OPINION OF ADVOCATE GENERAL LÉGER
delivered on 13 December 1994 *

1. BPB Industries Plc ('BPB') and British Gypsum Ltd ('BG') have lodged an appeal against the judgment of the Court of First Instance of 1 April 1993 in the case which they had brought against the Commission, which was supported by the Kingdom of Spain and Iberian Trading (UK) Ltd ('Iberian').

2. That judgment was given in the following circumstances.

3. BPB is the largest producer of plasterboard in the world outside the United States of America. [1] It is present in many countries, including several Member States of the Community.

4. BPB, as a holding company, controls the plasterboard market in the United Kingdom and Ireland through two wholly-owned subsidiaries, BG and Gypsum Industries Ltd ('GIL'). BG is the principal supplier in Great Britain and Northern Ireland, with a market share estimated at over 90%. GIL controls to a similar extent the market in Ireland.

5. Starting in 1982, plasterboard was imported from France by Lafarge UK Ltd ('Lafarge') and, starting in 1984, from Spain by Iberian.

6. In 1986, those two importers had a market share of 4% between them. [2]

7. On 17 June 1986, Iberian lodged a complaint with the Commission, alleging that BPB had acted in a manner contrary to Article 86 of the EEC Treaty.

* Original language: French.

1 — Point 5 of the Decision.

2 — Point 8 of the appeal.

8. By decision of 5 December 1988, [3] the Commission ordered BPB and BG to pay certain fines. The operative part of that decision reads as follows:

'*Article 1*

Between July 1985 and August 1986 British Gypsum Ltd infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Great Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from British Gypsum Ltd.

Article 2

In July and August 1985 British Gypsum Ltd infringed Article 86 of the EEC Treaty by implementing a policy of favouring customers who were not trading in imported plasterboard in the provision of priority orders for the supply of building plasters at a time of extended delivery for that product which constituted an abuse of its dominant position in the supply of plasterboard in Great Britain.

Article 3

BPB Industries plc, through its subsidiary British Gypsum Ltd, infringed Article 86 of the EEC Treaty by abusing its dominant position in the supply of plasterboard in Ireland and Northern Ireland:

— in June and July 1985 by successfully applying pressure on and thereby procuring the agreement of a consortium of importers to renounce importing plasterboard into Northern Ireland,

— by a series of rebates on BG products supplied to builders' merchants in Northern Ireland between June and December 1985 conditional on their not handling any imported plasterboard.

3 — Decision 89/22/EEC of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/31.900 — BPB Industries Plc, OJ 1989 L 10, p. 50).

Article 4

The following fines are imposed:

— on British Gypsum Ltd, a fine of ECU 3 million in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 1,

— on BPB Industries plc, a fine of ECU 150 000 in respect of the infringements of Article 86 of the EEC Treaty referred to in Article 3.

...'. [4]

9. The action brought by BPB and BG for the annulment of that decision was decided by the judgment of the Court of First Instance of 1 April 1993 in *BPB Industries and British Gypsum* v *Commission*, [5] in the operative part of which it:

'1. Annuls Article 2 of Commission Decision 89/22/EEC ... in so far as it relates to July 1985;

2. Dismisses the remainder of the claims made in the application;

...'

10. The appeal brought by BPB and BG against that judgment is limited to certain very precise points. Neither the existence of a dominant position nor the effect on trade between Member States are disputed. The appeal alleges four errors of law, [6] in that:

(1) the infringement found in Article 3 of the Decision is not attributable to BPB;

4 — In his paper entitled 'Abuse of Monopoly Power within the Meaning of Article 86 of the EEC Treaty: Recent Developments', Luc Gyselen has drawn attention to the paradoxical nature of this case: 'The situation on the UK plasterboard market was somewhat paradoxical. Competition from Lafarge and Iberian Trading seemed rather marginal as they had no production facilities of their own on that market. This caused extra shipping costs and, at times, discontinuity of supply. In addition, both competitors offered a narrower range of products than BG so that their customers always bought part of their requirements from BG. With regard to Lafarge, BG itself had noted that it was not seeking new business. And yet, BG felt the need to take action to prevent its growth.' (*Fordham Corporate Law Institute*, 1992, p. 597 at p. 631, note 93).

5 — Case T-65/89 [1993] ECR II-389.

6 — See point 13 of the appeal and point 9 of the Commission's response.

(2) the exclusive purchase agreements and the promotional payments referred to in Article 1 of the Decision do not constitute an abuse of a dominant position;

(3) the priority deliveries of plaster referred to in Article 2 do not constitute such an abuse either; and

(4) the non-disclosure of relevant documents constitutes an infringement of the rights of the defence.

11. BPB and BG therefore ask the Court to:

(i) quash, in whole or at least in part, the judgment;

(ii) annul Decision 89/22/EEC;

(iii) alternatively, cancel or at least reduce the amount of the fines;

(iv) order the Commission to pay the costs. [7]

12. I shall examine each of the four pleas in law in turn.

The first plea in law

The infringement found in Article 3 of the Decision is not attributable to BPB (paragraphs 99 to 122 and 141 to 155 of the judgment of the Court of First Instance, points 14 to 28 of the appeal)

13. Article 3 of the Decision states that BPB, through its subsidiary BG, abused its dominant position on the market in Northern Ireland by applying pressure on a consortium of importers so that they would renounce importing plasterboard into Northern Ireland and by allowing rebates in exchange for agreements not to handle any imported plasterboard.

14. In upholding the decision to impose a fine on BPB for BG's practices in Northern

7 — P. 4 of the appeal.

Ireland, the Court of First Instance points to the specific characteristics of that market: the group's products are sold by BG which, to a limited extent, markets its own production and, for the main part, imports from Ireland products manufactured by GIL.

15. It follows, in the view of the Court of First Instance that, 'by contrast with the position in the British market, neither the dominant position nor the abuse thereof in the market of the whole island of Ireland can be specifically attributed to either of the subsidiaries of BPB, particularly when the entire BPB group profited from BG's practices in Northern Ireland, in that its subsidiary, GIL, increased deliveries of plasterboard to the other subsidiary, BG, to an extent which varied directly according to the effectiveness of the abuses committed by the latter in Northern Ireland'. [8]

16. In the island of Ireland, therefore, BPB operates through its two subsidiaries without either of these having, alone, a dominant position on that market. BPB is, in any event, the end beneficiary of the operation.

17. The appellants argue that BPB cannot be held responsible for the infringement of Article 86 in Northern Ireland.

18. In their view, the Court of First Instance was wrong in considering that it would have been superfluous to investigate the degree of influence of the parent company over its wholly-owned subsidiary and that control by the parent over the subsidiary could be assumed. BG defines its own commercial policy independently and there was no proof that BPB gave it any instructions.

19. In addition, they claim that the Commission gave no reasons in the Decision itself regarding the attributability of the abuse. That failure to state reasons cannot be cured during the course of the proceedings before the Court. Moreover, when it decides to impose a fine on a parent company for an infringement committed by one of its subsidiaries, the Commission always states detailed reasons for that decision, especially since an attribution of the infringement to the parent company may lead to an increased fine if it is calculated according to turnover.

20. With regard to that first plea in law, two questions must be considered:

(1) Are sufficient reasons stated for the attribution to BPB of responsibility for the infringement found in Article 3 of the Decision?

(2) If so, is that attribution well founded?

8 — Paragraph 151.

21. (1) This Court has consistently held that Article 190 'requires the Commission to set out the reasons which prompted it to adopt a decision, so that the Court can exercise its power of review and Member States and nationals concerned know the basis on which the Treaty has been applied'. [9]

22. It follows that a decision must be self-sufficient, especially when it is intended to be published, and that the reasons on which it is based may not be stated in written or oral explanations given by the Commission in the course of an action brought against the decision in question. [10]

23. That is particularly true where it must be determined whether a parent company or a subsidiary is responsible for an abuse of a dominant position. As the appellants have pointed out, [11] if the parent company is held liable for an infringement, the amount of the fine may be higher if it is calculated according to turnover.

24. In the present case, I consider that the Decision itself states the reasons on which the attribution of responsibility for the abuse found in Article 3 is based. Admittedly, the judgment finds that certain facts were '*confirmed* by the *clarifications* given at the hearing' [12] and that the Commission gave '*details*, in the course of the procedure, and in particular in reply to the questions put to it orally and in writing by the Court, of the information on which the reasoning adopted in the Decision is based.' [13] Is it not the very purpose of both the written and the oral procedure to 'confirm' or to 'clarify' certain information? If a point is 'clarified', that clearly presupposes that it was already *contained* in the Decision and such is indeed the case here.

25. In attributing the abuse found in Article 3 of the Decision to BPB, the Commission relied on the characteristics of the Irish market which it sets out carefully at point 86 of its Decision. It mentions *BPB's market share* and specifies that that share derives from the activities of its two subsidiaries GIL and BG. Nowhere is it stated that either of those subsidiaries would, *considered separately*, enjoy a dominant position on that market. Adopting the Commission's point of view, the Court of First Instance considers, quite unambiguously, that

'by contrast with the position in the British market, *neither* the dominant position *nor* the abuse thereof in the market of the whole island of Ireland *can be specifically attributed*

9 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 66.

10 — See Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, at p. 2877.

11 — Point 1.1.1 of the reply.

12 — Paragraph 152 of the judgment, emphasis added.

13 — Paragraph 154 of the judgment, emphasis added.

to either of the subsidiaries of BPB, particularly when *the entire BPB group profited from BG's practices* in Northern Ireland ...' [14]

26. The first limb of the first plea in law, alleging an inadequate statement of reasons, should therefore be dismissed.

27. (2) In *ICI* v *Commission*, [15] cited by the Court of First Instance in its judgment, [16] this Court held:

'The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.

Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit.' [17]

28. In just that way, the Court of First Instance was able to infer from the structure of the relationship between the subsidiary BG and the parent company BPB and from the unified commercial policy which they followed that they constituted *a single economic entity* on the Irish market. [18] The Court also noted that it was apparent from the Commission's findings of fact that the Executive Committee of BPB was not uninvolved in the strategy adopted in Northern Ireland. [19]

29. I therefore conclude that the Court of First Instance was in a position to establish, by findings of fact against which no appeal can lie, that BG had followed instructions from its parent company. There is thus nothing to be gained from considering whether a parent company must be presumed to influence the conduct of a wholly-owned subsidiary, since specific findings of fact were made to establish that point in the present case. The last sentence of paragraph 149 of the judgment under appeal was therefore superfluous.

14 — Paragraph 151 of the judgment, emphasis added.

15 — Case 48/69 [1972] ECR 619.

16 — Paragraph 149.

17 — Paragraphs 132 to 134.

18 — Paragraph 152 of the judgment under appeal. For an analysis of what constitutes 'economic unity' between two undertakings, see Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223.

19 — Ibid.

30. Finally, in contrast to the market in Great Britain, where only the subsidiary BG was present, the dominant position on the market on the island of Ireland derives from the presence of two subsidiaries, without it being possible to attribute the dominant position and the abuse specifically to either of them.

31. The abuse of a dominant position which the Commission found to have taken place on that market was therefore properly attributable to BPB.

The second plea in law

The exclusive purchase agreements and the promotional payments do not fall within the scope of Article 86. The promotional agreements meet the criteria for an exemption under Article 85(3) (paragraphs 38 to 77 of the judgment of the Court of First Instance, points 29 to 63 of the appeal)

32. The Court of First Instance was able to establish that from 1985 BG implemented a marketing strategy involving the making of promotional payments to its clients in exchange for agreements to purchase plasterboard exclusively from BG [20] in order to 'recover the market share lost by BG to its competitors.' [21]

33. The Court of First Instance points out that in a normal competitive market situation such commercial cooperation is not prohibited in principle and that the appraisal of its effects depends on the characteristics of the market concerned. [22]

34. However, an exclusive contract concluded by an undertaking in a dominant position may constitute an abuse of that position within the meaning of Article 86. [23] That is undoubtedly the case when the aim of that conduct is to strengthen the dominant position.

35. The Court of First Instance states that the concept of abuse is an objective one not requiring proof of any fault.

36. In its view, such an abuse cannot be justified by the need to ensure regular supplies, by the prices charged by Iberian, by competitors' supply difficulties or by the fact that

20 — Paragraphs 62 and 63 of the judgment under appeal.
21 — Paragraph 62 of the judgment under appeal.
22 — Paragraphs 65 and 66 of the judgment under appeal.
23 — Paragraph 68 of the judgment under appeal.

customers were free to discontinue their contractual relations with BG at any time.

37. Finally, an exemption under Article 85(3), even if it can be established, does not prevent the application of Article 86.

38. The appellants claim, first, that there has been no demonstration that BG exploited its dominant position in order to obtain advantages which it would not have succeeded in obtaining if there had been effective competition. In other words, the causal connection between the dominant position on the market and the conclusion of exclusive supply agreements by BG has not been established. [24] Those agreements were, moreover, concluded at the request of the merchants.

39. Secondly, they argue, the agreements did not have the effect of excluding BG's competitors from the market. Unlike those examined in *Hoffmann-La Roche* v *Commission*, [25] they did not include any conditions as to their duration and did not bind customers for the future. Customers were free to terminate them at any time and would not have been dissuaded from purchasing from any competitors who might have offered the same advantages.

40. BPB and BG also rely on Article 85(3) of the EEC Treaty. They claim that the promotional agreements met the conditions for exemption without there being any need for notification since they were entered into between parties established in the same State and did not concern imports or exports between Member States. They further consider that the Court of First Instance misconstrued the judgment in *Tetra Pak* v *Commission* [26] and that it is clear from *Hoffmann-La Roche* [27] that the fact that a loyalty rebate system constitutes an abuse does not mean that it may not be considered under Article 85(3).

41. Finally, on the same point, the appellants consider that the Commission should have been prompted by the principle of legal certainty not to impose a fine on BG in respect of the promotional payments system, since, as the Court's case-law stood, BG was entitled to believe that it was not infringing Community law.

42. I consider that the reasoning followed by the Court of First Instance in that regard should be upheld.

43. It is clear from *Delimitis* [28] that an exclusive purchasing agreement (in that case a contract for the supply of beer) entered into

24 — Point 36 of the appeal.

25 — Case 85/76 [1979] ECR 461.

26 — Case T-51/89 [1990] ECR II-309.

27 — Cited above.

28 — Case C-234/89 [1991] ECR I-935.

in a market on which no supplier occupies a dominant position may be contrary to Article 85 of the EEC Treaty only if an economic analysis of the way in which that market operates, taking into account any cumulative effect from the existence of other exclusive agreements, shows that by reason of such contracts access to the market has become difficult or impossible for competitors.

44. That is not the case for an exclusive purchasing agreement entered into by an undertaking in a dominant position.

45. Such a contract operates, *ex hypothesi*, on a market where, as a consequence of the presence of an undertaking occupying a dominant position, the degree of competition has already been weakened. [29]

46. The exclusive supply agreement causes 'additional interference' with the structure of competition on that market. [30]

47. Consequently, 'the concept of abuse ... *in principle* includes any obligation to obtain supplies exclusively from an undertaking in a dominant position which benefits that undertaking'. [31]

48. The Court of First Instance, as final judge of the facts, found that the agreements in the present case formed part of a plan aimed at eliminating competition. [32]

49. Admittedly, as this Court has pointed out in *United Brands* v *Commission*, [33]

'Although it is true ... that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.' [34]

29 — Paragraph 120 of *Hoffmann-La Roche*.
30 — Ibid.
31 — Paragraph 121 of *Hoffmann-La Roche*, emphasis added.
32 — Paragraph 62 of the judgment under appeal.
33 — Case 27/76 [1978] ECR 207.
34 — Paragraph 189.

50. Thus the Community law of competition in no way precludes a supplier from rewarding loyal customers or offering quantity rebates. Reserving more favourable treatment for traditional customers than for occasional purchasers does not constitute an abuse, as the Court observed in *BP* v *Commission*. [35]

51. In *Hoffmann-La Roche*, this Court demonstrated that a fidelity rebate could not be treated in the same way as a quantity rebate:

'The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers.

Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.' [36]

52. By making the promotional payments strictly dependent on the 'loyalty' of its customers, BG applied dissimilar conditions to equivalent transactions and different prices for the same quantities of products depending on whether or not its trading partners agreed not to purchase imported products. [37] The fact that the undertakings receiving those payments were under an obligation to spend them on publicity has no bearing on the matter. BG gave them an advantage which it did not give to their competitors which refused exclusive supply arrangements.

53. By thus dissuading its customers from buying imported products, BG was clearly intent on eliminating its competitors present on the market.

54. Can the fact that BG's contracts were entered into with, or even at the request of, powerful merchants change that conclusion?

35 — Case 77/77 [1978] ECR 1513, paragraph 32.

36 — Paragraph 90. See also Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 71.

37 — On this point, see paragraph 90 of *Hoffmann-La Roche*.

55. Such an argument has already been dealt with in *Hoffmann-La Roche*:

'An undertaking which is in a dominant position on a market and ties purchasers — *even if it does so at their request* — by an obligation or promise ... to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position ...' [38]

to which the Court added:

'The fact that Roche's contracting partner is itself a *powerful undertaking* and that the contract is clearly *not the outcome of pressure* brought to bear by Roche on its partner does not preclude the existence of an abuse of a dominant position, such an abuse consisting in this case of the additional interference, due to the obligation to obtain supplies exclusively from Roche, with the structure of competition in a market in which in consequence of the presence there of an undertaking occupying a dominant position the degree of competition has already been weakened.' [39]

56. Admittedly, BG's contracting partners were not tied by long-term exclusive supply contracts, which would have been particularly detrimental to the interests of BG's competitors. [40]

57. Customers were entitled to terminate their exclusive supply agreements without notice and were thus free at any time to accept a more attractive offer from one of BG's competitors. Is it possible, in such circumstances, to speak of an abuse?

58. Of the supply contracts examined in *Hoffmann-La Roche*, some included a firm undertaking to obtain supplies exclusively from Roche, while others only provided for loyalty rebates.

59. The Court considered that the latter type involved 'a strong incentive to purchasers to let Roche alone supply ... their requirements'. [41]

38 — Paragraph 89, emphasis added. See also Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 ('*AKZO II*'), paragraph 149, and Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 44.

39 — Paragraph 120, emphasis added.

40 — See paragraphs 113 to 115 of *Hoffmann-La Roche*.

41 — Paragraph 110 of *Hoffmann-La Roche*.

60. The Court added that

'even if ... the purchaser's non-compliance with his undertaking to obtain his requirements exclusively from Roche did not make him liable to be sued for breach of contract but only caused him to lose the benefit of the promised rebates, such contracts nevertheless contain a *sufficient incentive* to reserve to Roche the sole right to supply the purchaser for them to be, for this reason alone, an abuse of a dominant position'. [42]

61. In the same way, the fact that BG's customers could readily withdraw from their contractual obligations at the cost of losing the loyalty rebates does not mean that such contracts entered into in such circumstances no longer constitute an abuse of a dominant position.

62. I conclude that BG's conduct helped to keep other producers out of the market and protect BG's production from the hazards of competition.

42 — Paragraph 111 of *Hoffmann-La Roche*, emphasis added.

63. Could Article 85(3) be applied here?

64. It is clear from *Hoffmann-La Roche* that exclusive supply agreements, whether or not they include a rebate arrangement, which can be held to constitute an abuse of a dominant position '*could only possibly be admissible* in the context of, and subject to the conditions laid down in, Article 85(3) of the Treaty'. [43]

65. The appellants are not justified in relying on *Bilger* v *Jehle* [44] in support of their submission that the promotional agreements in issue meet the conditions of Article 85(3) without there being any need for notification.

66. It cannot be maintained that those agreements do not concern imports or exports between Member States within the meaning of Article 4(2)(1) of Regulation No 17 [45] when they formed, as the Court of First Instance found in its capacity as sole judge of the facts, part of a strategy of hindering imports. In that connection, it may be noted that the appellants no longer dispute before this Court the considerations in the judg-

43 — Paragraph 120, emphasis added. See also paragraph 90, which speaks of 'exceptional circumstances'.

44 — Case 43/69 [1970] ECR 127. See also Case 63/75 *Fonderies Roubaix* v *Fonderies Roux* [1976] ECR 111.

45 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

ment of the Court of First Instance relating to the effect on trade between Member States.

67. Furthermore, in *Tetra Pak*, cited above, [46] the Court of First Instance demonstrated that the grant of an exemption under Article 85(3) cannot in any event confer a similar exemption from the prohibition set out in Article 86, since the two are independent provisions regulating 'distinct situations by different rules'. A exemption under Article 85(3) does not operate as a 'concurrent exemption from the prohibition of abuse of a dominant position'. [47]

68. Lastly, Article 85(3) makes it a condition for exemption that the agreement does not afford the 'possibility of eliminating competition in respect of a substantial part of the products in question'. That cannot be the case where the very purpose of an agreement is to eliminate such competition and where it therefore constitutes a restriction to competition which is not indispensable.

69. I cannot see how, when they entered upon the abuse found in Article 1 of the Decision, BG and BPB could have been entitled to believe that their conduct was permissible, when they were contravening principles of Community competition law based on the long-standing and consistent case-law of this Court, of which they should consequently have been aware. Their appeal to the principle of legal certainty is thus to no avail.

The third plea in law

The priority deliveries of plaster do not constitute an abuse of a dominant position (points 141 to 147 of the Decision, paragraphs 78 to 98 of the judgment of the Court of First Instance, points 64 to 78 of the appeal)

70. According to the Commission's Decision, BG committed an abuse of a dominant position by adopting a general policy of extending delivery periods for *plaster* but offering priority deliveries of that product to 'loyal' plasterboard customers, that is to say customers who did not handle imported *plasterboard*. In the Commission's view, the damage caused by that practice was aggravated by the fact that plaster is a product for which it is difficult to change supply sources. The only purpose of the discriminatory criterion for selecting those merchants who were to benefit from priority deliveries was to encourage them to sell only BG plasterboard and to exclude imported plasterboard from the market.

46 — Paragraph 25.
47 — Ibid.

71. The Court of First Instance upheld the Commission's Decision on that point, holding that 'a criterion, which results in the provision of equivalent services on unequal terms, is in itself anti-competitive by reason of the discriminatory purpose which it pursues and the exclusionary effect which may result from it', [48] particularly on a market where the undertaking is in a dominant position and competition has thus 'already been weakened', [49] given that, on the market for plaster, customers are in a dependent position vis-à-vis their suppliers.

72. The appellants submit that the Court of First Instance condemned an abuse on a market (the market for plaster) on which they were not dominant because it had effects on the market (the market for plasterboard) where they were dominant.

73. However, they say, the Commission could not infer from practices on the market for plaster, on which there was no dominant position, an abuse of a dominant position on the quite separate market for plasterboard.

74. They claim that such conduct on the market for plaster did not in any event penalize customers who could easily, the market being open to competition, switch from one supplier of plaster to another.

75. The appellants therefore consider that the statement that the possibilities of substitution in that product are limited on account of its well-known characteristics and that purchasers of plaster are dependent on their suppliers has not been substantiated.

76. The question of the priority deliveries of plaster calls for a close reading both of the Commission's Decision and of the judgment of the Court of First Instance.

77. In neither is it stated at any point that BPB and BG were in a dominant position on the market for plaster and the reasoning of the Court of First Instance has satisfied me that that question was irrelevant to the resolution of the case.

78. It is established — and such factual considerations (which have not been shown to be distorted) cannot be called into question before this Court — that

(1) BG's customers affected by those practices are present both on the market for plas-

48 — Paragraph 94.
49 — Paragraph 95.

ter and on the market for plasterboard. [50] Those markets are therefore connected.

(2) *On the market for plasterboard*

(a) BG sought to ensure the loyalty of customers for plasterboard who did not handle imported board by reserving priority deliveries of plaster for them;

(b) It is *difficult* for a purchaser of plaster to change suppliers, since the properties of plaster may vary and customers do not necessarily accept a change of supplier. On this market, therefore, customers are in a dependent position vis-à-vis their supplier. [51]

79. As a result, the priority given to 'loyal' customers who refused to handle imported plasterboard could have a real dissuasive effect and lead BG's customers to renounce buying imported board in order to be able to obtain deliveries of plaster in good time.

80. It can be seen that the criterion adopted as regards the priority deliveries was not an objective one: by penalizing those of its purchasers who were not 'loyal' in the plasterboard market, BG's policy was clearly to exclude imported plasterboard from the market in Great Britain by dissuading its trading partners from handling it, thus affecting the functioning of the market for plasterboard.

81. The Court of First Instance thus correctly applied subparagraph (c) of the second paragraph of Article 86 of the EEC Treaty by demonstrating that 'dissimilar conditions' were applied to 'equivalent transactions'.

82. Were the Commission and the Court of First Instance entitled to take account of an abuse on a market other than that on which the dominant position was identified?

83. That question is a familiar one for this Court. It has been answered in the affirmative whenever there is a connecting link between the two markets. I would refer here to the Court's judgments in *Commercial Solvents*, [52] *CBEM* v *CLT and IPB*, [53] *AKZO*

50 — Paragraph 93 of the judgment under appeal.
51 — Ibid.
52 — Cited above in footnote 18, paragraphs 21 and 22.
53 — Case 311/84 [1985] ECR 3261, paragraphs 23 and 25.

II, [54] *Merci Convenzionali Porto di Genova*; [55] and *GB-Inno-BM*. [56]

84. AKZO, for example, adopted abusive behaviour on the market for flour additives in order to preserve its dominant position on the — separate — market for organic peroxides. [57] The Court accepted that such a set of circumstances could constitute an abuse of a dominant position. [58]

85. In the present case, the close links between the markets for plasterboard and for plaster enabled BG, through an abuse (in the form of extended delivery times) committed on the plaster market, to strengthen its dominant position on the market for plasterboard.

86. Finally, I note that the Court of First Instance took the limited nature of the abuse (the extension of delivery times seems not to have exceeded one day) into account by not imposing a fine on that count.

54 — Cited above in footnote 38, paragraphs 39 to 45.

55 — Case C-179/90 [1991] ECR I-5889.

56 — Case C-18/88 [1991] ECR I-5941.

57 — See paragraphs 43 to 45 of the judgment.

58 — For another similar case, see Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 — Tetra Pak II) (OJ 1992 L 72, p. 1), point 104 *in fine*, and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 109 to 122.

The fourth plea in law

By not disclosing certain documents, the Commission infringed the rights of the defence (paragraphs 21 to 35 of the judgment of the Court of First Instance, points 79 to 100 of the appeal)

87. Referring to its previous judgments in *Hercules Chemicals* v *Commission* [59] and *Cimenteries CBR* v *Commission*, [60] the Court of First Instance pointed out that undertakings involved in a procedure are permitted to inspect the file on the case and that the Commission has an obligation to make available to them all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved. [61] The Court of First Instance noted that the Statement of Objections was accompanied by an annex

59 — Case T-7/89 [1991] ECR II-1711. The judgment is currently under appeal to the Court of Justice (Case C-51/92 P).

60 — Joined Cases T-10 to T-12/92 and T-15/92 [1992] ECR II-2667.

61 — Paragraph 29 of the judgment under appeal.

containing a list summarizing all the 2 095 documents which make up the Commission's file and indicating, for each document or group of documents, whether it was accessible to the applicants or not, and identified six categories of documents access to which was totally or partially refused: [62]

— documents for purely internal Commission purposes;

— certain correspondence with third-party undertakings;

— certain correspondence with the Member States;

— certain published information and studies;

— certain reports of verifications; and

— a reply to a request for information.

88. The Court of First Instance classed those six categories into two groups: internal documents, correspondence with Member States and published items on the one hand, a part of the complaint and information provided by third-party undertakings which had requested that it remain confidential on the other hand.

89. With regard to the latter, the Court of First Instance decided that the Commission was right in acceding to the request for confidentiality and refusing to make the documents available on the ground that the undertaking against which the procedure was directed, whose dominant position was not contested, might 'for that very reason, adopt retaliatory measures against a competing undertaking, a supplier or a customer, who has collaborated in the investigation carried out by the Commission'. [63]

90. BPB and BG base their argument that the rights of the defence were infringed on the following points:

(1) the Commission had an obligation to make available to the undertakings involved all documents, whether incriminating or exculpatory, contained in its files and not of a confidential nature;

62 — Paragraph 32 of the judgment under appeal.

63 — Paragraph 33 of the judgment under appeal.

(2) the Court of First Instance should itself have examined the documents in the file, but did not even have access to it;

(3) the Court endorsed the Commission's failure to disclose certain documents on the sole *and inadequate* ground that in the event of their disclosure there would be a risk of retaliatory measures being taken against the supplier of the information;

but an undertaking may not be deprived of its rights of defence merely because of the risk that disclosure of information could induce it to retaliate;

(4) the Commission could have protected the rights of the defence of the undertakings involved without disclosing the identity of its source by preparing, for example, a non-confidential summary.

91. This last plea involves a key question of Community law: what is the scope of the right of an undertaking under investigation to have access to the Commission's file during the adversary stage (after issue of the Statement of Objections) of an administrative procedure under Article 85 or 86 of the Treaty?

92. The appellants do not challenge the right of access to documents, whether incriminating or exculpatory, as stated by the Court of First Instance. They consider that some documents classed as confidential should have been made available to them.

93. This Court cannot, it seems to me, give an answer on the last point without taking a stance on the whole of the reasoning of the Court of First Instance relating to the right of access to the file. That question also calls for an assessment of the position adopted by the Court of First Instance in *Hercules Chemicals* and, especially, *Cimenteries CBR*. [64]

94. A remark made by O. Due in an article published in 1987, [65] is still just as relevant today:

'The case-law of the Court of Justice has not as yet provided a clear and satisfactory answer to the question of *parties' access to the administrative file* and it would be a delicate task for the Court to devise that answer.' [66]

64 — Both cited above.

65 — In 'Le respect des droits de la défense dans le droit administratif communautaire', *CDE* 1987, p. 383.

66 — P. 396.

95. Unlike Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, [67] neither Regulation No 17 nor Regulation No 99/63/EEC [68] provides for access to the complete file by undertakings investigated by the Commission for an infringement under Article 85 or 86 of the Treaty.

96. As regards access to the file during the course of the administrative procedure, the case-law of this Court may be outlined in the following principles:

(1) There is no absolute right to have the whole file made available: [69]

> '... although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions requiring the Commission to divulge the contents of its files to the parties concerned.' [70]

(2) Only documents on which the Commission has based its decision must be made available in order to ensure that the rights of the defence are respected. That principle derives its basis from Article 19(1) of Regulation No 17 and Article 4 of Regulation No 99/63, [71] which apply a 'fundamental principle of Community law' which must be observed even though the procedure is administrative: [72] the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegations, particularly when a fine is likely to be imposed.

Conversely, it is for the Commission to decide at its own discretion whether to

67 — OJ 1989 L 395, p. 1. Article 18(3) stipulates: 'Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.' See also the similar provisions of Article 21 of French Order No 81-1243 of 1 December 1986 (JORF 9.12.1986).

68 — Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47.

69 — Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 at p. 338; Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 42; Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 15; Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 15; Joined Cases 43 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25; and *AKZO II*, cited above, paragraph 16. See also paragraph 52 of *Hercules Chemicals*, cited above. According to Schröter and Jakob-Siebert, 'Ein allgemeines Recht der Unternehmen auf Akteneinsicht besteht *de lege lata* nicht' (*Kommentar zum EWG-Vertrag*, ed. Groeben, 4th edition, Article 87, Rn 39).

70 — Paragraph 25 of *VBVB and VBBB*, cited above.

71 — Cited above.

72 — *Consten and Grundig*, cited above; Case 54/69 *Francolor* v *Commission* [1972] ECR 851, paragraph 23; *Hoffmann-La Roche*, cited above, paragraphs 9 and 11; Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraphs 27 to 30; Case 322/81 *Michelin*, cited above in footnote 36, paragraph 7; and *AKZO II*, cited above, paragraph 16.

make available documents in the file on which it has not relied in the formulation of its allegations. [73]

(3) An applicant may complain that the Commission has failed to disclose documents only if it can adduce evidence that the Commission has based its decision on documents which were not made available. [74]

(4) Under the substantive defect theory, it is for the applicant to demonstrate that the result would have been different if the document had been disclosed. [75]

(5) Documents covered by the principle of the protection of business secrets may not be disclosed, by virtue of Article 20(2) of Regulation No 17. The Commission may not use them to support its decision. [76] Were it to do so, the undertaking's ability to put its point of view would be affected.

(6) Where a document has not been disclosed by the Commission, it is for the undertaking concerned to establish that it has been deprived of evidence needed for its defence, [77] or that there is concrete evidence for the assumption that the Commission has used and drawn conclusions from documents of which the undertaking has had no knowledge.

It has never been accepted that the undertaking concerned may challenge, *during the course of the administrative procedure*, a refusal by the Commission to disclose a document.

The Court of First Instance interprets such a refusal as a preparatory act against which it is not possible to bring court proceedings separately from an action brought against the final decision. [78]

73 — See Lenz and Grill, 'Zum Recht auf Akteneinsicht im EG-Kartellverfahrensrecht', in *Festschrift A. Deringer*, p. 310 at p. 315.

74 — *Michelin*, cited above in footnote 72, paragraphs 7 and 9.

75 — See paragraph 30 of *Musique Diffusion Française*, cited above in footnote 72.

76 — *AKZO II*, cited above, paragraph 21; *Hoffmann-La Roche*, cited above, paragraph 14; Case 107/82 *AEG* v *Commission* [1983] ECR 3151; and *Michelin*, cited above, paragraph 8. See also O. Due, op. cit., p. 390: 'Si la Commission estime ne pas pouvoir communiquer un document dans sa totalité à l'entreprise concernée pour des raisons de confidentialité et de protection du secret commercial, elle doit cependant renoncer à l'utilisation de ce document en tant que moyen de preuve.'

77 — Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* (FEDETAB) [1980] ECR 3125, paragraph 39; *AEG*, cited above, paragraph 24, and *VBVB and VBBB*, cited above, paragraph 24.

78 — *Cimenteries CBR*, cited above, paragraph 42.

(7) A third party complainant may not in any circumstances be given access to documents containing business secrets. Here, in contrast to the situation above, it is accepted that an undertaking which considers a document to contain a business secret and objects to its disclosure by the Commission to a third party may challenge the decision to make such disclosure in the Community courts, separately from the decision on the substance of the investigation. [79] That is because the damage caused by the disclosure of a document regarded by the courts as confidential would be irreparable: it cannot be made good whether the decision is upheld or annulled. Third parties may not claim the protection of the rights of the defence but merely a right to defend their legitimate interests. [80]

97. It may thus be seen from this Court's case-law that *the right of access to the file is inseparable from and dependent on the principle of the protection of the rights of the defence.*

98. It has been said that 'that right of access is not an end in itself but a means of implementing the right to the protection of the rights of the defence in specific proceedings'. [81]

99. Is there now a general principle of Community law requiring the Commission to allow the undertaking under investigation access to all the documents in the file, whether or not they relate to an infringement, whether they are incriminating or exculpatory, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved?

100. The judgment of the Court of First Instance in *Hercules Chemicals* [82] might suggest that there is such a principle when it states that:

'... the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.' [83]

101. In my opinion, however, that judgment follows the previous case-law which it takes, indeed, as its basis when it notes that 'there are no provisions requiring the Commission

79 — Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965.

80 — Joined Cases 142 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20: '... the procedural rights of the complainants are not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation.'

81 — Lenz and Grill, op. cit., at p. 318.

82 — Cited above. See also Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 49; Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, paragraph 54; and Case T-15/89 *Chemie Linz* v *Commission* [1992] ECR II-1275, paragraph 54.

83 — Paragraph 54.

to divulge the contents of its files to the parties concerned'. [84]

102. The judgment observes that, in the absence of any mandatory provision of Community law and 'exceeding the requirements laid down by the Court of Justice', [85] the Commission itself has undertaken, in its *Twelfth Report on Competition Policy*, to disclose to undertakings the documents in the file concerning them, whether incriminating or exculpatory: 'the Commission ... permits the undertakings involved in a procedure to inspect the file on the case'. [86] In other words, the Court of First Instance does not state that the procedure announced in the Twelfth Report was necessary in order to ensure that the rights of the defence were properly observed but rather points out that the Commission must honour its commitments. [87]

103. The legal basis of the position adopted by the Commission in its Twelfth Report is, however, insecure. As Lenz and Grill [88] have pointed out, an authority which imposes rules upon itself may at any moment change those rules. [89]

84 — Paragraph 52.

85 — Paragraph 53.

86 — Report, p. 40, paragraph 34.

87 — See also C. D. Ehlermann, 'Developments in Community Competition Law Procedures', in *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence* — Proceedings of the colloquium held on 24 and 25 January 1994 by the Association européenne des avocats, Bruylant, 1994, pp. 201-202.

88 — Op. cit., p. 326.

89 — See also J. M. Joshua, 'The right to be heard in EEC competition procedures': 'The statement has no statutory or regulatory force, and the Commission expressly reserved the possibility of adjusting its practice in this area in the light of experience', *Fordham International Law Journal*, Vol. 15/16, 1991-1992, p. 16 at p. 49.

104. All this amounts to is that the obligation to make the whole file available is left to the discretion of the Commission, which has imposed that obligation upon itself for as long as it does not revise its position as adopted in the Twelfth Report.

105. Even though such a revision might be incompatible with the principle of the protection of the legitimate expectations on which, in my view, undertakings would be entitled to rely as against the Commission, I do not think that an announcement made by the Commission in its reports on competition policy can provide a satisfactory legal basis for a right of access to the file.

106. I seem to detect a development in the case-law of the Court of First Instance in *Cimenteries CBR*. [90] That judgment, unlike *Hercules Chemicals*, no longer refers to the principle set out in paragraph 25 of *VBVB and VBBB* and no longer bases its recognition of the right of undertakings involved in a procedure pursuant to Article 85(1) of the EEC Treaty to have access to the documents in the file, whether incriminating or exculpatory, solely on the Commission's self-imposed obligation [91] in the *Twelfth Report*

90 — Cited above.

91 — Which is referred to only secondarily ('It must *also* be observed ...', paragraph 40, emphasis added).

on Competition Policy. Cimenteries CBR lays down the principle that:

'Access to the file is ... one of the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard, provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Regulation No 99/63 can be exercised effectively. It follows that the right of access to the file compiled by the Commission is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections made against them in the Statement of Objections.' [92]

107. Those words are repeated verbatim in the judgment under appeal. [93]

108. Should such a development be endorsed?

109. Those unwilling to see such a step taken are at no loss for argument: [94] it is difficult to imagine the Commission concealing documents exculpating the undertaking under investigation and such documents will in most cases be in the undertaking's possession in any event. Some items in the file may have only a remote connection with the decision adopted.

110. I consider that the position adopted by the Court of First Instance in *Cimenteries CBR* and *BPB* should be endorsed.

111. Access to incriminating and exculpatory documents makes it possible to verify not merely that the Commission has not disregarded exculpating documents (which is improbable) but above all that it has assessed them correctly.

112. To invest the right of access to the file at the adversary stage of a procedure under Article 85 or 86 of the Treaty with the authority of a fundamental principle of Community law is in fact merely to fall in step with a process which is already fully under way.

92 — Paragraph 38. Note also the unequivocal formulation in paragraph 47: '... if, for the sake of argument, the Court were to recognize, in proceedings against a decision bringing the procedure to a close, *that a right of full access to the file existed* and had been infringed and were therefore to annul the Commission's final decision for infringement of the rights of the defence, the entire procedure would be declared illegal' (emphasis added).

93 — Paragraph 30.

94 — See J. M. Joshua, 'Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures', 1994, 2 *ECLR*, p. 68, at p. 71, referring, in particular, to the case-law of the United States Supreme Court (note 18).

113. In the first place, is it not paradoxical that such a right should be institutionalized, recognized and applied in the field of mergers where, the investigation being carried out prior to the operation, the question of confidentiality is particularly sensitive? Detailed explanations of future strategy and detailed figures on the present and future situation of an undertaking appear to me to be information just as deserving of protection as that produced during the course of a judicial review, subsequent to the event, of an agreement or a dominant position — such as the turnover of the undertaking in question four years previously.

114. Secondly, is it possible to disregard the fact that the competition law of several Member States enshrines such a principle? [95] Here again, I may point to a paradox. Can the right of access to the file remain limited when the scope is European and the penalty incurred calculated in millions of ecus but be total for purely national cases of limited financial implication?

115. Thirdly, I see even less reason not to elevate this rule to the status of a fundamental principle of Community law in that it is one which the Commission is quite willing to impose upon itself. In its *Twenty-Third Report on Competition Policy* of 5 May 1994, [96] the Commission took a firm step towards ensuring transparency:

'With the Statement of Objections the Commission sends a copy of all the documents on which it is relying to establish the existence of an infringement. It also sends any documents that, on the basis of a careful examination of the file, appear to go against or contradict the Commission's case (known as "exculpatory" documents). If an undertaking thereafter makes a reasoned request that the Commission re-examine its file to determine whether it has any further documents which concern a specified matter that the undertaking considers useful to its defence, the Commission will do so, and forward any such documents'. [97]

116. I would therefore suggest that this Court should complete the step forward

95 — To take the French example, the right to a fair hearing before the Conseil de la Concurrence requires that the file be made available in its entirety. The Order of 1 December 1986, cited above in footnote 67, does however make an exception for business secrets. See the judgment of the Cour d'Appel, Paris (First Chamber, Competition Section), of 30 June 1988 in *Syndicat national des courtiers d'assurances*, BOCCRF No 14 of 9 July 1988. In German law, the right of access to the file is regulated by Paragraph 71 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against Restrictions on Competition) in complaint procedures. Paragraph 29 of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure) applies in administrative court proceedings and paragraph 147 of the Strafprozeßordnung (Code of Criminal Procedure) in proceedings concerning minor financial penalties. In this last category of cases, the right of access to the file is particularly extensive. That right derives its basis from the first paragraph of Article 103 of the Grundgesetz (Basic Law), relating to the rights of the defence. See Karsten Schmidt, *Drittschutz, Akteneinsicht und Geheimnisschutz im Kartellverfahren*, C. Heymanns Verlag, 1992, and S. Rohlfing, *Das kartellrechtliche Untersuchungsverfahren nach deutschem, französischem und europäischem Kartellrecht — und die Berücksichtigung der Verteidigungsrechte*, Lang 1989, p. 148 et seq. On the principles applicable in English law, see the observations of J. M. Joshua in 'Information in EEC Competition Law procedures', *ELR*, 1986, Vol. 11, p. 409 at p. 418.

96 — COM(94) 161 final.

97 — Point 202, *in fine*.

taken by the Court of First Instance in *Cimenteries CBR* and in *BPB* and confirm, beyond the actual terms of Regulation No 17 and as a corollary to the principle of the protection of the rights of the defence, the fundamental principle that an undertaking under investigation is entitled to have access to the whole file, save where the business secrets of other undertakings, the internal documents of the Commission [98] or other confidential information are involved.

117. That fundamental principle of right of access to the file must be carefully circumscribed. [99] It presupposes that the Commission may rely on a *confidentiality exception* to enable it to combine effective action with protection of the rights of the defence and the rights of third parties. The basis for that exception is to be found in Article 20(2) of Regulation No 17 and Article 214 of the EC Treaty. The Commission has all the more incentive to make careful use of that exception in that a breach of confidentiality may give rise to actions for damages with particularly serious consequences. The judgment in *Adams* v *Commission* [100] is particularly significant in that regard.

118. Use of that exception must be subject to review by the Community judicature, the only authority competent to judge whether a document classed as confidential by the Commission could indeed be so classed, when the validity of the Commission's final decision is raised before it. [101] I would agree with Professor Vandersanden when he says:

'Because of its role as investigator and prosecutor, the Commission cannot be allowed the sole right to decide whether certain documents should be withheld on the grounds of their confidentiality, the business secrets they contain or their purely internal nature.' [102]

119. Here, the undertaking under investigation cannot be required to provide either detailed arguments or a consistent body of evidence as to the effects on the decision adopted of a document which, *ex hypothesi*, has never been disclosed to it, of the contents of which it is unaware and of which it knows only the number and the title — a sort of *probatio diabolica*. If an individual were

98 — For example, the right of access to the Commission's file does not extend to the opinion of the Advisory Committee which, in conformity with Article 10(6) of Regulation No 17, is not made public (*Musique Diffusion Française*, cited above, paragraph 36) or to the hearing officer's report (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 55).

99 — See the *Twenty-Third Report on Competition Policy*, point 202.

100 — Case 145/83 [1985] ECR 3539.

101 — As Community law stands, I do not think that a dispute over the disclosure of documents can be entertained before the Commission's final decision without a redrafting of Regulation No 17 and a redefinition of the status of the hearing officer. In that regard, the *Cimenteries CBR* judgment should be endorsed. I would mention here that the risk is borne not by the undertakings concerned but by the Commission which, once the procedure has been completed, might find its decision annulled on the ground that its non-disclosure of documents was unjustified.

102 — G. Vandersanden: 'L'importance des droits de la défense en droit communautaire de la concurrence', in the proceedings of the colloquium on competition procedures held on 16 and 17 September 1993 by DG IV of the Commission, p. 20.

required to prove that had he had access to a document which was not disclosed he might have been able to adapt his arguments and perhaps influence the decision, a point which should not lie outside the scope of judicial review could not be examined by the courts: the Community judicature must be able to ascertain whether the right of access to the file, taken independently as a fundamental right, has been respected, [103] regardless of the effects which an infringement of that right might have had on the final decision.

120. It must not be possible, however, for the undertaking concerned to challenge offhand the failure to disclose any document at all. The documents involved must be identified [104] and there must be some likelihood — limited though it may be — that they will assist the applicant and be '*relevant to its right to be heard.*' [105]

121. I consider that when, in the context of an action before the Court of First Instance seeking the annulment of the Commission's final decision, the undertaking involved challenges the classification of a document as confidential or the Commission's refusal to disclose a document in the file, it is for that Court to require production of the document and to examine it. That cannot, however, be the case when the documents concerned are, *by their very nature, not of a kind of which disclosure could be required.*

122. It is to be noted, finally, that disputes relating to access to the file may not give rise to dilatory manoeuvring. Decisions of the Commission refusing access to the file may be challenged only with the decision on the substance, once the administrative procedure has been completed. [106]

123. I therefore suggest that this Court should examine the fourth plea in law in this appeal in the light of the principles I have identified above.

124. It is established that the Commission disclosed to the undertaking under investigation all the incriminating and exculpatory documents with the exception of six categories: (i) documents for purely internal Com-

103 — I would remind the Court of paragraph 24 of *AEG*, cited above, according to which it is not for the Commission 'to judge whether a document or part thereof was or was not of use for the defence of the undertaking concerned'.

104 — *VBVB and VBBB*, cited above, paragraph 24.

105 — The expression is used by the Commission in point 122 of its Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) (OJ 1994 L 243, p. 1, emphasis added) and in point 202 of the *Twenty-Third Report on Competition Policy*. See also paragraph 38 of *Cimenteries CBR* and paragraph 30 of the judgment under appeal, which refers to 'the need to ensure that the undertakings in question are able *properly* to defend themselves' (emphasis added). This solution may be compared to that adopted by the European Court of Human Rights in its *Bendenoun* v *France* judgment of 24 February 1994 (Series A, No 284) concerning a failure to disclose documents on which the customs authorities had not relied: 'The Court does not rule out that in such circumstances the concept of a fair trial may nevertheless entail an obligation on the Revenue to agree to supply the litigant with certain documents from the file on him or even with the file in its entirety. *However, it is necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request.*' (Paragraph 52, emphasis added).

106 — See *Cimenteries CBR*, cited above.

mission purposes; (ii) certain correspondence with third-party undertakings; (iii) certain correspondence with the Member States; (iv) certain published information and studies; (v) certain reports of verifications; and (vi) a reply to a request for information made under Article 11 of Regulation No 17. [107]

125. Obviously, BG does not complain that an incriminating document was not disclosed but rather that the documents which were not disclosed might have been helpful to its case. [108]

126. But it is *manifest* that the documents not disclosed fell within the categories of documents which the Commission may properly refuse to make available.

127. Documents for internal Commission purposes, such as draft decisions or correspondence with Member States, do not constitute evidence.

128. Published information and studies are, by definition, no longer confidential and BG could have had access to them.

129. Furthermore, I cannot see how, if an abuse of a dominant position is postulated, correspondence between the Commission and other undertakings such as BG's competitors, suppliers or customers could constitute documents of which disclosure could be required.

130. By its very nature, an undertaking in a dominant position is able to exert economic or commercial pressure on its competitors. As has been appositely observed, '... the need to preserve public order in the economic sphere ... means that outside undertakings which submit documents during the course of a Commission investigation and have reason to believe that that submission might lead to retaliatory measures being taken against them should be able to do so in the knowledge that their request for confidential treatment will be taken into consideration. Were that not so, it might be feared that such undertakings would consider that the safeguards available to them were inadequate and would refrain from submitting such documents to the Commission on their own initiative.' [109]

131. The Court of First Instance was thus right, in my view, exceptionally in this case without examining the documents in question, to hold that the refusal to disclose them was justified by the fact that an undertaking which occupies a dominant position in the

107 — See paragraphs 31 and 32 of the judgment under appeal.

108 — Paragraph 22 of the judgment under appeal.

109 — B. Geneste, 'La confidentialité des documents recueillis au cours de l'enquête: le cas British Gypsum', in *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence* — Proceedings of the colloquium held by the Association européenne des avocats on 24 and 25 January 1994, Bruylant, 1994, p. 119 at p. 124.

market may adopt retaliatory measures against a competing undertaking, a supplier or a customer which has collaborated in the investigation carried out by the Commission. [110]

132. As regards the reports of verifications, it is clear from the appellants' own pleadings that they concern inspections carried out in other undertakings. [111] Such documents obviously cannot be disclosed to an undertaking under investigation. A document which might reveal that infringements unconnected with the case had been committed by third parties is of no use to the appellants. [112]

133. Finally, the Commission may, 'where an undertaking makes a justified request to consult a document which is not accessible', [113] make a non-confidential summary available. It was not open to the appellants to complain that the Commission did not draw up such summaries when it is not established that a request to that effect was either made or would have been justified.

134. It is significant that the Court of First Instance stated that the applicants' allegations of an infringement of the rights of the defence were merely 'uncertain and hypothetical'. [114]

135. I therefore recommend that the fourth plea be dismissed.

136. In the alternative, BPB and BG seek a reduction of the fines imposed. [115] They do not, however, point to any new factor not taken into account by the Court of First Instance in its assessment of the validity of the Decision in that regard.

137. The decision of the Court of First Instance as regards the amount of the fines is accurately reasoned and free from any error in law and must thus also be upheld.

138. In conclusion, I propose that the Court should dismiss the appeal, confirm the fines imposed and order the appellants to pay all the costs, including those of the interveners.

110 — Paragraph 33 of the judgment under appeal.

111 — See point 82 of, and Annex 8 to, the appeal.

112 — In my opinion, point 74b of the *Thirteenth Report on Competition Policy* provides for the disclosure of reports of inspections only to the undertakings on which they were carried out.

113 — See point 35 of the *Twelfth Report on Competition Policy*.

114 — Paragraph 35 of the judgment under appeal.

115 — Points 101 and 102 of the appeal.