II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 December 2000

relating to a proceeding under Article 81 of the EC Treaty

(COMP/33.133-B: Soda-ash — Solvay, CFK)

(notified under document number C(2000) 3794)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/5/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the Commission's 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, in accordance with 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 Regulation No 17 ([3]),

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

Whereas:

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

PART I

THE FACTS

A. **Summary of the infringement**

1. *Investigations*

(1) The present Decision arises out of investigations carried out by the Commission in March 1989 pursuant to Article 14(3) of Regulation No 17 at the premises of Community producers of soda ash. By means of the said investigations and subsequent enquiries under Article 11 of Regulation No 17 the Commission discovered documentary evidence showing, *inter alia* that an infringement of Article 85 of the EEC Treaty (now Article 81 of the EC Treaty) had been committed by the following undertakings:

— Solvay et Cie SA (now Solvay SA), Brussels (Solvay),

— Chemische Fabrik Kalk, Cologne (CFK).

2. *The infringement of Article 81 by Solvay and CFK*

(2) From a date unknown in about 1987 to at least 1989 Solvay and CFK participated in an agreement and/or concerted practice contrary to Article 81 of the 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 179 000 tonnes and compensated CFK for any shortfall by purchasing from it the tonnages required to bring its sales to the guaranteed minimum.

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 roasted in refineries. Natural soda ash is produced only in dense form. Natural ash is also found in Africa and Australia.

(6) All soda ash produced in the United States 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*

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

— Solvay,

— Imperial Chemical Industries (ICI),

— Rhône-Poulenc,

— Akzo,

— Matthes & Weber (M & W),

— Chemische Fabrik Kalk, Cologne (CFK).

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

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

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

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

3. *The market worldwide*

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

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

(14) The six United States natural ash producers had total nominal capacity of 9,5 million tonnes per year and a domestic market demand in 1989 of some 6,5 million. Natural ash production in the United States in 1989 was almost 9 million tonnes. The United States producers supplied the whole of their home market and exported the balance of production. Costs of production

of natural ash are very much lower than for the synthetic product, but the mines are located far from their principal markets and distribution costs are correspondingly high.

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

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

(17) During the 1980s there was a marked increase in demand and soda ash was fully sold worldwide. Plants were running at maximum output in 1990. Chinese manufacture was to increase by some 500 000 tonnes per annum and production in Botswana (for South Africa) was to produce another 300 000 tonnes, developments which were to result in the displacement of imports from other production areas.

4. *The Community*

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

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

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

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

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

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

5. *United States natural ash*

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

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

(26) The pressure to export led to the United States' producers attempting to penetrate the European and other markets. Natural soda ash began to appear in the Community in the late 1970s, principally in the United Kingdom. In 1982 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 had also been in force against east European imports of light, but not dense, ash since October 1982.)

(27) The measures in force in the late 1980s granting anti-dumping protection against 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 GBP 112,26/tonne ex-store (Commission Regulation (EEC) No 2253/84) ([4]);

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

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

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

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

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

(32) 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) ([6])).

(33) 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).

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

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

C. **The infringement of Article 81 by Solvay and CFK**

1. *Introduction*

(36) CFK was a subsidiary of Kali & Salz AG (BASF Group) and one of three producers of synthetic soda ash located in Germany. It had a production capacity of around 260 000 tonnes and its market share in Germany was around 15 %.

([4]) OJ L 206, 2.8.1984, p. 15.
([5]) OJ L 311, 29.11.1984, p. 26.
([6]) OJ L 283, 16.10.1990, p. 38.
([7]) OJ L 152, 15.6.1991, p. 54.

(37) Solvay was by far the largest producer supplying the German market and had a market share of over 50 %. Throughout the period under consideration it conducted its soda ash business 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.

(38) In November 1989 Solvay announced plans to reorganise 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.

(39) 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.

(40) During 1986 Solvay realised that CFK was applying a policy of price cutting in order to retain or regain market share. In a telephone conversation between DSW and Solva'Ys 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 was 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.

(41) Both Solvay and CFK insisted 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*

(42) 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.

(43) Originally, CFK's guarantee was set at 179 000 tonnes, 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 1 080 000 tonnes in total.

(44) For both 1987 and 1988, CFK'Ys achieved sales were somewhat over its guaranteed minimum of 179 000 tonnes (183 000 tonnes and 180 000 tonnes 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 1 170 000 tonnes, an increase of some 8,3 % over the previous year.

(45) As a result of the growth in demand, CFK demanded a minimum guarantee for 1988 and 1989 of 194 000 tonnes. CFK was thus claiming retrospective 'compensation' for 1988 of 14 000 tonnes (194 000—180 000 tonnes), which after taking account of the credit for 1987 left 11 000 tonnes. CFK's internal forecasts for 1989, as revised in January 1990, confirm that it had altered its original planning so as to provide for 'coproducer' sales in 1989 of 11 000 tonnes. Solvay had in fact purchased 2 500 tonnes at the end of December 1988, leaving a balance of 8 500 tonnes which CFK wanted it to buy during 1989.

(46) In response to CFK's claim, Solvay offered maximum compensation for 1988 of 4 000 tonnes instead of the 8 500 tonnes. 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 190 000 tonnes instead of the 194 000 tonnes which CFK had originally demanded.

(47) 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 'Verstaendnis 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.

(48) The compensatory mechanism was put into practice, with Solvay buying in from CFK during the first half of 1989 the additional 8 500 tonnes which had been claimed by CFK.

3. *Arguments in defence*

(49) Both Solvay and CFK denied 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 utilisation rate for CFK, why it should need to refer specifically to its sales on the German market.) This 'survival tonnage' was assessed by Solvay at 179 000 tonnes 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.

(50) 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 a hearing.

(51) 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.

(52) 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 fax 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 Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 Suiker Unie and others v Commission) ([8]). In any case, there are several examples of detailed references in CFK's own documents that are echoed in the documents found at Solvay, 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 81 of the Treaty**

1. *Article 81(1)*

(53) Article 81(1) of the 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.

(54) Article 81(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*

(55) Article 81(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 indisputably constitutes an 'agreement' within the meaning of Article 81(1).

([8]) [1975] ECR 1663, paragraph 164.

(56) 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 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*

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

(58) 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 81(1).

4. *Effect on trade between Member States*

(59) The fact that the minimum guaranteed tonnage related only to sales on the German market in no way excludes the application of Article 81. 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*

(60) The Commission therefore considers that Solvay and CFK infringed Article 81 of the Treaty by participating from about 1986 until the end of 1990 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. **Article 15(2) of Regulation No 17**

(61) Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings fines of from EUR 1 000 to EUR 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) or Article 82. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

1. *Gravity*

(62) 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 strict secrecy.

2. *Duration*

(63) 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.

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

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

(66) Solvay has been the subject on several previous occasions of substantial fines imposed by the Commission for collusion in the chemicals industry: Decision 85/74/EEC Peroxides ([9]), Decision 86/398/EEC Polypropylene ([10]), Decision 89/190/EEC PVC ([11]). Its activities in soda ash were the subject of scrutiny by the Commission between 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 could not have been ignorant of the need to comply with Community law.

C. **Proceedings before the Court of First Instance and the Court of Justice**

(67) On 19 December 1990 the Commission, acting pursuant to Article 85 of the EEC Treaty, adopted Decision 91/298/EEC finding that Solvay and CFK had committed an infringement and imposing fines of ECU 3 million on Solvay and ECU 1 million on CFK. The Decision was notified to the undertakings by registered letter on 1 March 1991. Solvay brought an action for annulment of the Decision before the Court of First Instance on 2 May 1991. CFK did not bring any action against the Decision (which remains valid in so far as it relates to that undertaking) and paid the fine of ECU 1 million. On 10 April 1992 Solvay submitted a 'supplementary application', in which it put forward a new plea to the effect that the contested Decision should be declared non-existent following the judgment delivered by the Court of First Instance on 27 February 1992 in Joined Cases T-79/89, 84/89, 85/89, 86/89, 89/89, 91/89, 92/89, 94/89, 96/89, 98/89, 102/89 and 104/89 BASF and others v Commission ([12]). The Court of Justice ruled on the appeal brought by the Commission against that judgment in Case C-137/92 P Commission v BASF and others ([13]) and annulled the Decision at issue in those proceedings (Decision 89/190/EEC) on the grounds that the Commission had failed to comply with Article 12 of its Rules of Procedure, in the version in force at the time, which required decisions to be authenticated in the language or languages in which they are binding by the signatures of the President and the Secretary-General.

(68) In its judgment of 29 June 1995 in Case T-31/91 Solvay v Commission ([14]) (Solvay I) concerning Decision 91/298/EEC, adopted by the Commission in the present proceedings on 19 December 1990, the Court of First Instance ruled that the new plea submitted by Solvay was admissible and, finding that the text of the contested Decision had not been authenticated before it was notified, annulled it on the grounds that the Commission had infringed an essential procedural requirement within the meaning of Article 173 of the EEC Treaty (now Article 230 of the EC Treaty).

(69) The Commission brought an appeal against that judgment before the Court of Justice. The Court dismissed the appeal in its judgment of 6 April 2000 in Joined Cases C-287/95 P and C-288/95 P ([15]).

(70) The Court of First Instance took the view in its judgment of 20 April 1999 in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 LVM and others v Commission ([16]) (PVC II) that the Commission is entitled to adopt again a decision that has been annulled on account of purely procedural defects; a new decision may in such cases be adopted without initiating fresh administrative proceedings; the Commission is not required to organise a further hearing if the text of the new decision does not contain objections other than those set out in the first decision; and the rights of the defence of the undertakings concerned are not infringed if the new decision is taken within a reasonable time.

(71) The Court of First Instance also upheld the Commission's interpretation of Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition ([17]).

(72) In accordance with Regulation (EEC) No 2988/74, the Commission's power to impose fines or penalties for infringement of the competition rules is subject to a limitation period of five years. In the case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases (i.e. the end of 1990 in the present case).

(73) Under Article 2 of Regulation (EEC) No 2988/74, any action taken by the Commission to investigate or initiate proceedings against an infringement interrupts the limitation period. Each interruption starts time running afresh, but the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty, in other words 10 years from the date on which the infringement ceases.

([9]) OJ L 35, 7.2.1985, p. 1.
([10]) OJ L 230, 18.8.1986, p. 1.
([11]) OJ L 74, 17.3.1989, p. 1.
([12]) [1992] ECR II-315.
([13]) [1994] ECR I-2555.
([14]) [1995] ECR II-1821.
([15]) [2000] ECR I-2391.
([16]) [1999] ECR II-931.
([17]) OJ L 319, 29.11.1974, p. 1.

(74) Article 2(1) of Regulation (EEC) No 2988/74 lists certain Commission actions which interrupt the running of the limitation period, including the statement of objections. The list is not exhaustive. The Court of First Instance left open the question whether adoption of the annulled Decision itself constituted an action that interrupted the running of the limitation period. Even supposing that (i) the infringement ceased on 19 December 1990 and (ii) adoption (and notification) of the annulled Decision did not interrupt the running of the limitation period, the Commission would have had at least until the end of 1995 in order to adopt its decision.

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

(76) As the Court of First Instance stated in paragraph 1098 of its judgment in PVC II, the specific purpose of Article 3 is to enable the limitation period to be suspended where a decision finding an infringement and imposing a fine is annulled. The limitation period was therefore suspended for as long as Decision 91/298/EEC was the subject of proceedings pending before the Court of First Instance and the Court of Justice.

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

(78) If that suspension is added to the limitation period expiring on 19 December 1995, the Commission has until September 2004 in order to adopt again the annulled Decision,

HAS ADOPTED THIS DECISION:

Article 1

Solvay et Cie SA, now Solvay SA (Solvay), infringed Article 85 of the EEC Treaty (now Article 81 of the EC Treaty) by participating from about 1987 until at least the end of 1990 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

A fine of EUR 3 million is imposed on Solvay in respect of the infringement specified in Article 1.

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

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

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

Article 3

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

This Decision is enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 13 December 2000.

For the Commission
Mario MONTI
Member of the Commission