COMMISSION DECISION

of 13 December 2000

relating to a proceeding under Article 82 of the EC Treaty

(COMP/33.133-D: Soda-ash — ICI)

(notified under document number C(2000) 3796)

(Only the English text is authentic)

(Text with EEA relevance)

(2003/7/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:

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 that an infringement of Article 86 of the EEC Treaty (now Article 82 of the EC Treaty) had been committed by Imperial Chemical Industries plc (ICI).

2. INFRINGEMENT OF ARTICLE 82 BY ICI

(2) From about 1983 until about the end of 1990 ICI abused the dominant position which it held 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 had the object and effect of tying the said customers to ICI for the whole of their requirements and of excluding competitors.

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

[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.

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.

(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) The six Community producers of synthetic soda-ash at the relevant times were:

— Solvay,

— ICI,

— Rhône-Poulenc,

— AKZO,

— Matthes & Weber (M & W),

— Chemische Fabrik Kalk (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, 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) After 1987, ICI Soda Ash Products was 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 date 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 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 was some 85 to 90 % of 'nameplate' capacity.) Soda-ash consumption in the Community in 1989 was around 5,5 million tonnes annually, worth some EUR 900 million.

(14) The (then) 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 tonnes. 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 1980's it was possible for these producers to sell in Europe at prices substantially below the local market price levels 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 substantial imports into the Community of light soda-ash from Comecon countries.

(17) During the 1980's 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 expected to increase by some 500 000 tonnes per annum and production in Botswana (for South Africa) was expected to produce another 300 000 tonnes, developments which were considered likely 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 1980's 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 after about 1981 or 1982 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 to it by Solvay for this purpose.

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

(22) In Belgium Solvay's market share was in excess of 80 %, in France 55 % and in Germany 52 %. ICI had over 90 % of the United Kingdom 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 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 required 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. The glass industry was during the 1980's 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 1960's the United States market showed a substantial excess of capacity over domestic demand and a surplus of some 2,5 million tonnes was available annually for export at the end of the 1980s.

(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 being 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 had to be added transport costs by rail to the East Coast industrial centres. List prices were raised by most producers to USD 98/short ton effective on 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 were also in force against east European imports of light, but not dense, ash from October 1982.)

(27) The measures in force in the late 1980's granting anti-dumping protection against United States dense ash involved:

(a) for the two producers then in the market, Allied (later General Chemical) and Texas Gulf, minimum price undertakings of GBP 112,26/tonne ex-store (Commission Regulation (EEC) No 2253/84 ([4]));

([4]) OJ L 206, 2.8.1984, p. 15.

(b) for those producers not in the market, Tenneco, KMG, FMC and Stauffer, a definitive anti-dumping duty of EUR 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 by 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 had also been targeting France, affecting in particular Solvay and Rhone-Poulenc which shared this 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 indicated their intention to take a substantial part of their business away from the Community producers and to buy from the United States. By 1990 however a total of only about 40 000 tonnes had 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.

(32) The anti-dumping measures provided for by 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 the Americas. 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) The application of Ansac was the subject of Commission Decision 91/301/EEC ([7]), under which an exemption was refused.

C. *BACKGROUND*

1. ICI'S POSITION IN THE UNITED KINGDOM SODA-ASH MARKET AT THE RELEVANT TIME

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

(37) Up to the end of 1990, neither Solvay nor any other producer in continental western Europe had 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 30 000 tonnes per year. TGI soon abandoned the market and the only alternative suppliers to ICI were General Chemical (as Allied was known) with some 4 % of the market and Brenntag which supplied Polish ash (3 %) ([8]).

(38) 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.

([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.
([8]) The major customers all used ICI as their primary source with the United States or Polish producers as a possible second supplier only.

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

(40) ICI's declared policy was to maximise its share of the United Kingdom soda-ash market and to maintain it at over 90 %.

(41) Following the introduction of anti-dumping measures, ICI's market share remained stable at about 93 %. The ICI soda-ash operation returned to profitability from 1986 onwards and was considered a mature cash-generating business.

2. ICI'S COMPETITORS

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

(43) 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'.

(44) Imports of soda-ash from Poland continued to reach the United Kingdom market via a trader, Brenntag (formerly TR International). There were no anti-dumping duties on dense-ash from eastern Europe, but non-Community ash imported to the United Kingdom was subject to a 10 % customs duty. At 30 000 tonnes per year (of which half was a special metallurgical grade) Polish imports were however considered 'troublesome rather than critical' by ICI. ICI seemed to have developed a policy of eliminating supplies of Polish heavy-ash leaving only imports of light-ash from that source.

(45) The United States producers of natural-ash were considered by ICI as the main source of potential competition. Up to 1990, the anti-dumping measures (undertakings from two producers and anti-dumping duties on the others) provided ICI with a substantial measure of protection. According to ICI, perhaps half of its profit would have been at risk if anti-dumping protection against United States imports had been removed.

3. ICI'S CUSTOMERS

(46) Most of ICI's major soda-ash customers were in the glass manufacturing sector which in the United Kingdom used exclusively dense-ash. (Dense-ash accounted for 75 % of ICI's soda-ash sales.)

(47) In the flat glass sector Pilkington was the only United Kingdom producer, with a requirement of almost 150 000 tonnes per year: ICI had 95 % of the business.

(48) Container glass producers (such as United Glass, Rockware, Redfearn, Beatson Clarke) accounted for up to 300 000 tonnes per annum of dense soda-ash: again, they sourced primarily or exclusively from ICI.

(49) ICI's 10 largest soda-ash customers in the United Kingdom accounted for almost 80 % of its total business.

(50) The major customers for light-ash were in the metallurgical and chemical sectors.

4. ANTI-DUMPING MEASURES AGAINST UNITED STATES PRODUCERS

(51) The undertakings offered by Allied and TGI in August 1984 and accepted by the Commission (Commission Regulation (EEC) No 2253/84 ([9])) were not published but ICI was well aware that the minimum price undertaking was GBP 112,26 ex-store.

(52) 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 GBP 119 per tonne ex-store. Allied's price was raised to this level from GBP 112,26 in 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 ([10]) in late 1989.

(53) 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

([9]) OJ L 206, 2.8.1984, p. 15.
([10]) OJ L 311, 29.11.1984, p. 26.

ensure that anti-dumping measures against United States ash remained in place. On a number of occasions ICI wrote to the Commission arguing that irreparable harm would be caused to its business unless a minimum price for imported material of GBP 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 GBP 110 per tonne delivered.

(54) 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 ([11])).

5. EXCLUSIVE SUPPLY AGREEMENTS

(55) 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).

(56) 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.

(57) 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 of the European Communities in Case 85/76 *Hoffmann-La Roche* v *Commission* ([12]).

([11]) OJ L 283, 16.10.1990, p. 38.
([12]) [1979] ECR 461.

(58) 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

(59) Soda-ash was normally sold by ICI on a delivered basis. Although price lists were produced showing an ex-works price, these were intended for internal ICI use only and were not communicated to customers. To the ex-works price was added the transport rate as quoted by the haulier to ICI (customers wishing to collect from the works were given a collection allowance of part – but not all – of the actual haulage cost).

(60) Standard quantity rebates were given until the mid-1980's. 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 GBP 0,25 per tonne (2 500 to 7 500 tonnes) to GBP 3,00 per tonne for an annual take-off of over 87 500 tonnes. According to ICI, from 1984 onwards rebates were 'for the most part' the subject of individual negotiation.

D. *EXCLUSIONARY CONDUCT BY ICI*

1. TOP-SLICE REBATES

(61) 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 GBP 30 per tonne on marginal tonnage. From 1985 almost all the major customers of ICI had such arrangements in place.

(62) The term 'top-slice rebate' means that customers were 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 have been either TR (later known as Brenntag) or Allied (later known as General Chemical).

2. EXCLUSIONARY PURPOSE OF THE TOP-SLICE REBATES

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

(64) 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.

(65) 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…'.

(66) 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 (later known as 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.

(67) 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.'

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

'1. To minimise Allied sales to a level that will result in them remaining as a second source to the glass industry: 15 000 to 20 000 tonnes per annum.

2. Prevent any other United States supplier; Ansac establishing a position in the United Kingdom.'

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

(70) Originally ICI had expected to pick up the majority of the former TGI business and keep Allied's sales down to 15 000 tonnes per year. Subsequently it had to accept that almost all the major glassmakers wished to maintain a second source which would have given Allied some 25 000 to 30 000 tonnes 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. If Allied were to have withdrawn completely, the glassmakers would almost inevitably have looked 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 GBP 15/tonnes to obtain incremental tonnage from Allied. The objective is to maintain Allied's position at less than 30 000 tonnes 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.'

3. THE OPERATION OF THE TOP-SLICE REBATES

(71) 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***

(72) Although the original minimum-price undertaking for the United Kingdom was set at GBP 112,26, this was increased 'unofficially' (i.e. without a formal review) to GBP 120 (reduced to GBP 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 (then known as DG I) when ICI put up its prices by 6,5 % with effect from 18 November 1985.

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

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

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

(76) Later the note reports the position of United Glass (one of the largest container glass producers): 'Deals for incremental tonnage of GBP 10 to GBP 20/tonnes equivalent proposed continuously over past two years but UG not prepared to change their stance of 10 to 15 % ex-USA…'.

(77) 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 GBP 500 000 tonnes in rebates in order to ensure that marginal tonnage sought by all major bulk customers is below GBP 112,26 tonnes ex-works, the General Chemical minimum price undertaking. '

(78) A handwritten note, undated, but probably also from late 1987 when ICI put its prices up by GBP 6 per tonne reads: 'Are we cutting top slice enough? Gen Chem may not follow increase. Top slice should be under GBP 112,26 ex works.'

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

(80) 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 operated at several United Kingdom sites and had a total soda-ash requirement for 1986 of around 135 000 tonnes, all of which was supplied by ICI except for some 8 500 tonnes to one minor site at Pont-y-felin.

(81) On Pilkington's 'top-slice' (i.e. offtake over 120 000 tonnes) ICI gave a rebate of GBP 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 GBP 108,75 (under GBP 100 per tonne ex-works) while believing that General Chemical was supplying at a price of GBP 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 GBP 20 per tonne to have a second supplier. For quality control reasons Pilkington did 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 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.

(82) Another example is provided by Rockware which up to 1988 had a soda-ash consumption of around 70 000 tonnes per year. Again General Chemical was the second supplier. Since 1986 ICI had been offering Rockware a top-slice rebate of GBP 15 per tonne which according to a letter from ICI of 12 November 1985 was intended, in part at least, 'to encourage you to minimise 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 GBP 112,26 ex-store.

(b) ***Agreement to restrict purchases from competitors***

(83) Whatever formal amendments may have been made to ICI's supply agreements in 1980, it is apparent that ICI in practice made 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 minimise the customer's purchases from any second supplier.

(84) In several cases ICI also pressed the customer, sometimes successfully, to give a commitment to purchase 100 % from ICI for the following year. In other cases, ICI 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**

(85) 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'.

(86) 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 135 000 tonnes) while buying up to 8 000 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.'

(87) ICI had ascertained that Pilkington's total United Kingdom requirements for 1987 would be 145 000 tonnes 'of which you intend to purchase from ICI 136 000'. A top-slice rebate of GBP 25 was given on any tonnage over 120 000. ICI clearly indicated to Pilkington that it hoped by this means to obtain the Pont-y-felin business as well.

(88) 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 150 000 tonnes equivalent 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 9 000 tonnes equivalent per year).'

(89) The top-slice rebate to Pilkington had by this time been increased to GBP 30 per tonne on offtake over 120 000 tonnes per year.

(90) 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**

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

(92) On 12 November 1985 ICI wrote to Rockware confirming the oral agreement which had been reached for 1986. Incremental tonnage over 65 000 tonnes was to receive a GBP 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 2 500 tonnes will be taken from Allied'. (Subsequently it was agreed that the 2 500 tonnes from Allied would be diverted to another works.)

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

(94) In 1988 Rockware acquired the two CWS factories. Rockware's annual usage of soda-ash thus rose from around 80 000 tonnes to over 100 000 tonnes. On 29 November 1988 ICI and Rockware agreed the 1989 'supply frame'. Having ascertained Rockware's total requirements for 1989 as 104 000 tonnes, ICI obtained

an undertaking that it would obtain 'not less than 97 000 tonnes' from ICI. Rockware's purchases from other suppliers were the subject of detailed discussions. One of ICI's specific objectives was to: 'Recover 6 000 tonnes per year previously purchased from Poles at ex-CWS factories.'

(95) To this end, Rockware was offered a 'top-slice' rebate of GBP 10 per tonne for offtake from 80 000 to 90 000 tonnes and GBP 22 per tonne for anything above 90 000 tonnes. This meant that for the marginal tonnage the effective cost to the customer offered by ICI was only GBP 100,25 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.

(96) 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 7 000 tonnes. 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 GBP 100 000 (4 500 × GBP 22). The letter to Brenntag reads: 'I fully realise the position this places you in but you clearly understand that the commercial offer we have received is impossible to refuse.'

(97) 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**

(98) 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 500 tonnes'. A promise (albeit rather vague) was also obtained from CWS to reduce its purchases of Polish ash from TR which then stood at 5 000 tonnes per year.

— **Redfearn**

(99) 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 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 2 500 tonnes per year. Thus for 1986 it was agreed that: 'RNG intend to purchase not less than 42 500 tonnes of soda-ash from ICI in 1986 out of a total budgeted purchase of 45 000 tonnes. All additional volume that you may possibly require above the budgeted total will also be purchased from ourselves.'

(100) The arrangement for 1987 provided that Redfearn would purchase from ICI at least 45 000 tonnes out of its total expected usage of 47 500 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 GBP 10 rebate.

(101) Similar arrangements were made for 1988 and 1989.

— **Beatson Clarke**

(102) Besides the 'top-slice' rebate system, ICI gave 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.)

(103) 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.

(104) For example, for 1988 ICI wrote to Beatson Clarke confirming that 'you intend to purchase your total

requirements from ICI and an assumption of 16 000 tonnes equivalent has been considered when offering the following support…'.

(105) 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…'

(106) 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'.

(107) ICI was in fact the sole supplier of soda-ash to Beatson Clarke from 1985 up to the date of the investigations.

(108) After the investigations in the present case were carried out, ICI abandoned the practice of 'top-slice' rebates, while insisting that the modification of its pricing arrangements in no sense involved an admission that the rebates in question constituted an infringement of Article 81. 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

(109) ICI denied that it ever had a general strategy of excluding a particular supplier or suppliers from the market. The 'top-slice' rebates were 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 argued) 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 pointed to the continued presence of General Chemical in the market as proof that it did not intend to eliminate competition.

(110) ICI also claimed 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

(111) 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 (recitals 66, 67 and 68). 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 66 to 70). 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 GBP 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 GBP 112,26/tonne ex-works, the General Chemical minimum-price undertaking' (recitals 77 and 78).

(112) 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 95 to 99). This offer from General Chemical would 'produce an average price close to GBP 112/tonnes equivalent 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 topslice 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 GBP 120 per tonne ex-store. But even in the single case of Rockware, ICI is not able to explain why, if the General Chemical average price to Rockware was GBP 112, it should itself need to give a top-slice rebate which resulted in an effective price for the last 3 000 tonnes to be taken by Rockware from ICI of only GBP 100,25 per tonne.

(113) 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 did not go below a list price of GBP 119 ex-works for

container glass manufacturers and gave no discounts off this list price.

(114) 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 82 OF THE TREATY*

1. THE TERMS OF ARTICLE 82

(115) Under Article 82, 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 82 as an exclusionary practice.

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

— whether ICI held a dominant position within the meaning of Article 82,

— whether the conduct alleged constituted an abuse of such a dominant position,

— whether there was an appreciable effect upon trade between Member States.

2. DOMINANT POSITION

(a) ***Definition***

(117) The term 'dominant position' is not defined in Article 82. 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*, points 38 and 39).

(118) '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 ([13]), point 113).

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

(b) ***Relevant market***

(120) 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 ([14])).

(121) In the present case, the particular abuses suspected concerned the foreclosure by ICI of actual and potential competition from other suppliers of soda-ash.

(122) ICI produced 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 were also the subject of the 'top-slice' rebate

([13]) [1978] ECR 207.
([14]) [1979] ECR 1869.

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.

(123) 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.

(124) Conditions in the United Kingdom were, for the reasons set out earlier both relatively homogenous and separate from those prevailing in other Member States. ICI was 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 were all located in the United Kingdom.

(125) 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.

(126) The United Kingdom is a 'substantial part of the common market' within the meaning of Article 82.

(c) ***Market power***

(127) ICI's own documentation recognises that it held 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.

(128) To assess market power for the purposes of the present case, the Commission took 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 minimising the presence and/or effectiveness of General Chemical and Brenntag as competitors and maintaining its predominant market share in the United Kingdom.

(129) In assessing ICI's market power, the Commission took 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. 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 did not constitute a substantial limitation on ICI's market power in the United Kingdom which was principally based on supply to the glass manufacturers, few if any of which were likely to use caustic soda in preference to soda-ash.

(130) 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 was therefore — unlike soda-ash — subject to considerable fluctuation.

(131) At the relevant time caustic soda was 'short', i.e. the growth in demand for caustic soda exceeded that for chlorine: the product was in short supply and was likely to remain so for an indefinite period. It was also considerably more expensive than the equivalent in soda-ash. There was 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.

(132) 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 converted to caustic soda.

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

(134) ICI also argued that the availability of cullet (recycled broken glass) excluded its having a dominant position. A customer's requirement of soda-ash in glass container manufacture could be reduced by up to 15 % by using cullet and with appropriate technology the proportion might 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.

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

(136) 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 82.

3. ABUSE OF DOMINANT POSITION

(137) As the Court of Justice has observed in several cases, conduct by a dominant undertaking which undermines the objectives of Article 3(g) of the EC Treaty (formerly Article 3(f) of the EEC Treaty) by endangering the structure of competition may constitute an infringement of Article 82. 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 ([15]); Case 85/76, Hoffmann-La Roche v Commission; Case 322/81, Nederlandsche Banden Industrie — Michelin ([16]). See also Commission Decision 89/22/EEC ([17]), British Gypsum/BPB Industries.)

(138) The present case concerns the tying of customers to ICI by means of a number of devices which all served 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'***

(139) 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;

— minimising or neutralising the competitive impact of General Chemical by containing its presence or 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 minimising its competitive effect;

([15]) [1975] ECR 1663.
([16]) [1983] ECR 3465.
([17]) OJ L 10, 13.1.1989, p. 50.

— minimising the risk of the customers turning to alternative sources of supply whether from sister-producers, traders or other Community producers;

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

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

(141) There is no need, in order for such practices to fall under Article 82, for 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***

(142) 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 82 (Hoffmann-La Roche v Commission, paragraph 89).

(143) 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.

(144) 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.

(145) 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 minimise 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.

(146) Such arrangements substantially restrict the contractual freedom of the customer, prevent competitive entry, and are tantamount to an exclusivity clause.

(147) The agreements with these major customers meant that they were 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 was minimised.

(iii) ***Other financial inducements***

(148) In its dealings with Beatson Clarke, ICI also made it clear that the 'support package' ([18]), 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' had the object and effect of reinforcing ICI's position at the customer and excluding competition.

(149) All the above measures described in recitals 139 to 147 were 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 consolidated the dominant position of ICI in a manner which was incompatible with the concept of competition inherent in Article 82.

(150) The rebates did 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

([18]) The compatibility or otherwise of ICI's 'support packages' (import substitution, export assistance) with Article 81 or Article 82 are not the subject of the present proceedings. For the purposes of the present case the Commission confines itself to the linkage between the package and the customer's total requirement.

which it was activated. There were also differences in the amount per tonne of the rebate itself, varying from GBP 6 per tonne to GBP 30 or more.

4. EFFECT UPON TRADE BETWEEN MEMBER STATES

(151) Article 82 covers not only abuses which may directly prejudice consumers but also those which indirectly prejudice them by impairing the effective competitive structure in the common market as envisaged by Article 3(g).

(152) 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.

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

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

B. *ARTICLE 15(2) OF REGULATION No 17*

(155) 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 82. In fixing the amount of the fine, regard is to be had to both the gravity and the duration of the infringement.

1. GRAVITY

(156) In the present case the Commission considers that the infringements of Article 82 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 Treaty. Further, they were specifically directed at restricting or damaging the business of particular competitors.

(157) By foreclosing for a long time sales opportunities for all competitors, ICI caused lasting damage to the structure of the market concerned, to the detriment of consumers.

(158) ICI was well aware from its extensive negotiations with the Commission between 1980 and 1982 of the requirements of Article 82. 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.

(159) 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; PVC.

2. DURATION

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

(161) The Commission takes into account the fact that ICI abandoned the system of top-slice rebates with effect from 1 January 1990.

C. *PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE AND COURT OF JUSTICE*

(162) On 19 December 1990 the Commission adopted Decision 91/300/EEC in the present case pursuant to

Article 86 of the EEC Treaty finding that an infringement had been committed by ICI and imposing a fine of EUR 10 million. The decision was notified to the undertaking by registered letter of 1 March 1991. ICI applied to the Court of First Instance on 14 May 1991 for the annulment of the decision. On 2 April 1992 ICI lodged a supplement to its application putting forward a new plea in law to the effect that the decision should be declared non-existent following the judgment of the Court of First Instance of 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* ([19]). The Court of Justice ruled on the Commission's appeal against that judgment on 15 June 1994 in Case C-137/92P, *Commission* v *BASF and others* ([20]) and annulled the decision on the ground that the Commission had not complied with Article 12 of the version of its Rules of Procedure in force at that time, which required the decision to be authenticated in the authentic language versions by the signatures of the President and the Secretary-General.

(163) In its judgment of 29 June 1995 in Case T-37/91, ICI v Commission ([21]) concerning Decision 91/300/EEC adopted in the present case on 19 December 1990, the Court of First Instance held that the new plea of ICI was admissible and, having found that the text of the contested decision had not been authenticated before it was notified, annulled the decision for infringement of an essential procedural requirement within the meaning of Article 173 of the Treaty (now, after amendment, Article 230).

The Commission appealed to the Court of Justice against this judgment. The Court of Justice dismissed the Commission's appeal in its judgment of 6 April 2000, Case C-286/95 P ([22]).

(164) The Court of First Instance has held in Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94, T-329/94 and T-335/94 LVM and Others v Commission ([23]) ('PVC II') that the Commission is entitled to re-adopt a decision which has been annulled for purely procedural defects. A new decision may in the circumstances be adopted without conducting a fresh administrative procedure. The Commission is not required to hold a new oral Hearing if the text of the new decision does not contain any new objections besides those set out in the original decision. Furthermore, the rights of defence of the undertakings concerned are not infringed if the new decision is adopted within a reasonable time.

(165) The Court of First Instance also confirmed 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 ([24]).

(166) Under Regulation (EEC) No 2988/74, the power of the Commission to impose fines for substantive infringement of the rules of competition 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 (which in the present case was 31 December 1989).

(167) Under Article 2 of Regulation (EEC) No 2988/74, any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period in proceedings. Where the limitation period is thus interrupted, time starts running afresh with each interruption, but the imposition of a fine is definitively time-barred on the day on which a period equal to twice the limitation period has elapsed without the Commission imposing a fine, i.e. 10 years from date on which the violation ceased.

(168) Article 2(1) of Regulation (EEC) No 2988/74 identifies certain actions by the Commission which interrupts the limitation period, including notification of a statement of objections. The list is not exhaustive. The Court of First Instance left open the question whether the adoption of the annulled decision itself constituted an action interrupting limitation, but even if the notification of the statement of objections to ICI is taken as the last action which would start time running again under Article 2, the Commission would have had until 13 March 1995 to adopt its decision.

(169) That time-limit has to be extended by the period during which proceedings against the decision were pending before the Court. Article 3 of Regulation (EEC) No 2988/74 provides that the limitation period in proceedings is to be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice (which for these purposes includes the Court of First Instance).

([19]) [1992] ECR II-315.
([20]) [1994] ECR I-2555.
([21]) [1995] ECR II-1901.
([22]) [2000] I-2341
([23]) [1999] ECR II-931.
([24]) OJ L 319, 29.11.1974, p. 1.

(170) As the Court of First Instance stated at point 1098 of its PVC II judgment, Article 3 is specifically intended to apply to the case where the decision finding the infringement and imposing a fine is annulled. The limitation period is thus suspended for as long as Decision 91/300/EEC was the subject of proceedings pending before the Court of First Instance and the Court of Justice.

(171) In the present case, ICI's application was lodged at the Court of First Instance on 14 May 1991 and the judgment was delivered on 29 June 1995. The Commission's appeal to the Court of Justice was filed on 30 August 1995 and the final judgment was rendered on 6 April 2000. Even if the time which elapsed between the judgment of the Court of First Instance and the Court of Justice being seized of the appeal is disregarded, the limitation period was suspended for a minimum period of eight years, eight months and 22 days.

(172) If this period of suspension is added to the time-limit which expired on 13 March 1995, the Commission has until the end of 2003 to re-adopt the annulled Decision.

HAS ADOPTED THIS DECISION:

Article 1

Imperial Chemical Industries plc (ICI) infringed Article 86 of the EEC Treaty (now Article 82 of the EC 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

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

The fine imposed shall be paid within three months of the date of notification of this Decision to the following bank 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 automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision is adopted plus 3,50 percentage points, namely 8,32 %.

Article 3

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

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 13 December 2000.

For the Commission
Mario MONTI
Member of the Commission