

COMMISSION DECISION

of 19 December 1990

relating to a proceeding under Article 86 of the EEC Treaty

IV/33.133-C: Soda-ash — Solvay

(Only the French text is authentic)

(91/299/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

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

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

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

PART I

THE FACTS

A. Summary of the infringement

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

2. The infringement can be summarized as follows:

Infringement of Article 86 by Solvay

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

B. Background

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

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

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

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

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

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

⁽³⁾ See page 1 of this Official Journal.

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

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

2. Solvay's competitors

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

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

3. Solvay's customers

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

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

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

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

4. Solvay's sales organization

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

5. Solvay's total requirements contracts up to 1981

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

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

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

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

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

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

6. Anti-dumping protection

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

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

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

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

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

C. Exclusionary conduct

1. Solvay's commercial strategy since 1982

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

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

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

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

This entails:

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

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

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

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

2. Solvay's rebate system in Germany

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

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

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

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

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

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

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

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

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

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

To take again the example of Vegla in 1989:

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Solvay's rebate system in France

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

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

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

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

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

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

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

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

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

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

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

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

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

4. St Gobain

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

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

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

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

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

By Clause 2 of the Protocol:

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

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

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

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

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

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

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

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

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

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

5. Exclusivity arrangements in Germany

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

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

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

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

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

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

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

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

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

6. Exclusivity arrangements in France

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

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

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

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

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

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

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

7. The Belgian glassmaker contracts

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

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

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

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

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

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

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

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

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

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

8. Other exclusivity arrangements in Belgium

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

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

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

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

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

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

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

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

9. 'Competition' clauses

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

(a) Competition Clauses

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

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

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

Competition clause

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

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

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

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

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

⁽¹⁾ [1979] ECR 461.

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

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

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

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

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

(b) Safeguard clauses

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

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

PART II

LEGAL ASSESSMENT

A. Article 86 of the EEC Treaty

1. *The terms of Article 86*

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

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

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

2. *Dominant position*

(a) *Definition*

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

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

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

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

(b) Relevant market

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

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

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

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

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

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

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

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

(c) Market power

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

⁽¹⁾ [1978] ECR 207.

⁽²⁾ [1979] ECR 1869.

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

- (i) Solvay's position as the only soda-ash producer operating throughout the Community (with the exception of the United Kingdom and Ireland);
- (ii) Solvay's manufacturing strength with plant in Belgium, France, Germany, Italy, Spain and Portugal;
- (iii) Solvay's 'upstream' integration in raw materials as the largest producer of salt in the Community;
- (iv) The absence of any competition from ICI, the only other Community producer of comparable market strength to Solvay;
- (v) Solvay's high market share in the Benelux countries, France and Germany and its monopoly or near-monopoly position in Italy, Spain and Portugal;
- (vi) Solvay's excellent 'market coverage' as the exclusive or near-exclusive supplier to almost all the major customers in the Community;
- (vii) The improbability of any new producer of synthetic ash entering the market and setting up manufacturing facilities in the Community;
- (viii) The protection against non-Community producers afforded by the anti-dumping duties;
- (ix) Solvay's traditional role of price leader;
- (x) The perception of Solvay by other Community producers as the dominant producer and their reluctance to compete aggressively for Solvay's traditional customers.

(46) In assessing the extent of Solvay's market power, the Commission takes account of the possible substitutability of caustic soda for soda-ash. Caustic soda (sodium hydroxide) is largely used for the production of paper and aluminium and may also in theory replace soda-ash for certain manufacturing applications as a source of alkali, particularly in the manufacture of detergents and in metallurgical processes. (The reverse is also true: soda-ash is in theory also an alternative for caustic soda in some processes.) In practice however the possible availability of caustic soda does not constitute a

substantial limitation on Solvay's market power in the Community which is principally based on supply to glass manufacturers, few if any of which are prepared to substitute caustic soda for soda-ash.

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

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

(47) In the glass sector, the main consumer of soda-ash, accounting for two-thirds of Solvay's sales, caustic-soda substitution is even less likely than in metallurgical and detergent applications. In theory up to 15% of the alkali requirement of glassmakers may be provided by caustic soda. Again, capital investment in plant modification is required. In practice, only one of the glassmakers has ever converted to caustic soda. It is significant that Solvay itself in its meetings with ICI invariably discounted the potential threat from caustic soda.

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

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

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

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

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

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

3. Abuse of dominant position

(a) Exclusionary practices and fidelity rebates

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

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

(i) Rebates on marginal tonnage

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

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

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

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

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

⁽¹⁾ [1975] ECR 1663.

⁽²⁾ [1983] ECR 3465.

⁽³⁾ OJ No L 10, 13. 1. 1989, p. 50.

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

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

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

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

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

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

(ii) The St Gobain group rebate

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

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

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

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

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

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

(iii) Exclusivity agreements

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

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

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

In a number of cases however it is apparent that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Discrimination

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

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

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

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

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

4. Effect on trade between Member States

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

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

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

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

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

B. Remedies and sanctions

1. Article 3 of Regulation No 17

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

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

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

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

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

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

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

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

2. Article 15 (2) of Regulation No 17

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

⁽¹⁾ [1974] ECR 223.

(a) Gravity

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

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

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

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

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

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

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

(b) Duration

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

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

HAS ADOPTED THIS DECISION:

Article 1

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

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

Article 2

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

Article 3

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

Article 4

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

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

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

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

Article 5

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

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

Done at Brussels, 19 December 1990.

For the Commission

Leon BRITTAN

Vice-President