in 1988). In many cases it is also shown that Solvay was informed as to the customer's total annual requirements. It can thus, with full knowledge of the relevant details of the offer (price, tonnage, etc.) and the customer's intentions and total requirements, arrange that the competitive effect is limited or even removed.

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

If a customer contracts for a tonnage which is in fact equivalent or close to its total requirements, such arrangements may still be exclusionary and fall under Article 86 particularly if they are of long duration. In the case of 'evergreen' contracts the 24-month notice period imposed by Solvay is excessively long. It prevents the customer from reacting in an informed or competitive manner to changes in market conditions. Since it is impossible to predict with any certainty what conditions will prevail in two years' time, the long period of notice acts as a strong deterrent against terminating the link with Solvay. Some customers at least considered the length of the notice period oppressive.

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

- (60) The various forms of 'competition clause' and other similar mechanisms set out in recitals (35) to (38) all reinforce the tie with Solvay, limit the opportunities for the customer to change suppliers and make entry for competitors at established Solvay customers more difficult.

The purpose of these various clauses is to give Solvay as the established supplier a built-in advantage over any other supplier attempting to compete for all or even a part of the business of the customer in question.

Far from mitigating the anti-competitive effect of the long-term supply agreements with Solvay (with their fidelity rebates and *de facto* exclusivity), the competition clauses in fact strengthen the tie between Solvay and the customer and are exclusionary in object and effect. They allow Solvay to be fully

informed of the details of competitors' activity while effectively excluding the possibility of the competitor actually obtaining any business. 'Competition clauses' which give the dominant supplier the option of terminating the whole agreement if the customer obtains even a small part of its supplies from a competitor are already a deterrent to competition: the customer is extremely unlikely to jeopardize its security of supply in such circumstances.

- (61) All the above measures as set out in recitals (50) to (60) are designed to remove or restrict the opportunity of other producers or suppliers of soda-ash to compete effectively with Solvay. They also consolidate the dominant position of Solvay in a manner which is incompatible with the concept of competition inherent in Article 86.

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

#### (b) Discrimination

- (62) In addition to its exclusionary object and effect, the rebate system applied by Solvay also falls under the express prohibition in Article 86 (c) against the application of dissimilar conditions to equivalent transactions. The rebates and other financial inducements did not reflect possible differences in costs based on the quantities supplied but were referable to securing the whole or the largest possible percentage of the customer's requirements.

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

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

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

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

#### 4. Effect on trade between Member States

- (65) Article 86 covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure in the common market as envisaged by Article 3 (f) of the EEC Treaty.

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

- (66) The fact that Solvay's measures were aimed principally at imports from the United States does not affect the application of Article 86. Imports of natural ash from the United States were seen as the main

threat to Solvay's domination of the soda-ash market in continental western Europe. The arrival in substantial quantities of natural ash would also have had a considerable effect upon the agreed division of the market between ICI and Solvay. The activities therefore affected the basic competitive structure of the soda-ash industry within the Community.

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

## B. Remedies and sanctions

### 1. Article 3 of Regulation No 17

- (67) Where the Commission finds that there is an infringement of Article 86 of the Treaty it may require the undertaking concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

In the present case the infringements of Article 86 were effected in conditions of considerable secrecy and were still continuing at the date these proceedings were commenced.

The Commission therefore considers that it is appropriate in the case of the infringement of Article 86 by Solvay to issue a termination order. Besides requiring the undertakings to bring the infringement to an end, the Commission may also specify particular measures to ensure that the infringements are not repeated or continued. It was established by the Court of Justice in Joined Cases 6 and 7/73 — *Commercial Solvents v. Commission* <sup>(1)</sup>, that the Commission has a discretionary power to order measures ensuring that its decision is effective. The power to order such measures is not confined to acts directly affecting trade between Member States particularly where the objective is the maintenance or

the establishment of an effective competitive structure in the Common Market.

- (68) Solvay will be required to abandon its system of fidelity rebates and will have to notify to the Commission the details of any new system of discounts or rebates in order to ensure its conformity with Community competition rules. Any new system of rebates applied by Solvay will have to be confined to reflecting in a fair and objective manner the cost savings involved in large tonnage orders.

A period of three months should be accorded to Solvay to complete the necessary arrangements. Solvay will also be required within the same period to renegotiate all its supply agreements for soda-ash in the Community so as to conform with the requirements of this Decision and shall notify the Commission of the measures it has taken in that regard.

In particular, all clauses in agreements, and any unofficial understanding or arrangement tending to tie the customer to Solvay for the whole or substantially the whole of its requirements must be deleted or terminated. 'Competition clauses' or other devices which operate in an anti-competitive manner must be deleted or amended so as not to deter or prevent the customer from ever purchasing from a competitor whose offer matches that of Solvay.

The practice of 'evergreen contracts' for the major part of the customer's requirement and with a long notice period must also be abandoned. Customers should be free to decide for themselves the tonnage they wish to commit to Solvay under 'evergreen' contracts. They should also be able to change to another supplier for the whole or a part of their business on giving no more than six months' notice. Fixed-term supply contracts should not exceed one year.

### 2. Article 15 (2) of Regulation No 17

- (69) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

<sup>(1)</sup> [1974] ECR 223.

## (a) Gravity

- (70) In the present case the Commission considers that the infringements were of extreme gravity.

Solvay is the major producer of soda-ash in the Community and the infringements enabled it to consolidate its hold over the market by excluding effective competition in a large part of the Common Market.

By foreclosing for a long time sales opportunities for all competitors, Solvay has caused lasting damage to the structure of the market concerned, to the detriment of consumers. This infringement is under the specific circumstances of the case more serious than the infringements of Article 85 in which Solvay was also involved.

Solvay was well aware from its extensive negotiations with the Commission between 1980 and 1982 of the requirements of Article 86 in relation to exclusivity. It was also clearly cognisant of the prohibition of fidelity rebates. The documentation obtained from Solvay shows that company officials at a high level knew the risk involved but nevertheless persisted in the abusive conduct.

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

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

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

## (b) Duration

The infringements began in about 1983 — very shortly after the negotiations with the Commission

and the closure of the Commission's file — and have continued up until the present time,

HAS ADOPTED THIS DECISION:

*Article 1*

Solvay et Cie SA ('Solvay') has infringed Article 86 of the EEC Treaty from about 1983 to the present time by a course of conduct aimed at excluding or severely limiting competition and consisting of:

- (a) the conclusion of agreements with customers which require them to purchase the whole or a very large proportion of their requirements of soda-ash from Solvay for an indefinite or excessively long period;
- (b) the granting of substantial rebates and other financial inducements referable to marginal tonnage over and above the customer's basic contracted tonnage in order to ensure that they buy all or most of their requirements from Solvay;
- (c) making the granting of rebates dependent upon the customer agreeing to buy the whole of its requirements from Solvay.

*Article 2*

Solvay shall (if it has not already done so) forthwith take the steps necessary to bring the infringement to an end in the manner set out in recital (68) of this Decision and shall, within a period of three months of the notification of this Decision, inform the Commission of the measures which it has taken to this end and the details of any new system of rebates.

*Article 3*

A fine of ECU 20 million is imposed on Solvay in respect of the infringement of Article 86 specified in Article 1 (b) and (c).

*Article 4*

The fine imposed by Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,  
Banque Bruxelles Lambert,  
Agence Européenne,  
Rond Point Schuman 5,  
B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, i.e. 14%.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

*Article 5*

This Decision is addressed to Solvay et Cie SA, Rue du Prince Albert 33, B-1050 Brussels.

*For the Commission*

Leon BRITTAN

*Vice-President*

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 86 of the EEC Treaty

(IV/33.133-D: Soda-ash — ICI)

(Only the English text is authentic)

(91/300/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

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

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

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

## PART I

## THE FACTS

## A. Summary of the infringement

(1) The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14 (3) of Regulation No 17 at the premises of Community producers of soda-ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing that an infringement of Article 86 had been committed by Imperial Chemical Industries plc (ICI).

(2) The infringement can be summarized as follows:

*Infringement of Article 86 by ICI*

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

## B. Background

1. *ICI's position in the United Kingdom soda-ash market*

(3) Details of the product and the soda-ash market reference are set out in Part IB of Commission Decision 91/297/EEC (ICI-Solvay) <sup>(3)</sup>.

ICI is the only soda-ash market producer located in the United Kingdom. The 'Page 1000' agreement of 1945 (replacing an earlier cartel agreement) recognized that Solvay and ICI would not compete in each other's traditional markets.

(4) To this day, neither Solvay nor any other producer in continental western Europe has marketed soda-ash in the United Kingdom. ICI enjoyed a complete monopoly in the supply of soda-ash to the United Kingdom until the late 1970s when import penetration from the United States began. Two United States producers, TGI and Allied were active on the market and imports reached 77 000 tonnes in 1982 (some 10 % of the market) before anti-dumping measures were adopted and reduced the United States presence to around 30 Kt per year. TGI soon abandoned the market and the only alternative

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

<sup>(3)</sup> See page 1 of this Official Journal.

suppliers to ICI are now General Chemical (as Allied is now known) with some 4% of the market and Brenntag which supplies Polish ash (3%) <sup>(1)</sup>.

- (5) The ICI soda-ash business was continuously profitable until the early 1980s, when there was a substantial fall in demand. From 1979 to 1984 soda-ash consumption in the United Kingdom dropped by one-third, leading to the closing of the ICI's production units (Wallerscote) in September 1984.

As a result of the closure, the United Kingdom supply-demand balance was in deficit and ICI bought material from Solvay under 'PFR' (purchase for resale) arrangements.

ICI's declared policy is to maximize its share of the United Kingdom soda-ash market and to maintain it at over 90%.

Following the introduction of anti-dumping measures, ICI's market share has been stable at about 93%. The ICI soda-ash operation has returned to profitability since 1986 and is considered a mature cash-generating business.

## 2. ICI's competitors

- (6) Whatever the reason, 'major competitive incursions' by other Community producers are considered unlikely by ICI, although since 1980 the list price levels of ICI in the United Kingdom have been substantially — up to 20% — higher than those of producers in the neighbouring markets.

According to a briefing by the Soda Ash Business Team Leader ICI 'have managed to reduce the number of competitors in the market to two — Poland and one American supplier — and plan to keep it this way'.

- (7) Imports of soda-ash from Poland continue to reach the United Kingdom market via a trader, Brenntag (formerly TR International). There are no anti-dumping duties on dense-ash from eastern Europe, but non-Community ash imported to the United Kingdom is subject to a 10% customs duty. At [...] <sup>(2)</sup> tonnes per year (of which half was a special metallurgical grade) Polish imports were however considered 'troublesome rather than critical' by ICI.

<sup>(1)</sup> The major customers all use ICI as their primary source with the US or Polish producers as a possible second supplier only.

<sup>(2)</sup> In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

Recently ICI seems to have developed a policy of eliminating supplies of Polish heavy-ash leaving only imports of light-ash from that source.

- (8) The United States producers of natural-ash are considered by ICI as the main source of potential competition. Up to the present time the anti-dumping measures (undertakings from two producers and anti-dumping duties on the others) have provided ICI with a substantial measure of protection. According to ICI, perhaps half of its current profit would be at risk if anti-dumping protection against United States imports were to be removed.

## 3. ICI's customers

- (9) Most of ICI's major soda-ash customers are in the glass manufacturing sector which in the United Kingdom uses exclusively dense-ash. (Dense-ash accounts for [...] % of ICI's soda-ash sales.)

In the flat glass sector Pilkington is the only United Kingdom producer, with a requirement of almost [...] tonnes per year: ICI has [...] % of the business.

Container glass producers (such as United Glass, Rockware, Redfearn, Beatson Clarke) account for up to [...] tonnes per annum of dense soda-ash: again, they source primarily or exclusively from ICI.

ICI's 10 largest soda-ash customers in the United Kingdom account for almost [...] % of its total business.

The major customers for light-ash are in the metallurgical and chemical sectors.

## 4. Anti-dumping measures against United States producers

- (10) The undertakings offered by Allied and TGI in August 1984 and accepted by the Commission (Commission Regulation (EEC) No 2253/84 <sup>(3)</sup>) were not published but ICI was well aware that the minimum price undertaking was £ 112,26 ex-store.

TGI withdrew from the market in 1985 leaving Allied (which after reorganization became General Chemical) as the only United States supplier. For most of the period covered by the present decision, the General Chemical price was £ 119 per tonne ex-store. Allied's price was raised to this level from £ 112,26 in

<sup>(3)</sup> OJ No L 206, 2. 8. 1984, p. 15.

November 1985 following contacts with the Commission's Directorate-General for External Relations (DG I) but no official review was undertaken until the expiry of Council Regulation (EEC) No 3337/84 <sup>(1)</sup> in late 1989.

- (11) Both ICI and Solvay became aware that as a result of exchange rate movements since 1984 the United States producers would be able to offer natural-ash in the Community at prices competitive with (and even substantially below) their own without dumping. Both of these producers also knew that in many cases their own prices, particularly on marginal tonnage, were substantially below the minimum price undertakings. They foresaw a strong likelihood that the United States producers could make a successful case for the removal of anti-dumping protection in 1989 when the measures were due for review. However ICI considered that in order to maintain the profitability of its soda-ash products business at current levels it was crucial to ensure that anti-dumping measures against United States ash remain in place. On a number of recent occasions ICI has written to the Commission arguing that irreparable harm would be caused to its business unless a minimum price for imported material of £ 120 per tonne ex-store was maintained. At the time that ICI last wrote to the Commission in these terms (on 16 March 1990, after the commencement of the present proceedings) it had recently modified its price of its largest customer (Pilkington) to a single price of £ 11 [ . . . ] per tonne delivered.

The anti-dumping measures against the United States producers expired in November 1989. A review of the measures had been requested by the United States producers and by representatives of the Community glass industry in 1988. On 7 September 1990 the review was terminated without protective measures being imposed (Commission Decision 90/507/EEC) <sup>(2)</sup>.

##### 5. Exclusive supply agreements

- (12) Until 1979 most of ICI's supply agreements were so-called 'evergreen contracts' (i.e. contracts running for an indefinite period) with a two-year notice of termination and which stipulated that the buyer obtain the whole of its requirements from ICI.

Following negotiations with the Office of Fair Trading, ICI began in October 1980 to offer its United Kingdom customers a range of contract options which included running contracts on a total requirements basis but terminable on shorter notice (three to six months notice after one year).

- (13) The Commission however considered that the total requirements clause even for short periods was

unacceptable in terms of Community competition rules. The Commission also objected to certain aspects of ICI's 'competition clause' ('English clause') as then drafted since it would effectively have excluded the possibility that any competitive offer could ever succeed.

- (14) Although ICI disputed that its new form agreements were incompatible with competition rules, it agreed (under protest) to cease to offer to its customers a total requirements contract terminable at short notice. It also amended its non-competition clauses. The file was closed on 14 December 1982 without any formal decision. It is amply clear from the correspondence that ICI was well aware of the policy on fidelity rebates underlying the judgment of the Court of Justice in Case 85/76 Hoffmann-La Roche v Commission <sup>(3)</sup>.

- (15) On 24 December 1980 ICI wrote to the Commission asserting that the customers were being offered a range of contract options from which they could choose:

'In no way is ICI obliging its principal customers — or, indeed, any of its customers to accept a form of contract which requires them to purchase from ICI their total requirements of soda-ash or a quantity close to this, nor does it offer any special inducement to do so.'

As a result of the discussions with the Commission, ICI amended almost all its supply contracts to a 'tonnage' basis.

##### 6. Quantity rebates up to 1985

- (16) Soda-ash is normally sold by ICI on a delivered basis. Although price lists are produced showing an 'ex-works' price, these are intended for internal ICI use only and are not communicated to customers. To the 'ex-works' price is added the transport rate as quoted by the haulier to ICI (customers wishing to collect from the works are given a collection allowance [ . . . ]).

Standard quantity rebates were given until fairly recently. ICI's 'price book' circular of 1 October 1985 shows that a new scale of tonnage rebates was to be effective on 1 January 1986. The standard tonnage rebates in this 1985 list ranged from £ 0,25 per tonne (2 500 to 7 500 tonnes) to £ 3,00 per tonne for an annual take-off of over 87 500 tonnes. According to ICI, from 1984 onwards rebates have 'for the most part' been the subject of individual negotiation.

<sup>(1)</sup> OJ No L 311, 29. 11. 1984, p. 26.

<sup>(2)</sup> OJ No L 283, 16. 10. 1990, p. 38.

<sup>(3)</sup> (1979) ECR 461.

## C. Exclusionary conduct by ICI

1. *Top-slice rebates*

- (17) In spite of the assurances on special inducements which ICI had given to the Commission in 1981, from 1983 onwards it made increasing use of so-called 'top-slice rebates' of up to £ 30 per tonne on marginal tonnage. From 1985 almost all the major customers of ICI had such arrangements in place.

The term 'top-slice rebate' means that customers are offered substantial financial incentives in the form of deep discounts in order to induce them to buy from ICI not only the 'core' tonnage which they would normally have obtained from their principal supplier but also the marginal tonnage (or 'top slice') which they might or would otherwise have purchased from a second supplier which in the United Kingdom would be either TR (now Brenntag) or Allied (now General Chemical).

2. *Exclusionary purpose of the top-slice rebates*

- (18) The place in ICI's strategy of the top-slice rebates was made clear in a number of internal memoranda dating from 1985.

By early 1985 it was apparent to ICI that one of the two United States suppliers, TGI, was intending to withdraw entirely from the market, not least as a result of the 'deals' which ICI had offered the glass industry in order to displace the product from the United States. ICI's objective was to ensure that it obtained the maximum benefit from TGI's withdrawal. It was concerned that customers which had previously used TGI as a second source should not go to Allied, the other United States supplier, or still worse from ICI's point of view, approach producers or traders in continental western Europe.

Referring to the likelihood of picking up most of the former TGI business, an ICI note of 28 February 1985 states that 'monies are available to extend the existing top slice deals . . . '.

- (19) A strategy document of 28 June 1985 sets out in explicit detail ICI's plan for preventing or eliminating all imports of dense soda-ash into the United Kingdom with the exception of Allied (now called General Chemical), which ICI, for reasons of 'commercial prudence' was content to see remaining in the United

Kingdom market as a minor supplier strictly limited as to price and to volume.

ICI's objective as regards eastern European imports of dense-ash was clearly stated:

- '1. To reduce current TR bagged and bulk special heavy-ash sales to zero/minimum.
2. To prevent TR establishing any position with bulk standard heavy ash at any glass producer.'

The strategy of ICI as regards US imports of dense-ash was set out as follows:

- '1. To minimize Allied sales to a level that will result in them remaining as a second source to the glass industry: 15 to 20 Kt per annum.
2. Prevent any other United States supplier/ Ansac establishing a position in the United Kingdom.'

- (20) Pursuant to the plan, ICI's policy was 'to compete for the US share of the business by offering up to £ 15/Te discounts for "top-slice tonnage" above the core ICI tonnage.' (The paper notes that at the time the differential between ICI's list price and those of the United States producers Allied and TGI was only £ 0,50 per tonne.)

- (21) Originally ICI had expected to pick up the majority of the former TGI business and keep Allied's sales down to 15 Kt per year. Subsequently it had to accept that almost all the major glassmakers wished to maintain a second source which would give Allied some 25 to 30 Kt annually. Paradoxically, it suited ICI's purposes to have Allied remain in the market as a minimal presence at prices which were controlled by the anti-dumping undertakings. Were Allied to withdraw completely, the glassmakers would almost inevitably look to Europe for alternative supplies. Traders in western Europe were seen as a particular danger to market stability. A memorandum of 18 November 1985 explains:

'The strategy remains one of being price competitive at every account on a delivered basis in order to achieve the core ICI tonnage, and to offer top-slice deals of up to £ 15/Te to obtain incremental tonnage from Allied. The objective is to maintain Allied's position at less than 30 Kt annually. Our intention is not to force Allied from the marketplace since this would force the glass industry to seek supplies from either continental western Europe or eastern Europe.'

5. *The operation of the top-slice rebates*

- (22) The operation and the effect in practice of the top-slice rebate system have to be assessed in the light of:

- the minimum-price undertakings given by the two American producers,
- ICI's practice of securing the customer's agreement to limit their purchases from competitors.

(a) *The minimum-price undertaking*

- (23) Although the original minimum-price undertaking for the UK was set at £ 112,26, this was increased 'unofficially' (i.e. without a formal review) to £ 120 (reduced to £ 119 soon afterwards) following contacts between ICI, the United Kingdom Department of Trade and Industry (DTI) and the Commission's Directorate-General for External Relations (DG I) when ICI put up its prices by 6,5 % with effect from 18 November 1985.

General Chemical (formerly Allied) is unlikely to go much below this price of £ 119 ex-store, since it was aware that any perceived breach of the 'unofficial' undertaking would result in the imposition of prohibitive anti-dumping duties. In fact apart from a £ 1 per tonne allowance for quantities over 1 000 tonnes, General Chemical has never given discounts or rebates off list price. From November 1985 its price to container glass manufacturers was £ 119 per tonne ex-works, increased to £ 121 in January 1988. For Pilkington the price was slightly less but still well above the official undertaking.

ICI's internal documents show clearly the relationship between the minimum-price undertaking and the top-slice rebate and how it is aimed at containing the competitive activity of General Chemical.

- (24) Referring to the price increase of 18 November 1985, and its implementation at the major customers, an ICI briefing note observes that:

'The Allied minimum-price undertaking has remained at £ 112,26/Te ex-store, but their price having increased initially to £ 120/Te ex-store has very recently been eroded to £ 119/Te ... All customers apart from Redfearn and UG have an incremental tonnage deal in place with rebate of £ 5 to 20/Te being offered as either export assistance (principally Beatson Clarke) or to attract potential United States tonnage to ICI.'

Later the note reports the position of United Glass (one of the largest container glass producers):

'Deals for incremental tonnage of £ 10 to 20/Te proposed continuously over past two years but UG not prepared to change their stance of [. . .] % ex-USA ...'

- (25) A memorandum of the quarterly sales meeting of ICI Soda Ash Products dated 4 September 1987 makes the connection even more explicitly:

'... budget allows for additional £ 500/k in rebates in order to ensure that marginal ton sought by all major bulk customers is below £ 112,26 PMT ex-works, the General Chemical minimum-price undertaking.'

A handwritten note, undated, but probably also from late 1987 when ICI put its prices up by £ 6 per tonne reads:

'Are we cutting top slice enough? Gen Chem may not follow increase. Top slice should be under £ 112,26 ex works.'

- (26) With General Chemical effectively prevented by the anti-dumping undertakings from going below £ 112,26 (if not £ 119, the 'unofficial' undertaking price), ICI was able to ensure that its presence was marginalized by the operation of the top-slice rebate system.

A striking example of the operation of this policy is provided by the case of Pilkington, the largest customer, where ICI was aiming at obtaining a 100 % supply position. Pilkington operates at several United Kingdom sites and had a total soda-ash requirement for 1986 of around [. . .] Kt, all of which was supplied by ICI except for some [. . .] Kt to one minor site at Pont-y-felin.

On Pilkington's 'top-slice' (i.e. offtake over [. . .] Kt) ICI gave a rebate of £ 20 per tonne. This 'top-slice' rebate was not particularly costly for ICI in terms of the total offtake of Pilkington. It meant however that for the Pont-y-felin site ICI was quoting a delivered price of £ 10 [. . .] (under £ [. . .] per tonne ex-works) while believing that General Chemical was supplying at a price of £ 128,50 delivered because of the unofficial minimum-price undertaking. Pilkington had a group purchasing policy of not becoming dependent upon a single producer so it was in effect paying a premium of almost £ 2 [. . .] per tonne to have a second supplier. For quality control reasons Pilkington does not normally mix soda-ash originating from different producers so if one Pilkington site was to be 'denied' to ICI it was logical

for it to be the smallest one. In view of the price differential Pilkington's had no alternative but to keep its purchases from the second supplier to the minimum, so ICI was assured of the vast bulk of its business.

Another example is provided by Rockware which up to 1988 had a soda-ash consumption of around [...] Kt per year. Again General Chemical was the second supplier. Since 1986 ICI had been offering Rockware a 'top-slice' rebate of £ 15 per tonne which according to a letter from ICI of 12 November 1985 was intended, in part at least, 'to encourage you to minimize your Allied purchases'. An ICI employee noted in handwriting at the bottom of the memorandum on the subject dated 5 June 1987:

'Top-slice must be below £ 112, 26 ex-store.'

(b) Agreement to restrict purchases from competitors

- (27) Whatever formal amendments may have been made to ICI's supply agreements in 1980, it is apparent that ICI in practice makes it its business during price negotiations to ascertain each customer's total anticipated annual requirements. Only United Glass seem to have kept ICI uncertain of its total consumption needs. With this detailed knowledge of the customer's total soda-ash consumption ICI was able to frame its 'top-slice' rebate in such a way as to minimize the customer's purchases from any second supplier.

In several cases ICI has also pressed the customer, sometimes successfully, to give a commitment to purchase 100 % from ICI for the next year. In other cases, ICI was secured the customer's agreement to taking substantially the whole of its needs from ICI while limiting purchases from another source to specified and relatively unimportant tonnages.

— Pilkington

- (28) In the text of the Pilkington 'evergreen' supply agreement dated 1 April 1981 the stipulation 'Buyer's total commercial requirements in the United Kingdom' was deleted and a new clause substituted on 2 September 1982 which provided simply for 'a quantity of sodium carbonate to be agreed annually between buyer and seller'.

ICI seems however to have considered that whatever the wording of the new clause its relations with Pilkington should continue to be governed by the original agreement. Pilkington's policy of sourcing from ICI for its four largest sites (total [...] tonnes)

while buying up to [...] tonnes from Allied for the small Pont-y-felin works led ICI to remind Pilkington in February 1987 that the April 1981 contract had referred to 'Buyer's total requirements':

'This is clearly not today's reality. As you know we are extremely keen to make it so and feel there is no commercial or technical barrier from our side ...

For your part you have indicated some unhappiness at committing the totality of your requirements to us irrevocably. I understand your fears and would be only too happy to agree some modification to the contract wording that gives you the flexibility you desire whilst meeting our volume aspirations.'

- (29) ICI had ascertained that Pilkington's total United Kingdom requirements for 1987 would be [...] tonnes 'of which you intend to purchase from ICI [...]'. A top-slice rebate of £ 25 was given on any tonnage over [...]. ICI clearly indicated to Pilkington that it hoped by this means to obtain the Pont-y-felin business as well.

For the 24-month period 1 April 1988 to 31 March 1990 the agreement with Pilkington was set out as follows:

'You expect the United Kingdom soda-ash requirements of Pilkington plc to be close to [...] tes per year and you intend to purchase all this from ourselves with the one exception of your Insulation Division's Pont-y-felin works (approximately [...] tes per year.'

The top-slice rebate to Pilkington had by this time been increased to £ 30 per tonne on offtake over [...] tonnes per year.

A note of a meeting between ICI and Pilkington on 6 March 1989 shows that the 100 % theme was still being actively pursued by ICI.

— Rockware

- (30) Rockware originally operated three works (five after taking over another glass producer, CWS, in 1988).

On 12 November 1988 ICI wrote to Rockware confirming the oral agreement which had been reached for 1986. Incremental tonnage over [...]

tonnes was to receive a £ 15 per tonne rebate. It was expressly agreed that two of the works would purchase '100 % of their 86 requirements from ICI' while the third would buy the majority of its needs from ICI 'some [ . . . ] tonnes will be taken from Allied'. (Subsequently it was agreed that the [ . . . ] tonnes from Allied would be diverted to another works.)

ICI's choice of language in relation to Rockware's purchases from competitors is also not without significance. On a number of occasions ICI refers in its documents to Rockware having 'admitted' to taking a certain tonnage from General Chemical, a curious phrase to use if the customer is free to choose whether and how much it will buy from another supplier.

- (31) In 1988 Rockware acquired the two CWS factories. Rockware's annual usage of soda-ash thus rose from around [ . . . ] tonnes to over [ . . . ] tonnes. On 29 November 1988 ICI and Rockware agreed the 1989 'supply frame'. Having ascertained Rockware's total requirements for 1989 as [ . . . ] tonnes, ICI obtained an undertaking that it would obtain 'not less than [ . . . ] tonnes' from ICI. Rockware's purchases from other suppliers were the subject of detailed discussions. One of ICI's specific objectives was to:

'Recover [ . . . ] Kt per year previously purchased from Poles at ex-CWS factories.'

To this end Rockware was offered a 'top-slice' rebate of £ 10 per tonne for offtake from [ . . . ] Kt and £ 22 per tonne for anything above [ . . . ] Kt. This meant that for the marginal tonnage the effective cost to the customer offered by ICI was only £ 10 [ . . . ] ex-works. It would appear that before this meeting Rockware was considering rationalizing its minor suppliers and keeping only General Chemical as a second source, but had assured Brenntag on 8 November that there would be no change in purchasing policy until at least the middle of 1989 and that it would receive adequate notice of any such change.

- (32) The result of the ICI offer however was that Rockware agreed with ICI to cease all Polish purchases and to keep the General Chemical volume constant at [ . . . ] Kt. The Commercial Director of ICI Soda Ash Products wrote a note congratulating the United Kingdom sales manager for having 'snaffled' the Polish share at CWS. Brenntag was informed of the Rockware decision but still maintained some expectation of continuing to supply at least some tonnage. Deliveries of ash from Brenntag continued for the first two months of 1989. ICI then met Rockware again on 28 February 1989. The ICI note of the meeting records that: 'All Polish purchases will cease after today'. This is in fact what occurred. Rockware wrote to Brenntag on 13 March 1989 confirming that instructions had already been given

two weeks previously to cease placing orders with Brenntag as from 1 March. According to Rockware, continuing to do business with Brenntag instead of ICI would have involved a 'penalty cost' of some £ 100 000 [ . . . ]. The Letter to Brenntag reads:

'I fully realize the position this places you in but you clearly understand that the commercial offer we have received is impossible to refuse.'

ICI claimed that it was General Chemical and not itself which gained the tonnage previously supplied by Brenntag to CWS. In fact General Chemical made no special offer to Rockware and it did not obtain any of the former CWS business.

#### — CWS

- (33) Prior to the takeover of the CWS glassworks by Rockware, ICI was the main supplier of CWS, with secondary sourcing from Allied and TR (as Brenntag was then known). Again, attempts were made by ICI to ensure that purchases from these competing suppliers were limited. Thus for 1987, ICI obtained an undertaking from CWS that 'we intend to restrict our offtake of United States soda-ash to a maximum of [ . . . ] tonnes'. A promise (albeit rather vague) was also obtained from CWS to reduce its purchases of Polish ash from TR which then stood at [ . . . ] tonnes per year.

#### — Redfearn

- (34) Another customer, Redfearn, had indicated to ICI in 1985 that it had an 'irrevocable commitment to maintenance of a competitive pressure' by taking some tonnage from Allied. Again ICI has made a particular point of ascertaining Redfearn's total requirements for each year and then making an arrangement, involving a 'top-slice' rebate, which would restrict the purchases from the second supplier to [ . . . ] tonnes per year. Thus for 1986 it was agreed that:

'RNG intend to purchase not less than [ . . . ] tonnes of soda-ash from ICI in 1986 out of a total budgeted purchase of [ . . . ] tonnes. All additional volume that you may possibly require above the budgeted total will also be purchased from ourselves.'

The arrangement for 1987 provided that Redfearn would purchase from ICI at least [ . . . ] tonnes out of its total expected usage of [ . . . ] tonnes, (i.e. some 95 % of its requirement). There was an added inducement to purchase any marginal tonnage from ICI in the form of a £ 10 rebate.

Similar arrangements were made for 1988 and 1989.

— Beatson Clarke

- (35) Besides the 'top-slice' rebate system, ICI has given other forms of rebate or allowance to glassmakers, including 'export-support' rebates and 'import-substitutions' rebates. (These rebates are not the subject of the present proceedings.)

In one case at least, Beatson Clarke, it was made clear to the customer by ICI from 1985 onwards that not only the top-slice rebate but also the other special allowances were dependent upon the customer placing the whole of its business with ICI each year.

For example, for 1988 ICI wrote to Beatson Clarke confirming that 'you intend to purchase your total requirements from ICI and an assumption of [...] Te has been considered when offering the following support ...'.

An ICI note of a meeting with Beatson Clarke relating to the 1988 negotiations reports that:

'I ... made it clear that the offer was only for 100 % of their business. (The Purchasing Manager of Beatson Clarke) equally made it clear that he was prepared to commit 100 % of their business and that as far as the competition went, it would only be used as a bargaining tool if we got completely out of line ...'

Later in the same note the author reports how he had emphasized to Beatson Clarke 'the reward aspect for placing all their business with ICI'.

ICI has in fact been the sole supplier of soda-ash to Beatson Clarke since 1985.

- (36) Since the investigations in the present case were carried out, ICI has abandoned the practice of 'top-slice' rebates, while insisting that the modification of its pricing arrangements in no sense constitutes an admission that the rebates in question constituted an infringement of Article 86. ICI's own documentation shows however that it was aware that its rebate system was of questionable legality: a note headed '1989 Issues and Objectives' reads 'consider legality of top-slicing and alternatives'.

#### *ICI's principal factual arguments*

- (37) ICI denies that it ever had a general strategy of excluding a particular supplier or suppliers from the market. The 'top-slice' rebates are said not to have been motivated by any exclusionary intent. According

to ICI, they were intended to 'encourage and support growth' and therefore had inevitably to be related to quantities over and above the customer's nominal or 'core' tonnage. They were (ICI argues) conceived in response to customer demands for a change in the rebate structure and were negotiated on an individual basis rather than pursuant to any plan. ICI points to the continued presence of General Chemical in the market as proof that it did not intend to eliminate competition.

ICI also claims that it was obliged to give a 'top-slice' rebate in one case (Rockware) because it had reason to believe that Allied (later General Chemical) had done so first.

#### *Assessment of the defence argument*

- (38) ICI's assertion that the top-slice rebates were not part of an exclusionary plan is in direct contradiction with its own internal documents. It is made clear that its intention was to exclude TR (Brenntag) entirely as a supplier of dense (but not light) ash (recital 19). As for General Chemical, it was never alleged by the Commission that ICI intended to eliminate this producer entirely. The whole object was to ensure that a second source of supply remained in the market but one which sold at prices and in quantities which posed no real competitive threat to its dominant position (see recitals 19 to 21). The suggestion that the rebate system developed in a haphazard way is also difficult to reconcile with ICI's own documents, particularly the memorandum which states that an additional £ 500 000 was available to finance the top-slice rebates 'in order to ensure that the marginal tonnage sought by all bulk customers is below £ 112,26 PMT ex-works, the General Chemical minimum-price undertaking' (recital 25).

- (39) In relation to the claim that ICI was only reacting to competition from Allied, there is no evidence to support this assertion apart from an indication that, in November 1988, ICI was led to believe that General Chemical had offered a 'deep-top slice' to Rockware with a view to picking up the Polish share of the former CWS business (recitals 31 to 33). This offer from General Chemical would 'produce an average price close to £ 112/Te ex-store'. Even if it were the case that on this occasion General Chemical offered a special price to Rockware (and ICI appears in fact to have been mistaken on this point) it does not provide the explanation for ICI's general policy of giving top-slice rebates to 'all major bulk customers' for at least three years prior to that date. ICI does not even appear to be claiming that General Chemical offered special prices, except to Rockware. According to its own

documents it believed that General Chemical's pricing was at around £ 120 per tonne ex-store. But even in the single case of Rockware, ICI is not to explain why, if the General Chemical average price to Rockware was £ 112, it should itself need to give a top-slice rebate which resulted in an effective price for the last [...] tonnes to be taken by Rockware from ICI of only £ 10 [...] per tonne.

In fact neither Allied nor its successor General Chemical offered a special 'top-slice' rebate to Rockware, or indeed to any other customer. Since November 1985 it has not gone below a list price of £ 119 ex-works for container glass manufacturers and has given no discounts off this list price.

The Commission therefore considers that the rationale of the strategy of giving 'top-slice' rebates was indeed that which was explained in detail in ICI's own documents.

## PART II

### LEGAL ASSESSMENT

#### A. Article 86 of the EEC Treaty

##### 1. The terms of Article 86

- (40) Under Article 86 of the EEC Treaty, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States. Special rebates or other financial inducements granted to customers by dominant undertakings in order to secure the whole or a substantial part of their business may be prohibited by Article 86 as an exclusionary practice.

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

- whether ICI holds a dominant position within the meaning of Article 86,
- whether the conduct alleged constitutes an abuse of such a dominant position,
- whether there is an appreciable effect upon trade between Member States.

#### 2. Dominant Position

##### (a) Definition

- (41) The term 'dominant position' is not defined in Article 86. The Court of Justice has however described a dominant position under that Article as 'a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers. Such a position does not preclude some competition ... but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which competition will develop, and in any case to act largely in disregard of it so long as such conduct does not act to its detriment' (Judgment in Case 85/76, *Hoffmann-La Roche v. Commission*, paragraphs 38 and 39).

- (42) 'Dominance' is therefore the power to hinder effective competition. Such power may involve the ability to eliminate or seriously weaken existing competition or to prevent potential competitors from entering the market. As the Court stated, the existence of a dominant position does not however require the producer enjoying it to have eliminated all possibility of competition (see also Case 27/76, *United Brands v. Commission* <sup>(1)</sup>, paragraph 113).

The existence of a dominant position may depend upon a combination of factors, none of them necessarily controlling of itself.

##### (b) Relevant market

- (43) In order to determine whether an undertaking holds a dominant position, it is necessary first of all to identify the area of business in which conditions of competition and the market power of the allegedly dominant undertaking fall to be assessed. This examination enables the Commission to identify the actual and potential competitors of the undertaking in question and other constraints which may exist on the exercise of its supposed market power. Account has to be taken of the nature of the abuse which is being alleged and of the particular manner in which competition is impaired in the case in question (see Judgment in Case 22/78, *Hugin v. Commission* <sup>(2)</sup>).

<sup>(1)</sup> (1978) ECR 207.

<sup>(2)</sup> (1979) ECR 1869.

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

- (44) ICI produces both light and dense soda-ash. Glassmakers almost all consume dense-ash, while for chemical and metallurgical applications light-ash is the preferred form. Although the competition which ICI was aiming to exclude came principally from dense-ash, it would be artificial to draw a strict boundary line between light- and dense-ash. ICI's major light-ash customers could switch to dense-ash with little capital outlay and are also the subject of the 'top-slice' rebate system. The relevant product market in which ICI's market power — in particular its ability to exclude competitors — falls to be assessed, may therefore fairly be taken to include both light and dense soda-ash.

For the purposes of assessing ICI's market power, the Community can be divided into two broad zones or 'spheres of influence', one dominated by Solvay, the other by ICI.

- (45) Conditions in the United Kingdom are, for the reasons set out earlier both relatively homogenous and separate from those prevailing in other Member States. ICI is the sole national producer and neither Solvay nor the other western European producers market their product in its 'home' territory. ICI's important customers in the Community are all located in the United Kingdom.

The appropriate product and geographical area in which ICI's economic power falls to be assessed is thus the market for soda-ash in the United Kingdom.

- (46) The United Kingdom is a 'substantial part of the common market' within the meaning of Article 86.

#### (c) Market power

- (47) ICI's own documentation recognizes that it holds a dominant position in the United Kingdom. Its historic market share of more than 90 % over the whole of the period under consideration is in itself strong evidence of a significant degree of market power. Market share, while important, is however only one of the indicators from which the existence of a dominant position may be inferred. Its significance may vary from case to case according to the characteristics of the market in question.

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

- (i) the persistence over many years of ICI's near-monopoly in the United Kingdom;
- (ii) the absence of any competition from Solvay and the other western European producers;
- (iii) the improbability of any 'new' producer of synthetic soda-ash entering the market and setting up manufacturing facilities in the Community;
- (iv) ICI's position as exclusive or nearly-exclusive supplier to all the major customers;
- (v) the perception by customers of General Chemical and Brenntag as secondary suppliers only;
- (vi) the protection against United States and eastern European producers afforded by the anti-dumping measures;
- (vii) the pricing constraints imposed on General Chemical by the anti-dumping undertakings;
- (viii) ICI's demonstrated ability over the years to maintain a higher price level than in other Member States;
- (ix) the 'interdependence' of major customers and ICI and their shared perception of a community of interest;
- (x) the success of ICI's strategy of minimizing the presence and/or effectiveness of General Chemical and Brenntag as competitors and maintaining its predominant market share in the United Kingdom.

- (49) In assessing ICI's market power, the Commission takes account of the possible substitutability of caustic soda for soda-ash and vice versa. Caustic soda (sodium hydroxide) is largely used for the production of paper and aluminium and may also in theory replace soda-ash for certain manufacturing applications as a source of alkali particularly in the manufacture of detergents and in metallurgical processes. (NB: The reverse is also true: soda-ash is in theory also an alternative for caustic soda in some processes.) In practice however the availability of caustic soda does not constitute a substantial limitation on ICI's market power in the United Kingdom which is principally based on supply to the glass manufacturers, few if any of which are likely to use caustic soda in preference to soda-ash.

Caustic soda is a co-product of the manufacture of chlorine, a basic raw material in the manufacture of

PVC. Since long-term storage is not feasible, production of chlorine is tailored to current PVC demand. The supply of caustic soda inevitably fluctuates in line with that of chlorine. Demand for caustic soda on the other hand depends largely on the requirements of the paper industry. The price of caustic soda is therefore — unlike soda-ash — subject to considerable fluctuation.

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

- (50) In the glass sector — the main consumer of soda-ash — caustic soda substitution is even less likely than in metallurgical and detergent applications. In theory up to 15 % of the alkali requirement of glassmakers may be provided by caustic soda. Again, capital investment in plant modification is required. In practice, none of the United Kingdom glassmakers has converted to caustic soda.

It should also be noted that the major soda-ash producers (Solvay, ICI, AKZO) between them make some one-third of the caustic soda produced in the Community. In the United Kingdom, ICI is the leading producer of caustic soda.

- (51) ICI has also argued that the availability of cullet (recycled broken glass) excludes its having a dominant position. A customer's requirement of soda-ash in glass container manufacture can be reduced by up to 15 % by using cullet and with appropriate technology the proportion may be higher. It may well be that the cullet usage lessens the dependence of customers upon the soda-ash suppliers in general. It does not however lessen the ability of a powerful soda-ash producer to exclude smaller producers of that product.

The possibilities of substitution do not therefore act as a constraint on the exercise of ICI's market power *vis-à-vis* the other producers of soda-ash.

- (52) On the basis of the above considerations the Commission concludes that at all material times ICI occupied a dominant position in the sense of Article 86.

### 3. Abuse of dominant position

- (53) As the Court of Justice has observed in several cases, conduct by a dominant undertaking which undermines the objectives of Article 3 (f) of the EEC Treaty by endangering the structure of competition may constitute an infringement of Article 86. Exclusionary behaviour which hinders existing competition or the development of new competition has been condemned by the Court. Practices designed to block the access of competitors to customers by tying the latter to the dominant supplier have been particularly identified as abusive in leading cases (Case 40/73, *Suiker Unie v. Commission* <sup>(1)</sup>; Case 85/76, *Hoffmann-La Roche v. Commission*; Case 322/81, *Nederlandsche Banden Industrie — Michelin* <sup>(2)</sup>).

(See also Commission Decision 89/22/EEC <sup>(3)</sup>, *British Gypsum/BPB Industries*.)

- (54) The present case concerns the tying of customers to ICI by means of a number of devices which all serve the same exclusionary purpose: 'top-slice' rebates, exclusive requirements clauses and (in one case at least) making other financial benefits dependent on the customer taking its total requirements from ICI.

#### (i) 'Top-slice rebates'

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

- inducing customers to obtain from ICI the marginal tonnage which might otherwise be obtained from a second supplier,
- minimizing or neutralizing the competitive impact of General Chemical by containing its presence on the market in terms of price, tonnage and customers within limits that insured the continuance of ICI's effective monopoly,
- eliminating Brenntag from the market or at least minimizing its competitive effect,
- minimizing the risk of the customers turning to alternative sources of supply whether from

<sup>(1)</sup> (1975) ECR 1663.

<sup>(2)</sup> (1983) ECR 3465.

<sup>(3)</sup> OJ No L 10, 13. 1. 1989, p. 50.

sister-producers, traders or other EEC producers,

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

- (56) The substantial variations in 'trigger' tonnages at which the rebate is activated at each customer demonstrates that the top-slice rebate system and the price advantages it confers depends not upon differences in the cost to ICI in relation to the quantities supplied but upon the customer taking its marginal tonnage from ICI.

There is no need, in order for such practices to fall under Article 86, of a legal obligation or express stipulation requiring the customer to obtain its supplies exclusively from the dominant firm. It is sufficient if the object or result of the inducement offered is to tie customers to the dominant producer.

(ii) Exclusive requirements clauses and restrictions on purchases from competitors

- (57) It is clearly established in law that where a dominant undertaking ties customers — even at their request — by an obligation or promise to obtain the whole or substantially the whole of their requirements exclusively from that undertaking, this will constitute an infringement of Article 86 (Hoffmann-La Roche v. Commission, point 89).

It is irrelevant whether the obligation in question is stipulated for without further qualification or whether it is undertaken in consideration of the grant of a rebate.

- (58) The possible anti-competitive effects of the stipulations on quantities in ICI's supply agreements have to be assessed in the light of ICI's stated policy towards General Chemical and Brenntag. As the documents discovered at ICI show, ICI was concerned not to exclude all competitors entirely. It was in ICI's interest to ensure that General Chemical at least remained in the United Kingdom market as a 'presence' — strictly controlled as to both price and tonnage — which met the need of most large customers for a secondary supplier while in fact presenting no real competitive threat to ICI's near-monopoly position.
- (59) By making it its business to ascertain the total requirements of each major customer, ICI was able to structure its 'top-slice' rebate system in such a way as to exclude or minimize the presence of competitors. In many cases an assurance was obtained from the customer to reduce its competitive purchases or

restrict them to a specified tonnage. In the case of Beatson Clarke it was expressly stipulated that the customer obtain its total requirements from ICI.

Such arrangements substantially restrict the contractual freedom of the customer, prevents competitive entry, and is tantamount to an exclusivity clause.

- (60) The agreements with these major customers mean that they are tied to ICI for substantially the whole of their requirements (and in one case at least, their total requirements) while the competitive effect of other suppliers is minimized.

(iii) Other financial inducements

- (61) In its dealings with Beatson Clarke, ICI also made it clear that the 'support package' <sup>(1)</sup>, additional to the 'top-slice' rebate, was dependent upon its agreeing to take 100 % of its requirements from ICI, a condition which was confirmed in writing. This special 'inducement' has the object and effect of reinforcing ICI's position at the customer and excluding competition.

All the above measures in recitals 55 to 60 are intended to remove or restrict the opportunities of other producers or suppliers of soda-ash to compete with ICI. They have to be seen in the light of ICI's clearly expressed strategy of retaining a virtual (but not 100 % complete) monopoly of the United Kingdom market. They thus consolidate the dominant position of ICI in a manner which is incompatible with the concept of competition inherent in Article 86.

- (62) The rebates do not reflect possible differences in costs based on the tonnage supplied but were referable to securing the whole or the largest possible percentage of the customer's requirements. The 'top-slice' rebate system thus involved considerable variations from customer to customer as to the 'trigger' tonnage at which it was activated. There were also differences in the amount per tonne of the rebate itself, varying from £ 6 per tonne to £ 30 or more.

4. *Effect upon trade between Member States*

- (63) Article 86 covers not only abuses which may directly prejudice consumers but also those which indirectly

<sup>(1)</sup> The compatibility or otherwise of ICI's 'support packages' (import substitution, export assistance) with Article 85 or 86 of the EEC Treaty may form the subject of separate proceedings. For the purposes of the present case the Commission confines itself to the linkage between the package and the customer's total requirement.

prejudice them by impairing the effective competitive structure in the common market as envisaged by Article 3 (f) of the EEC Treaty.

The measures taken by ICI to ensure the continuance of its dominant position and effective monopoly in the United Kingdom were aimed in the first place at direct competition from outside the Community (the United States and Poland) rather than other Community producers. However the 'top-slice' rebates and other exclusionary devices have to be examined in the overall context of the phenomenon of strict separation of national markets in the Community. ICI's documents stress that its commercial strategy called for the continued but limited presence on the United Kingdom market of a single American producer as a 'second supplier' which ICI could control through the anti-dumping measures.

- (64) ICI was thus particularly anxious that General Chemical should remain in the United Kingdom as an 'alternative': were it to leave the market entirely, the customers might be encouraged to look for alternative and possibly cheaper sources of supply in continental western Europe.

Furthermore, the fact that the competition at which the conduct of ICI was particularly directed came from outside the Community does not exclude an appreciable effect upon trade between Member States. The maintenance and reinforcement of ICI's dominant position in the United Kingdom affects the whole structure of competition in the common market and ensures that the status quo, based on marked separation, will be maintained.

## B. Remedies and sanctions

### 1. Article 3 of Regulation No 17

- (65) Where the Commission finds that there is an infringement of Article 86 of the Treaty it may require the undertaking concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

In the present case the infringements of Article 86 were still continuing at the end of 1989.

Since the date of the investigation ICI has altered its rebate system in the United Kingdom and in its contractual negotiations with customers for 1990 the system of 'top-slice' rebates has been abandoned.

ICI insists that the modification of its pricing system is without prejudice to its contentions that the 'top-slice' rebates do not fall within the prohibition set out in Article 86 of the Treaty.

- (66) The Commission therefore considers that it is appropriate in the case of the infringements of Article 86 by ICI to issue a termination order. Besides requiring the undertaking to bring the infringements to an end, the Commission may also specify particular measures to ensure that the infringements are not repeated or continued. It is established by the judgment of the Court of Justice in Joined Cases 6 and 7/73, *Commercial Solvents v. Commission* <sup>(1)</sup>, that the Commission has a discretionary power to order measures ensuring that its decision is effective. The power to order such measures is not confined to acts directly affecting trade between Member States particularly where the objective is the maintenance or the establishment of an effective competitive structure in the common market.
- (67) ICI will be required to abandon its system of loyalty rebates for soda-ash. Any new system of rebates applied by ICI will have to be confined to reflecting in a fair and objective manner the cost savings involved in large tonnage orders.

### 2. Article 15 (2) of Regulation No 17

- (68) Under Article 15 (2) of Regulation No 17 the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 86. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

#### (a) Gravity

- (69) In the present case the Commission considers that the infringements of Article 86 were of particular gravity. They were part of a deliberate policy aimed at consolidating ICI's control over the United Kingdom soda-ash market in a manner which was in fundamental conflict with the basic objectives of the EEC Treaty. Further, they were specifically directed at restricting or damaging the business of particular competitors.

<sup>(1)</sup> (1974) ECR 223.

By foreclosing for a long time sales opportunities for all competitors, ICI has caused lasting damage to the structure of the market concerned, to the detriment of consumers. This infringement is, under the specific circumstances of the case, more serious than the infringement of Article 85 in which ICI was also involved.

ICI was well aware from its extensive negotiations with the Commission in 1980 to 1982 of the requirements of Article 86. The introduction of the top-slice rebates in about 1983 followed not long after specific assurances had been given to the Commission by ICI that it offered no special inducements to customers to take the whole or a quantity close to the whole of their requirements of soda-ash from ICI.

- (70) ICI has been the subject on several previous occasions of substantial fines imposed by the Commission for collusive arrangements in the chemical industry: dyestuffs; polypropylene; LdPE; PVC.

(b) Duration

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

The Commission takes into account the fact that ICI has abandoned the system of top-slice rebates with effect from 1 January 1990,

HAS ADOPTED THIS DECISION:

*Article 1*

Imperial Chemical Industries plc ('ICI') has infringed Article 86 of the EEC Treaty from about 1983 until at least the end of 1989 by a course of conduct aimed at excluding or severely limiting competition and consisting of:

- (a) granting substantial rebates and other financial inducements referable to marginal tonnage in order to ensure that customers buy all or most of their requirements from ICI;
- (b) securing the agreement of customers to buy the whole or substantially the whole of their requirements from ICI and/or to restrict their purchases of competitive material to a specified tonnage;
- (c) in one case at least making the granting of rebates and other financial benefits dependent upon the customers

agreeing to buy the whole of its requirements from ICI.

*Article 2*

ICI shall (if it has not already done so) forthwith take the steps necessary to bring the infringements to an end and shall in the future refrain from any pricing practice in relation to soda-ash which may have the same or an equivalent effect.

*Article 3*

A fine of ECU 10 million is imposed on ICI in respect of the infringement of Article 86 specified in Article 1.

*Article 4*

A fine imposed under Article 3 shall be paid within three months of the date of notification of this Decision to the following bank account:

No 310-0933000-43,  
Banque Bruxelles Lambert,  
Agence européenne,  
Rond Point Schuman 5,  
B-1040 Bruxelles.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, i.e. 14 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

*Article 5*

This Decision is addressed to Imperial Chemical Industries plc, 9 Millbank, London SW1P 3JF.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 19 December 1990.

*For the Commission*  
Leon BRITTAN  
Vice-President

## COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 85 (1) of the EEC Treaty

(IV/33.016 — Ansac)

(Only the English text is authentic)

(91/301/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the application and notification submitted by American Natural Soda Ash Corporation ('Ansac') on behalf of itself and its members on 9 December 1988 with a view of obtaining negative clearance or exemption in respect of arrangements for selling US produced soda-ash in the EEC,

Having regard to the Commission's decision on 3 July 1989 to initiate proceedings,

Having given Ansac and its member companies the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 <sup>(2)</sup>,

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

Whereas:

## I. THE FACTS

## A. Introduction

- (1) This Decision concerns the application of Article 85 of the EEC Treaty to arrangements notified by Ansac for selling in the Community natural dense soda-ash produced in the United States by its member

companies for which Ansac has requested negative clearance or in the alternative exemption under Article 85 (3) of the Treaty.

## B. The parties

- (2) Ansac is a 'Webb-Pomerene' Association — a corporation set up in accordance with the provisions of the United States Export Trade Act 1918, commonly called the Webb-Pomerene Act. The purpose of that Act is to exclude the application of the Sherman Act to United States associations engaged solely in export trade and whose activities do not restrain trade within the United States.

The Ansac membership agreement relates solely to export sales, defined as sales of soda-ash produced in the United States and its territories for export to any country other than Canada, except sales made under United States foreign aid or procurement programmes. The EEC market was excluded up to the notification and pending its outcome Ansac has not implemented the agreement with respect to that market.

Ansac in its current form dates from 1983: its membership agreement was adopted in December of that year. It was formerly known as the Soda Ash Export Association.

- (3) Ansac's members are the six United States producers of natural soda-ash:
- FMC Wyoming Corporation ('FMC'),
  - General Chemical (Soda Ash) Partners (formerly known as Allied Corporation) ('General Chemical'),
  - Kerr McGee Chemical Corporation ('KMG'),
  - Stauffer Chemical Company (a division of Rhône-Poulenc Inc., the United States affiliate of the Rhône-Poulenc Group) ('Stauffer'),

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

- Tenneco Minerals Company ('Tenneco'),
- TG Soda Ash Inc. (a wholly-owned subsidiary of Elf Aquitaine Inc., the United States affiliate of the Elf Aquitaine-Group) ('Texas gulf').

### C. The product

- (4) Soda-ash (sodium carbonate —  $\text{Na}_2\text{CO}_3$ ) is a white powder used principally as a raw material in glassmaking, where it accounts for approximately 60 % of manufacturing costs, and also in making detergents and paper and in metallurgy. It is produced by two distinct processes:

- in Europe soda-ash is produced from brine and limestone by the synthetic process developed by Solvay in the last century. Solvay's patents for the process have long expired;
- in the United States almost all soda-ash is of natural origin. It is produced by refining trona ore (a mixture of sodium carbonate and sodium bicarbonate), found principally in the Green River basin in Wyoming, Colorado and Utah.

Natural soda-ash offers a number of advantages over the synthetic product. Its production uses less energy and is less labour-intensive: it is therefore cheaper to produce. It is also purer, containing only 300—600 ppm of chloride, as against 3 000 ppm for synthetic soda-ash. Removing residual chloride (for example, in the course of glass manufacture) is expensive; and if it is not removed it causes environmental pollution.

Soda-ash exists in two densities, light ( $0,5 \text{ g/cm}^3$ ) and dense ( $1,0 \text{ g/cm}^3$ ). Either form can be produced by either process. Dense soda-ash is preferred for glassmaking and is the only form marketed by Ansac.

### D. The market

#### 1. World soda-ash capacity

- (5) World soda-ash capacity (natural and synthetic) is currently around 36 million tonnes (nominal) per annum, of which the EEC accounts for some 7,2

million tonnes. Soda-ash consumption in the EEC is currently around 5,5 million tonnes per year, worth some ECU 900 million.

- (6) The United States natural-ash producers have total nominal capacity of 9,5 million tonnes per year and a domestic market demand of some 6,2 million tonnes. They supply the whole of their home market and export the balance of production. Costs of production of natural-ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

#### 2. The EEC

- (7) EEC producers tend to concentrate their end user sales in those Member States where they possess production facilities. Solvay is the market leader with almost 60 % of the total market and sales in all Member States except the United Kingdom and Ireland. The other EEC producers' approximate shares are: ICI 15 %; Rhône-Poulenc 10 %; Akzo 6 %; Chemische Fabrik Kalk and Matthes & Weber 5 % each. ICI sells exclusively in the United Kingdom and Ireland where it has over 90 % of the market.

Some 65 to 70 % of soda-ash produced in the EEC is used in the manufacture of flat and hollow (container) glass. The glass industry has in recent years been the subject of a Europe-wide consolidation with large manufacturers operating on a pan-European basis and manufacturing in several Member States.

#### 3. The United States

- (8) The United States market has since the development of natural-ash mining in the 1960s shown a substantial excess of capacity over domestic demand and a surplus of some 2,5 million tonnes is now available annually for export.

Given the over-supply and the presence of a number of producers with similar costs, the United States domestic market has been characterized by strong price competition. The product has in recent years been sold at a substantial discount off the list price of \$ 93 per short ton fob. Wyoming, ex-works prices at the end of 1989 being around \$ 73 per short ton. List prices were raised by most producers to \$ 98 per short ton with effect from 1 July 1990 and the effective price went up to around \$ 85.

- (9) The pressure to export has led the United States producers to attempt to penetrate the European and

other markets: European manufacturers view them as the major competitive threat in their home markets. At current exchange rates it is possible for United States producers to sell in the EEC at prices substantially below local list prices without dumping. Natural soda-ash began to appear in the EEC in the late 1970s, principally in the United Kingdom. In 1982 United States imports into the EEC amounted to some 100 000 tonnes, almost 80 000 tonnes in the United Kingdom. The European industry successfully applied for anti-dumping protection against these imports in 1982.

- (10) The most recent measures granting anti-dumping protection against United States dense-ash involved:

- (a) for the two producers then in the market — Allied (now General Chemical) and Texas Gulf — minimum-price undertakings of £ 112,26 per tonne ex-store <sup>(1)</sup>;
- (b) for those producers not in the market — Tenneco, KMG, FMC and Stauffer — a definitive anti-dumping duty of ECU 67,49 per tonne <sup>(2)</sup>.

The price undertakings accepted by the Commission provided for conversion into other currencies at the exchange rates then prevailing: the changes in parities since 1984 meant that the undertaking price for Germany, France and other markets was substantially above the market price so that sales outside the United Kingdom were no longer commercially feasible under the undertakings.

- (11) Texas Gulf suffered a loss in volume and withdrew from the United Kingdom in 1985, leaving General Chemical in the market (with sales of only some 30 000 tonnes per year).

[. . .] <sup>(3)</sup> Texas Gulf has also sold some tonnage in Belgium. In both cases the imports have been made free of anti-dumping duties under the inward processing regime <sup>(4)</sup>.

- (12) A number of large EEC customers in the glass sector have already indicated their intention to place a

substantial percentage of their business with United States producers. So far however a total of only about 40 000 tonnes of United States soda-ash has been supplied in continental western Europe (CWE), almost all of it under inward processing rules.

The anti-dumping measures provided for by Council Regulation No 3337/84 expired in November 1989. A review of the measures had been requested by certain United States producers and by representatives of the EEC glassmaking industry in 1988. On 7 September 1990 the review was terminated without the imposition of protective measures by Commission Decision 90/507/EEC <sup>(5)</sup>.

The Commission has in parallel with this Decision adopted Decisions finding that European soda-ash producers have infringed Articles 85 and 86 of the EEC Treaty <sup>(6)</sup>.

#### E. The Ansac agreement

- (13) Under the membership agreement of 8 December 1983, the members agree that all export sales by them or by any subsidiary will be made through Ansac, with the exception of sales or deliveries to companies in which a member owns 20 % or more of the shares. Ansac's Board of Directors is empowered to ensure that each member receives a fair share of total tonnage shipped, to determine price policies and to exclude particular sales or territories from Ansac procedures; each member is responsible for providing a minimum share of estimated export needs. Ansac has an autonomous management and absolute authority to decide what to ship, to whom and at what price. However, a board resolution provides that if Ansac should begin operations in the EEC, General Chemical would be allocated its present (United Kingdom) tonnage in addition to its entitlement under the Ansac rules. The intention of Ansac as outlined in the notification is to enter the EEC market as a second supplier to glass manufacturers, as they would be unwilling to jeopardize relations with their main suppliers.

#### F. Ansac's submissions

- (14) Ansac maintained that, because of the rigidity of the EEC soda-ash market, only a new entrant could

<sup>(1)</sup> Commission Regulation (EEC) No 2253/84 of 31 July 1984 (OJ No L 206, 2. 8. 1984, p. 15).

<sup>(2)</sup> Council Regulation (EEC) No 3337 of 27 November 1984 (OJ No L 311, 29. 11. 1984, p. 26).

<sup>(3)</sup> In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

<sup>(4)</sup> Council Regulation (EEC) No 1999/85 of 16 July 1985 (OJ No L 188, 20. 7. 1985, p. 1).

<sup>(5)</sup> OJ No L 283, 16. 10. 1990, p. 38.

<sup>(6)</sup> See pages 1, 16, 21 and 40 of this Official Journal.

create genuine competition; and that only Ansac, representing the whole of the United States natural soda-ash industry, had the necessary economic power to achieve a significant share of the market. Two of Ansac's members (General Chemical and Texas Gulf) had set up their own distribution facilities in the United Kingdom: Texas Gulf had been obliged to withdraw, and General Chemical maintained a presence only at the request of its large customers, which were prepared to pay a higher price for an alternative source of supply.

Ansac claimed that Article 85 (1) did not apply: here, the aim of its proposed market entry was pro-competitive, and the judgments of the Court of Justice in *Metro* <sup>(1)</sup> and *Remia* <sup>(2)</sup> were examples of a wider principle, that:

'if the end is good, the means (within limits) cannot be regarded as restrictive.'

Such restrictions as the arrangements contained were ancillary to Ansac's overall, pro-competitive, aim. Moreover, Ansac was not a 'cartel' but a dedicated sales organization with 26 staff members.

(15) If Article 85 (1) was found to apply, Ansac argued that exemption under Article 85 (3) was justified:

1. Natural soda-ash being lower in chloride was environmentally superior and thus contributed to an improvement in the production of goods and to the promotion of technical progress.
2. The economies of scale achievable only by Ansac were necessary in view of the high overhead costs involved in setting up distribution facilities in the EEC and would thus lead to an improvement in the distribution of goods.
3. Ansac would, by helping to change the oligopolistic structure of the EEC market, promote economic progress.
4. Consumers would benefit from:
  - (a) the avoidance of the duplication of costs which would have been incurred had Ansac's member companies decide to enter the market separately;
  - (b) the lower prices which Ansac would need to offer;
  - (c) the existence of a credible competitive source of supply;

(d) the environmental superiority of natural soda-ash;

(e) the improved security offered by Ansac rather than its member companies acting separately.

5. The restrictions were indispensable and did not enable the parties to eliminate competition in respect of a substantial part of the soda-ash market. According to Ansac competition in the EEC market could be achieved only by allowing United States producers to combine.

(16) During the oral hearing Ansac's President demonstrated how, calculating back from a price ex-warehouse of \$ 165 per tonne, Ansac could show a higher cif value than an individual United States producer (\$ 143 as against \$ 138) and a higher price ex-works (\$ 86 as against \$ 70), giving Ansac a 'safety margin' of \$ 16 per tonne for anti-dumping purposes.

An economic expert called by Ansac sought to show by reference to a theoretical model that Ansac's entry would lead to an overall decrease in soda-ash prices for the glass industry. He made it clear, however, that his model was based on the assumption that Ansac would enter the market with sales comparable to those of the leading Community producers.

Another expert who had undertaken market research for Ansac stated however that the initial market share available to a new entrant would be only of the order of 5 %, or 200 000 tonnes.

(17) Representatives of the glass industry stated that they wished to have a reliable second source of supply, because limited storage facilities at glassworks made regular deliveries essential, and that United States natural soda-ash, because of its purity, offered considerable advantages over other alternative sources. They made it clear, however, that the industry had no particular preference for Ansac over other possible suppliers, including its member companies, provided that price, quality and security of supply could be guaranteed.

(18) Following the hearing a number of further submissions were made to the Commission on Ansac's behalf. It was argued that an exemption for a limited period (two years) would allow Ansac to demonstrate that its behaviour in the market would have a beneficial effect on competition.

It was also claimed that the ending of the Commission's anti-dumping review without a finding

<sup>(1)</sup> Case 26/76: (1977) ECR 1875.

<sup>(2)</sup> Case 42/84: (1985) ECR 2545.

of injury created a situation in which only Ansac, and not its members acting individually, could market United States soda-ash in the EEC without running the risk of a finding of dumping injury by the Commission: economies of scale would allow Ansac to show a higher nominal ex-works price than its members selling individually.

## II. LEGAL ASSESSMENT

### A. Article 85 (1)

- (19) The Ansac membership agreement is an agreement between undertakings of the kind envisaged in Article 85 (1). Any decisions or resolutions made by Ansac's Board of Directors under the agreement are decisions of an association of undertakings within the meaning of that Article.

The agreement has as its object and likely effect a restriction of competition within the common market with respect to prices and quantities. The agreement obliges the members to sell soda-ash for export exclusively through Ansac and prevents them from selling individually, with the exception of sales or deliveries to associated companies. The overall size of the United States producers, their low production costs (compensating largely for higher transport costs) and the fact that some of them have sold regularly on an individual basis show however that they could compete effectively among themselves and with the European producers. Their past sales activities show that they have, on their own initiative, been capable of overcoming storage and transport problems and assuring regular supplies to their customers. They are therefore capable of acting independently within the common market.

- (20) The object and effect of the Ansac arrangements is that customers are confronted with a single supplier of natural soda-ash applying uniform prices and conditions. Ansac's members are entitled to a fair share of the sales allocated to them. The fact that one member — General Chemical — has been allocated an additional tonnage equivalent to its current annual deliveries to the United Kingdom demonstrates that Ansac is bound to respect the contractual rights of its members and to assure coordination between them. The Commission therefore does not accept the argument that Ansac enjoys an autonomous structure

and organization such as to exclude any anti-competitive cooperation. The fact that Ansac is set up as a separate corporation in order to function as a single selling agent for all United States producers, rather than to coordinate the activities of its members, is not relevant to an assessment under Article 85 (1). Ansac as a joint sales organization must therefore be seen as the vehicle for eliminating competition between its members.

- (21) Moreover, the Commission does not accept the argument that the restrictions are needed to allow a strong and credible new entrant to open up the structure of the market in the EEC:

1. It does not follow from the limited success of attempts to enter the market by General Chemical and TG Soda Ash that Ansac's proposals fall outside the scope of Article 85 (1) as being the only way to achieve increased competition. The Commission found in *Floral* <sup>(1)</sup> that the parties in that case had failed to demonstrate the need for their collaborative arrangements. In *Woodpulp* <sup>(2)</sup> the Commission found that the members of the Pulp, Paper and Paperboard Export Association (KEA) — like Ansac a Webb-Pomerene association — had refrained from pursuing independent pricing policies in the EEC, thereby restricting competition between themselves. Ansac's proposed role in the present case is more active than that of the KEA in *Woodpulp*.
2. Ansac has stated that it expects to gain only a very limited share of the market — 200 000 tonnes, an amount which, although important to the competitive structure of the market as a second source of supply, could easily be supplied by one or two of its members.

- (22) If Ansac enters the EEC soda-ash market on the terms set out in the notification there will be only one new operator on the market. Trade within the Community will necessarily be conducted on different terms from those which would prevail if all or any of Ansac's members were to enter the market individually. The notified arrangements are thus liable to affect trade between Member States.

### B. Article 85 (3)

- (23) The notified arrangements will not contribute to improving production or promoting technical

<sup>(1)</sup> OJ No L 39, 15. 2. 1980, p. 51.

<sup>(2)</sup> OJ No L 85, 26. 3. 1985, p. 1.

progress. The Commission does not dispute the environmental arguments in favour of the use of natural, rather than synthetic, soda-ash. Those arguments have no bearing, however, on the marketing of the product, with which alone Ansac's proposals are concerned. Ansac's environmental argument in any case presupposes that it is the only vehicle by which natural soda-ash could reach the Community, i.e. that if Ansac were not granted an exemption, no individual United States producers or producers would market the product in the EEC. As shown in recital (25), the Commission does not accept that this would be the case. Further, as Ansac's own documents show, its current marketing plans are limited to supplying only a very small percentage (around 5 %) of total demand.

(24) Ansac has also failed to demonstrate that its proposals will lead to an improvement in the distribution of soda-ash or promote economic progress in the common market. To be exempted under Article 85 (3) restrictions should bring about an objective improvement over the situation which would have existed in their absence.

(25) The Commission does not accept Ansac's contention that its entry would enhance competition and lead to the improvement of the present rigidly oligopolistic market structure. If Ansac were granted an exemption under Article 85 (3) there would be no possibility of competition between its member companies, which would be obliged to grant it exclusive sales rights in the EEC for all natural soda-ash produced by them. Ansac would thus control, and be able to restrict, the amount of United States natural soda-ash produced for, imported into and sold within the Community; and would also determine the price at which it was sold. United States producers acting independently, however, would compete amongst themselves and improve competition in the EEC soda-ash market generally. They are all large undertakings with sufficient trading experience and resources to provide their customers with a reliable source of supply. The ending of the anti-dumping review without the imposition of protective measures means that they are now free to enter the EEC market.

(26) Furthermore, the concentration of all supplies of natural soda-ash imported from the United States in the hands of a single sales agency would facilitate the opportunity for collusion with the existing suppliers. Even if there is no express collusion on pricing, Ansac's current intention is to limit its sales in the Community to a level of around 200 000 tonnes and effectively to accept the role of a permanent secondary supplier. Ansac would at this level of business be in the market as a price follower, as indeed was clear from the presentation during the oral hearing of the economics expert called by Ansac.

(27) The Ansac agreement also forecloses an important element of competition which would otherwise be available. A number of major EEC glass producers have expressed an interest in buying soda-ash directly from producers in the United States, a plan which would be impossible under Ansac's membership agreement which specifically prohibits such direct sales for export by its members.

(28) The notified arrangements cannot be said to be indispensable or to offer consumers advantages which could not have been achieved by less restrictive means. The Commission does not accept the argument that the only means by which the rigidity of the EEC market can be reduced is by permitting the United States producers to combine as Ansac. Collusive pricing or marketing arrangements between the EEC producers do not by themselves keep out competition: if they set prices above the market level, competitors outside the arrangements should in theory be able to enter more easily by underpricing the collusive price. The principal obstacles to the entry of American natural-ash into the EEC were the anti-dumping measures which have now been removed and the exclusionary rebate systems operated by Solvay and ICI which are the subject of a prohibition in decisions of 19 December 1990.

(29) The only advantages which Ansac's entry might offer consumers flow from the economies of scale achievable by shipping and storing soda-ash in much larger quantities than would be possible for any of Ansac's members acting individually.

However Ansac itself does not intend those economies of scale to be passed on to the consumer in the form of lower prices. Its own forecasts (produced during the oral hearing) show that it intends to charge slightly higher prices in the EEC than it believes would be achieved by the individual United States producers. For Ansac, the main benefit flowing from any cost savings in the form of joint shipping or storage facilities would be the possibility in any future anti-dumping proceedings of showing a higher notional ex-mine price than would be the case for individual producers. Such considerations are not however relevant under Article 85 (3).

(30) In any case, joint-selling arrangements go far beyond what might be necessary to achieve economies of scale that could be passed on to the consumer. The Commission has indicated to Ansac on numerous occasions, both before and during the present proceedings, that it would be prepared, in accordance with the provisions of its notice concerning agreements, decisions and concerted practices in the

field of cooperation between enterprises<sup>(1)</sup>, to give favourable consideration to arrangements limited to joint storage and transport facilities. While claiming that cost savings are its main rationale, Ansac and its members have not been prepared to limit cooperation to such measures.

#### C. Remedies — Article 3 of Regulation No 17

- (31) Where the Commission finds that there is an infringement of Article 85, it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

As the Ansac membership agreement and related arrangements notified by Ansac would, if put into effect in the EEC, amount to such an infringement it is appropriate to require by Decision that they shall not be implemented,

HAS ADOPTED THIS DECISION:

#### Article 1

The Ansac membership agreement and related arrangements notified to the Commission by American Natural Soda Ash Corporation on 9 December 1988 constitute an infringement of Article 85 (1) of the EEC Treaty in so far as they relate to the market in the EEC.

#### Article 2

An exemption under Article 85 (3) of the Treaty is hereby refused.

#### Article 3

American Natural Soda Ash Corporation and its member companies are hereby required to refrain from implementing the notified arrangements in the EEC.

#### Article 4

This Decision is addressed to:

- American Natural Soda Ash Corporation,  
8 Wright Street,  
Westport, CT 06880,  
United States of America,
- FMC Wyoming Corporation,  
2000 Market Street,  
Philadelphia, PA 19103,  
United States of America,
- General Chemical (Soda Ash) Partners,  
PO Box 393,  
Parsippany, NJ 07054-0393,  
United States of America,
- Kerr McGee Chemical Corporation,  
PO Box 25861,  
Oklahoma City, OK 73125,  
United States of America,
- Stauffer Chemical Company,  
One Corporate Drive,  
Shelton, CT 06484,  
United States of America,
- Tenneco Minerals Company,  
PO Box 281300,  
Lakewood, CO 80228,  
United States of America,
- TG Soda Ash Inc.,  
PO Box 20321,  
Raleigh, NC 27622-0321,  
United States of America.

Done at Brussels, 19 December 1990.

*For the Commission*

Leon BRITTAN  
Vice-President

(1) OJ No C 75, 29. 7. 1968, p. 3 (at point II.4).