JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
21 April 2005 *

In Case T-28/03,

Holcim (Deutschland) AG, formerly Alsen AG, established in Hamburg (Germany), represented initially by F. Wiemer and K. Moosecker, then by F. Wiemer, P. Niggemann and B. Menkhaus, lawyers,

applicant,

v

Commission of the European Communities, represented by R. Lyal and W. Mölls, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for compensation in the form of reimbursement of the bank guarantee charges incurred by the applicant following a fine fixed by Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1), which was annulled by the judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 June 2004,

gives the following

Judgment

Facts

1 The applicant, Alsen AG, which became Holcim (Deutschland) AG, whose registered office is in Hamburg (Germany), manufactures construction materials.

Alsen AG came about as a result of the merger in 1997 between Alsen Breitenburg Zement- und Kalkwerke GmbH ('Alsen Breitenburg') and Nordcement AG ('Nordcement').

2 By Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1; 'the Cement Decision'), the Commission ordered Alsen Breitenburg and Nordcement to pay fines of EUR 3.841 million and EUR 1.85 million, respectively, for infringement of Article 85 of the EC Treaty (now Article 81 EC).

3 Alsen Breitenburg and Nordcement brought actions for annulment of that decision. Those actions were registered under the references T-45/95 and T-46/95 and were then joined to the actions brought by the other companies to which the Cement decision was addressed.

4 In accordance with the option given by the Commission, Alsen Breitenburg and Nordcement decided to provide bank guarantees, thus avoiding the need to pay the fines immediately. Alsen Breitenburg's bank guarantee was in existence from 3 May 1995 until 2 May 2000 and was arranged by Berenberg Bank, in consideration of an annual commission of 0.45%. Nordcement provided, from 18 April 1995 until 3 May 2000, a bank guarantee arranged by Deutsche Bank, in consideration of an annual commission of 0.375% and a single start-up commission of EUR 15.34. The applicant paid to the banks, for arranging the bank guarantees, a total amount of EUR 139 002.21.

5 By judgment of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cementeries CBR*

and Others v *Commission* ('*Cement*') [2000] ECR II-491, the Court of First Instance annulled the Cement decision in so far as the applicant was concerned and ordered the Commission to pay the costs.

6 Pursuant to Article 91 of the Rules of Procedure of the Court of First Instance, and by letter of 28 September 2001, the applicant therefore requested the defendant to pay, first, the costs of the proceedings (in particular the lawyers' fees, amounting to EUR 545 000) and, second, the charges incurred in providing the bank guarantees.

7 By letter of 24 January 2002, the defendant offered to pay to the applicant part of its lawyers' fees (EUR 130 000), but refused to pay the bank guarantee charges, relying on the case-law on costs within the meaning of Article 91 of the Rules of Procedure.

8 By letter of 5 April 2002, the applicant again requested the applicant to pay it the whole of the lawyers' costs and the bank guarantee charges. For payment of the bank guarantee charges, the applicant relied this time on the second paragraph of Article 288 EC and Article 233 EC and also on the judgment of the Court of First Instance of 10 October 2001 in Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, which had been delivered in the meantime.

9 By an e-mail of 30 May 2002, the defendant offered to pay the lawyers' fees in the amount of EUR 200 000. As regards the bank guarantee charges, it again refused to pay them, taking the view that the possibility of deferring payment of the fine by providing a bank guarantee was a simple option and that the defendant could not therefore be held liable for the charges occasioned where undertakings decided to take advantage of that possibility.

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the Court of First Instance on 31 January 2003, the applicant brought the present action.

11 On 10 April 2003, the defendant raised an objection of inadmissibility, under Article 114 of the Rules of Procedure, in so far as the action is based on Article 233 EC, and lodged a defence.

12 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the Court at the public hearing held on 10 June 2004.

13 The applicant claims that the Court should:

— order the Commission to pay it the sum of EUR 139 002.21, plus default interest at the rate of 5.75% per annum from 15 April 2000;

— order the Commission to pay the costs.

14 The defendant contends that the Court should:

— dismiss the action as inadmissible, in so far as it is based on Article 233 EC;

— dismiss the action in its entirety, in so far as it is based on Article 288 EC:

— as inadmissible, or, in the alternative, as unfounded, in so far as it relates to the bank guarantee charges incurred before 31 January 1998;

— as unfounded for the remainder;

— order the applicant to pay the costs.

15 In its observations, the applicant claims that the Court should:

— declare the action admissible, in so far as it is based on Article 233 EC;

— in the alternative, interpret the action, in so far as it is based on Article 233 EC, as being an action for annulment or for failure to act;

— order the defendant to pay the costs.

Admissibility

The admissibility of the action in so far as it is based on Article 233 EC

Arguments of the parties

16 The defendant submits that if the applicant is of the opinion that Article 233 EC has not been observed, two remedies are available, namely an action for annulment (Article 230 EC) and an action for failure to act (Article 232 EC).

17 The present action, whereby the applicant seeks an order that the defendant pay a certain sum, is neither an action for annulment nor an action for failure to act.

18 In the defendant's submission, by initiating the present proceedings, the applicant hopes to secure a judgment producing directly the result to which, in its opinion, the Commission is bound in execution of the *Cement* judgment. However, the EC Treaty contains no legal basis which would allow such a solution.

19 The case-law of the Court of Justice on what are known as 'payment' actions confirms that no type of action other than those provided for in Article 230 EC and Article 232 EC can be contemplated.

20 The defendant infers that the claim based on the first paragraph of Article 233 EC and seeking an order that the Commission reimburse the bank guarantee charges is manifestly inadmissible. Nor, in its submission, can such a claim be interpreted as being an action brought under Article 230 EC or Article 232 EC, which, moreover, would be equally inadmissible in the present circumstances.

21 The applicant observes, first, that it seeks reimbursement for the damage it sustained. It maintains, therefore, that reliance on Article 233 EC comes within the framework of an 'action for damages' and that the defendant had no discretion in this case. Relying on the retroactive effect of a judgment annulling a measure and also on the case-law of the Court of First Instance (and in particular the judgment in *Corus UK* v *Commission*, paragraph 8 above, paragraph 50), the applicant submits that the defendant is under an obligation to reimburse the bank guarantee charges. The applicant further submits that the Court of First Instance rightly stated in the *Cement* judgment (paragraph 5116 et seq.) that the bank guarantee charges must be reimbursed.

22 Second, the applicant claims that the first paragraph of Article 233 EC also gives rise to a right to compensation, so that it is entitled to rely on that provision.

23 The applicant refutes the defendant's submission that the rights derived from the first paragraph of Article 233 EC could be invoked solely within the framework of an action for annulment or an action for failure to act. That argument finds no support in the wording of Article 233 EC, nor does it follow from the case-law cited by the defendant.

24 The applicant further submits that the defendant's argument is inconsistent with the principle of procedural economy, since it would entail embarking upon two remedies (an action for damages under Article 288 EC and an action for annulment or for failure to act under Article 233 EC).

25 In the alternative, the applicant requests the Court to interpret the action, in so far as it is based on the first paragraph of Article 233 EC, as being an action for annulment or for failure to act.

26 In that regard, the applicant maintains that it would be inconsistent with the principle of procedural economy to require it to claim anew reimbursement from the Commission for the bank charges and then to bring an action for annulment or for failure to act, even when the defendant has already definitively indicated that it refused to pay the amount in question. The applicant observes, last, that it would still be possible to bring an action for annulment since the Commission would not yet have adopted a contestable decision.

Findings of the Court

— Admissibility of the action in so far as it is based on Article 233 EC

27 It should be observed at the outset that the applicant has based its action in part, and autonomously, on Article 233 EC, in order to secure reimbursement of the bank guarantee charges.

28 Thus, in order to explain the legal basis of its right, the applicant draws a clear distinction in its application between 'the right to reimbursement under Article 233 EC' (Title II, point 1(a) of the application) and 'the right to compensation based on the combined provisions of the second paragraph of Article 288 EC and Article 235 EC' (Title II, point 1(b) of the application).

29 In addition, the applicant states that, '[a]longside the right derived from Article 233 EC, the Commission is also required, on the basis of the combined provisions of the second paragraph of Article 288 EC and Article 235 EC, to reimburse the guarantee charges' (paragraph 22 of the application).

30 Last, the applicant stated at the hearing that its action rested on two separate and autonomous legal bases, namely (i) Article 233 EC and (ii) the combined provisions of Article 288 EC and Article 235 EC.

31 It should be borne in mind, in that regard, that the EC Treaty provides, restrictively, the remedies which are available to persons to rely on their rights (see, to that effect, order of the Court of Justice in Case 233/82 *K.* v *Germany and Parliament* [1982] ECR 3637).

32 As Article 233 EC does not establish a remedy, it cannot autonomously found a claim such as the claim for reimbursement of the bank guarantee charges in the present case.

33 That does not mean, however, that a person is without a remedy when he considers that the measures required for the purpose of complying with a judgment have not been taken. The Court of Justice has already had occasion to hold, on that point, that the obligation arising under Article 233 EC could be implemented by means, in particular, of the remedies provided for in Article 230 EC and Article 232 EC (Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraphs 24, 32 and 33).

34 In that context, it is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty (Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 45; Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 75; and Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1, paragraph 124).

35 The fact that, as the applicant submits, the defendant had no discretion in the present case, or that the Court of First Instance declared in *Cement* that the bank guarantee charges must be reimbursed, does not alter that finding. The same applies to the applicant's argument that Article 233 EC creates 'rights to compensation' or that other remedies, outside an action for annulment or for failure to act, may be used in order to rely on those rights, or again the argument that the principle of procedural economy should be applicable.

36 The only question raised in the context of the objection of inadmissibility is whether Article 233 EC, as such, constitutes a specific remedy. In the light of the restrictive remedies provided for in the Treaty and of the case-law cited above, the answer must be in the negative.

37 For the sake of completeness, it should be noted that in *Cement* the Court of First Instance, contrary to the applicant's claim, did not state that the bank guarantee charges must be reimbursed. It merely stated, and, moreover, did so in the context of Cases T-50/95 and T-51/95, in which the applicant was not a party, that 'those claims in actual fact concern[ed] compliance with the present judgment and that it [was] for the Commission to take the necessary steps to comply with it, in accordance with Article 176 of the EC Treaty (now Article 233 EC)' (*Cement*,

paragraph 5118). It follows from that paragraph that the Court did not hold that the Commission was under an obligation, under Article 233 EC, to reimburse the bank guarantee charges. The Court merely stated that it was for the Commission to take the necessary steps to comply with the judgment. It must be borne in mind, in that regard, that it is not for the Court to substitute itself for the Commission and determine the measures that the latter should have adopted in the context of Article 233 EC (Case T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335, paragraphs 78 and 79).

38 Nor is the present case comparable with *Corus UK* v *Commission*, paragraph 8 above. In that judgment, the Court of First Instance held (at paragraph 39) that Article 34 CS (the counterpart in the ECSC Treaty of Article 233 EC) provided for a specific legal remedy, distinct from that provided by the general rule of Community liability under Article 40 CS (the counterpart in the ECSC Treaty of Article 288 EC), in cases where the injury relied upon resulted from a decision of the Commission that had subsequently been annulled by the Community Courts.

39 However, Article 233 EC, on which the applicant relies in the present case, is drafted in different terms from those of Article 34 CS. According to Article 34 CS, not only is the Commission to take steps to ensure equitable redress for the harm resulting directly from the decision or recommendation declared void, but its failure to do so provides a ground for bringing an action for damages before the Court. In those circumstances, the solution adopted by the Court of First Instance in *Corus UK* v *Commission*, paragraph 8 above, cannot be transposed to the present case.

40 For all of those reasons, the applicant's action, in so far as it is based on Article 233 EC, must be dismissed as inadmissible.

— The applicant's request that the action be interpreted as being an action for annulment or for failure to act

41 It should be noted, first of all, that in the introduction to its application, the applicant states that the objective of the present action is a 'claim for damages'. Furthermore, by the form of order which it seeks, the applicant claims that 'the Commission should be ordered to pay the applicant the sum of EUR 139 002.21, plus default interest at the rate of 5.75% per annum from 15 April 2000'. It follows that the object of the present action is clearly to obtain damages and not to obtain annulment of an act or a declaration that the defendant has failed to act.

42 The first paragraph of Article 21 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 of that Statute, is applicable to the procedure before the Court of First Instance, provides that '[a] case shall be brought before the Court by a written application addressed to the Registrar' and that '[t]he application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based'.

43 Likewise, Article 44(1)(c) of the Rules of Procedure provides that an application of the kind referred to in Article 21 of the Statute of the Court of Justice is to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

44 It is settled case-law that that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if appropriate, without other information in support. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential

facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 143).

45 It is also settled case-law that, under Article 44(1) in conjunction with Article 48(2) of the Rules of Procedure, the subject-matter of the claim must be defined in the application. A claim put forward for the first time in the reply modifies the original subject-matter of the application and must therefore be regarded as a new claim and be rejected as inadmissible (Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47, paragraph 49, and the case-law cited there). The same reasoning applies where the initial subject-matter of the application is modified in observations on an objection of inadmissibility.

46 In the light of those factors, and since the sole object of the application was to obtain 'damages', the applicant's request that the action, in so far as it is based on the first paragraph of Article 233 EC, be interpreted as being an action for annulment or for failure to act, must be dismissed as inadmissible.

The time-barring of the action for damages based on Article 235 EC and the second paragraph of Article 288 EC

Arguments of the parties

47 The defendant also disputes, for a part of the bank charges incurred by the applicant, the admissibility of the action based on Article 235 EC and the second paragraph of Article 288 EC.

48 Having regard to Article 46 of the Statute of the Court of Justice, the defendant contends that the alleged right which the applicant claims is time-barred and the action inadmissible, in so far as it relates to the bank guarantee charges incurred before 31 January 1998.

49 In the present case, the act which may possibly give rise to an obligation to compensate the applicant, namely the Cement decision, was adopted on 30 November 1994 and notified to the applicant on 3 February 1995. The bank guarantees were issued on 18 and 21 April 1995 and then sent to the Commission. The period covered by the guarantee began at the end of the period allowed for payment, i.e. on 3 May 1995. Since, according to the defendant, the conditions of an obligation to provide compensation could be satisfied, where appropriate, with effect from that day, 3 May 1995 must be regarded as the starting date of the limitation period.

50 The defendant acknowledges that, in the present case, the damage was not caused by a single isolated incident, but continuously, until the expiry of the bank guarantees. In such a case, the limitation referred to in Article 46 of the Statute of the Court of Justice applies to the period more than five years before the date of the interrupting act but does not affect rights which came into being during later periods.

51 In the present case, the defendant submits that the applicant, in its letter of 5 April 2002, did indeed request it to reimburse the bank guarantee charges, relying on the second paragraph of Article 288 EC, but it did not, as required by the third sentence of Article 46 of the Statute of the Court of Justice, then bring an action within the period prescribed in Article 230 EC.

52 The defendant concludes that the limitation period was interrupted only when the application was lodged, on 31 January 2003, and that the rights in respect of the bank guarantee charges incurred before 31 January 1998 are therefore time-barred.

53 The applicant contends, on the contrary, that the limitation period for the claim for reimbursement of the bank guarantee charges began to run only with the pronouncement of the *Cement* judgment. Referring in particular to Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraphs 10 to 12, the applicant submits that it is only from pronouncement of the judgment that the conditions on which the obligation to make reparation depends were satisfied.

54 In the applicant's submission, the decisive factor giving rise to the right to compensation is not, in the present case, the mere illegality of the decision imposing the fine, but its annulment by the Court, since while the decision was valid there was a legal basis for providing the bank guarantees. As the action for annulment of the decision imposing the fine did not have suspensory effect, the obligation imposed by the operative part of the Cement decision continued throughout the duration of the proceedings.

55 A different approach would not, in the applicant's submission, be consistent with the principle of procedural economy, since it would also make it necessary to initiate, alongside the action for annulment of the decision imposing the fine, an action for compensation, seeking reimbursement of the bank guarantee charges. In order to avoid divergent judgments on the legality of the decision in issue, the Court would be unable to adjudicate on the action for compensation until after the judgment annulling the decision, and the action for compensation would have to be suspended until that time.

56 Furthermore, the applicant contends that the extent of the harm was determined by the duration of the action for annulment. On that basis, there is no indirect damage in the present case.

57 Last, the applicant maintains that the approach supported by the defendant would have the consequence that the limitation period for the right to reimbursement of the bank guarantee charges would continue to run while the annulment proceedings were pending. Thus, the defendant would be able to avoid claims for compensation by ensuring, by lodging an appeal, that the judgment annulling the decision became enforceable at the latest possible moment.

58 The applicant concludes that the limitation period began to run in March 2000 and was interrupted when it brought the action on 31 January 2003, i.e. before the expiry of the limitation period, in accordance with Article 46 of the Statute of the Court of Justice.

Findings of the Court

59 According to the case-law, the limitation period for proceedings against the Communities in matters arising from non-contractual liability cannot begin before all the requirements governing the obligation to make good the damage are satisfied (Case T-174/00 *Biret International* v *Council* [2002] ECR II-17, paragraph 38).

60 In the present case, the damage alleged to have been caused to the applicant became apparent when it provided the bank guarantees. Annexes 2 and 3 to the application show that Alsen Breitenburg's bank guarantee was in existence between 3 May 1995 and 2 May 2000 and was arranged by Berenberg Bank and that Nordcement's was in existence between 18 April 1995 and 3 May 2000 and arranged by Deutsche Bank. Those banks therefore applied charges, calculated on the basis of annual commission expressed as a percentage of the sums guaranteed (0.45% in the case of Berenberg Bank and 0.375% in the case of Deutsche Bank).

61 In those circumstances, the sums payable to the banks were proportionate to the number of days during which the bank guarantees were in force. That method of calculating the bank charges is apparent from Annex 2 to the application, as Berenberg Bank calculated the charges in proportion to the number of days elapsed. The applicant confirmed at the hearing that the bank guarantee charges accrued by reference to the days.

62 It should further be noted that the charges already incurred would have been payable to the banks whatever the final outcome of the action for annulment.

63 Being of the view that the Cement decision was illegal (which is confirmed by the fact that it brought an action for annulment), the applicant was in a position to invoke the non-contractual liability of the Community as soon as it provided the bank guarantees. It could have relied, in that context, on the existence of future but certain and quantifiable damage (namely the bank guarantee charges applicable), since that harm was foreseeable with sufficient certainty (see, on the possibility of relying on future loss, in particular, Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Council and Commission* [1976] ECR 711, paragraph 6, and Joined Cases T-79/96, T-260/97 and T-117/98 *Camar and Tico* v *Commission and Council* [2000] ECR II-2193, paragraphs 192 and 207).

64 Contrary to the applicant's contention, it was not necessary for the Cement decision to be annulled in order for the limitation period for the action for compensation to begin. The Court has already had occasion to hold that the fact that an applicant considered that it did not yet have all the evidence it needed to prove to the requisite legal standard in judicial proceedings that the Community was liable could not, as such, prevent the limitation period from running. Confusion would then arise between the procedural criterion relating to the commencement of the limitation period and the finding that the conditions for liability were satisfied, which can ultimately be made only by the court before which the matter has been brought for

final adjudication on its substance (order of the Court of First Instance in Case T-124/99 *Autosalone Ispra dei Fratelli Rossi* v *Commission* [2001] ECR II-53, paragraph 24).

65 In the present case, any infringement of Community law existed before the Cement decision was adopted. At the time when the applicant was notified of that decision, it took formal notice of it, in fact and in law. It was also at that point that the Cement decision began to produce legal effects vis-à-vis the applicant. From that date, it was therefore open to the applicant to plead an infringement of Community law.

66 To adopt a different approach would amount to calling in question the autonomy of actions for damages vis-à-vis other remedies, and in particular an action for annulment (see, on the autonomy of an action for damages, judgment in Case T-209/00 *Lamberts* v *European Ombudsman* [2000] ECR II-2203, paragraph 58, and the case-law cited there).

67 The arguments put forward by the applicant concerning the principle of procedural economy are inoperative. Even though that principle means that a litigant may not be required to bring a new action where the contested decision is replaced by a new decision (Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph 22), it cannot permit the rules governing the limitation period of an action for compensation to be called in question. That would be the case if the applicant's argument were followed.

68 Taking into account all those elements, it must be held that the limitation period for the action in respect of non-contractual liability began to run, in the present case, as soon as the bank guarantees were provided by the companies concerned, namely on 3 May 1995 for Alsen Breitenburg and on 18 April 1995 for Nordcement.

69 However, account must also be taken of the fact that the damage relied on in the present case was not a single isolated incident but was ongoing. In fact, as stated above, the charges were calculated in proportion to the number of days during which the bank guarantees were in force. That point, moreover, was confirmed by the applicant at the hearing. Accordingly, the damage in question increased from day to day and was ongoing in nature.

70 In such a case, the limitation period referred to in Article 46 of the Statute of the Court of Justice applies, by reference to the date of the event which interrupted the limitation period, to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods (Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 132; *Biret International* v *Council*, paragraph 59 above, paragraph 41; and order of the Court of First Instance in Case T-332/99 *Jestädt* v *Council and Commission* [2001] ECR II-2561, paragraphs 44 and 45).

71 In that regard, Article 46 of the Statute of the Court of Justice envisages as an act interrupting the limitation period either the proceedings instituted before the Court or the application made prior to such proceedings by the aggrieved party to the relevant institution. In the latter case, the application must be made within the period of two months provided for in Article 230 EC and the provisions of the second paragraph of Article 232 EC are to apply where appropriate.

72 In the present case, by an initial letter of 28 September 2001, on the basis of Article 91 of the Rules of Procedure, the applicant requested the defendant to reimburse the charges incurred in providing the bank guarantees. It reiterated its request by letter of 5 April 2002, relying on that occasion on the second paragraph of Article 288 EC.

73 Following those two requests, however, the applicant did not institute proceedings within the period provided for in Article 230 EC, as required by the third sentence of Article 46 of the Statute of the Court of Justice. Those letters therefore do not constitute events interrupting the limitation period for the purposes of Article 46 of the Statute of the Court of Justice.

74 For all of those reasons, and in view of the fact that the present action was brought on 31 January 2003, it must be dismissed as inadmissible as regards the bank guarantee charges incurred by the applicant five years before that date, i.e. before 31 January 1998.

Substance

75 As the action is being dismissed as inadmissible in so far as it is based on Article 233 EC, the Court's examination of the substance is confined to the arguments which the applicant puts forward on the basis of the second paragraph of Article 288 EC and Article 235 EC. Furthermore, as the action for compensation is also being dismissed as inadmissible as regards the bank guarantee charges incurred before 31 January 1998, the examination of the substance will be confined to the costs incurred after that date.

Arguments of the parties

76 As regards the unlawfulness of the Cement decision, which was annulled by the Court of First Instance, the applicant claims that that decision contains a defect which renders the Community liable. It maintains that that decision was annulled in part because the defendant was unable to prove that the applicant had infringed Article 85 of the EC Treaty or that it had participated in agreements that restricted competition. The applicant therefore submits that in the present case the Commission made a grave error.

77 The applicant explains that the defendant had no discretion when it adopted the Cement decision. Referring to the judgment in Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541, the applicant contends that a mere infringement of

Community law is therefore sufficient to establish the existence of a 'sufficiently serious breach'. According to the *Cement* judgment, the defendant should not have imposed a fine in the present case, which completely reduces its discretion. The present case is also different from *Corus UK* v *Commission*, paragraph 8 above, where it was necessary to analyse whether the Commission had incorrectly exercised its discretion when determining the amount of the fine. The applicant concludes that, in this case, the illegality of the decision imposing the fine is sufficient to engage the liability of the Community.

78 In those circumstances, there is no need to determine whether the case was complex. In any event, it is necessary to analyse the applicant's particular situation. Since the Court of First Instance considered that there was not sufficient evidence in the present case, the applicant's situation could not be regarded as complex. There was in any event a serious infringement of the Commission's duty to exercise diligence.

79 Last, the applicant observes that the cooperation or lack thereof on the part of the other undertakings during the administrative procedure cannot in any event harm it. In addition, the bank guarantee charges should be reimbursed under the principle of fairness.

80 As regards the causal link, the applicant maintains that the Cement decision directly caused it damage, namely the bank guarantee charges. That damage is not based on a decision freely taken by the applicant and if its action for annulment had been dismissed it would have suffered damage either as a result of the interest paid or as a result of the bank guarantee charges imposed. The applicant also submits that if the provision of a bank guarantee did not have the same legal consequences as immediate payment of the fine, it would no longer be a valid alternative for undertakings.

81 As regards the damage, the applicant submits, annexed to its application, two bank invoices for a total amount of EUR 139 002.21. It also claims that the Commission should be ordered to pay default interest (at 5.75%) from one month after delivery of the *Cement* judgment, i.e. from 15 April 2000.

82 The defendant contends that the applicant has misread the *Commission* v *Fresh Marine* judgment, paragraph 77 above. The Court of Justice stated in that judgment that the mere infringement of Community law 'may' be sufficient to establish the existence of a sufficiently serious breach. The determining factor is the manifest and grave nature of the error committed and it is also necessary, in the defendant's submission, to examine all the factors which may provide an indication of the gravity of the fault committed by the Commission.

83 In the present case, the defendant contends that the *Cement* case was very complex. The infringement was distinguished by numerous ramifications, the involvement of a large part of the European industry and an extremely high number of participants and therefore of addressees of the decision. The cartel was kept secret, moreover, and during the investigation none of the undertakings cooperated to a greater extent than provided for by the rules on investigative powers.

84 As regards the causal link, the defendant contends that, unlike payment of a fine, the provision of a bank guarantee is not an obligation. It concludes that there is no direct causal link, within the meaning of the case-law, between any fault committed by the Commission and the alleged damage.

85 Concerning the damage, the defendant explains that, as regards the interest claimed, on 15 April 2000 (which the applicant proposes as the date on which default interest begins to accrue), it was not aware of the applicant's demands or of the amount

claimed. As for the applicant's letter of 5 April 2002, it was not followed by an application within the period set out in the second sentence of Article 46 of the Statute of the Court of Justice. The defendant therefore submits that a right to payment of default interest could in any event be envisaged only from the date on which the present action was brought, on 31 January 2003. Last, as regards the rate of interest claimed, the defendant submits that the rate applied by the European Central Bank to its main refinancing transactions, on 31 January 2003, was 2.75%. The addition of two percentage points fixed in *Corus UK* v *Commission*, paragraph 8 above, would result in an interest rate of 4.75% and not of 5.75%, as the applicant maintains.

Findings of the Court

86 It follows from a consistent line of decisions that the non-contractual liability of the Community, within the meaning of the second paragraph of Article 288 EC, depends on the fulfilment of a set of conditions, namely the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between the conduct and the damage complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30).

The condition relating to the unlawfulness of the alleged conduct

87 As regards the condition relating to the unlawfulness of the alleged conduct, the case-law requires that a sufficiently serious breach of a legal rule designed to confer rights on individuals be established. In that regard, it must be borne in mind that the system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available

to the author of the act in question. The determining factor for regarding a breach of Community law as sufficiently serious lies in the manifest and serious failure by the Community institution concerned to observe the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 40 and 42 to 44; Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraphs 52 to 55; and *Commission* v *Fresh Marine*, paragraph 77 above, paragraphs 24 to 26).

— The factual and legal context of the Cement decision

88 It should be observed at the outset, first, that the Cement decision provides, in Article 1, that certain associations, federations and undertakings (including the applicant) had infringed Article 85(1) of the EC Treaty by participating in an agreement (known as 'the Cembureau agreement' after the European cement association) designed to ensure non-transhipment to home markets and to regulate cement transfers from one country to another. Cembureau was made up of direct members and indirect members. The undertakings whose merger led to the creation of the applicant formed part of the second category (see, in particular, paragraph 1440 of the *Cement* judgment). In that context, and in respect of the indirect members of Cembureau, Article 1 of the Cement decision referred to the undertakings (including therefore the applicant) which had manifested their accession to the Cembureau agreement by participating in a measure implementing that agreement (paragraph 4076 of the *Cement* judgment).

89 In that regard, Article 5 of the Cement decision concluded that certain associations, federations and undertakings (including the applicant) had infringed Article 85(1) of the EC Treaty by participating, within the framework of the European Cement Export Committee ('the ECEC'), in concerted practices designed to prevent incursions by competitors on respective national markets in the Community.

90 For those reasons, according to Article 9 of the Cement decision, fines of EUR 3.841 million and EUR 1.85 million respectively were imposed on Alsen Breitenburg and on Nordcement (the merger of which led to the creation of the applicant).

91 The Court of First Instance held, however, that the evidence adduced in the Cement decision, even considered as a whole, did not establish that the members of the ECEC aimed, in the framework of their cooperation within that export committee, to channel their production surpluses in order to reinforce the rule that there should be no transhipment to home markets (paragraph 3849 of the *Cement* judgment).

92 In so far as the activities within the ECEC were considered, in Article 5 of the Cement decision, to constitute an infringement of Article 85(1) of the EC Treaty, on the ground that they were designed to prevent incursions by competitors on respective national markets in the Community, the Court of First Instance decided to annul Article 5 of the Cement decision (paragraph 3850 of the grounds and paragraphs 16 and 17 of the operative part of the *Cement* judgment).

93 Furthermore, since it had not been established that the conduct referred to in Article 5 of the Cement decision pursued the same objective as the Cembureau agreement, the Court of First Instance held that that conduct could not be regarded as elements of the infringement referred to in Article 1 of the Cement decision (paragraph 4058 of the *Cement* judgment). The Court of First Instance therefore decided also to annul, in so far as it concerned the applicant, Article 1 of the Cement decision (paragraphs 4074 to 4079 of the grounds and paragraphs 16 and 17 of the operative part of the *Cement* judgment).

94 Consequently, Article 9 of the Cement decision, which fixed the fines for Alsen Breitenburg and Nordcement, was also annulled (paragraph 4718 of the grounds and paragraphs 16 and 17 of the operative part of the *Cement* judgment).

— The Commission's discretion

95 The Community judicature undertakes generally a comprehensive review of the question whether or not the conditions for the application of Article 85(1) of the EC Treaty are met. It is only where it reviews complex economic appraisals made by the Commission that the Community judicature confines itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 34).

96 In the present case, it should be observed at the outset that the review carried out by the Court of First Instance, which led to the annulment of the Cement decision so far as the applicant was concerned, covered the existence of conduct which was contrary to Article 85(1) of the EC Treaty. That review did not cover the fixing by the Commission of the amount of the fines imposed on the applicant.

97 It follows from paragraphs 3771 to 3850 of the *Cement* judgment, moreover, which set out the grounds on which the Court of First Instance annulled Article 5 of the Cement decision, and therefore, in consequence, annulled Articles 1 and 9 of that decision, so far as the applicant was concerned, that the Court undertook a comprehensive review of the application by the defendant of Article 85(1) of the EC Treaty.

98 The relevant paragraphs of the *Cement* judgment make no reference to economic appraisals made by the Commission or to any discretion on its part that might have limited the scope of the review carried out by the Court of First Instance.

99 Last, the classification of the conduct of the undertakings concerned as constituting or not constituting an infringement for the purposes of Article 85(1) of the EC Treaty fell in this case within the scope of the simple application of the law on the basis of the elements of fact available to the Commission.

100 It follows from those factors that the Commission's discretion was reduced in the present case. In those circumstances, the infringement of Article 85(1) of the EC Treaty found by the Court of First Instance in the *Cement* judgment, namely the insufficiency of the evidence adduced by the defendant in support of the applicant's impugned practices, could suffice to establish the existence of a sufficiently serious breach.

101 As stated at paragraph 87 above, however, the system of rules which the Court of Justice has worked out with regard to non-contractual liability on the part of the Community must also induce the Community judicature to take into account, in addition to the discretion enjoyed by the institution concerned, in particular, the complexity of the situations to be regulated and also the difficulties in the application or interpretation of the texts.

— The complexity of the situations to be regulated and the difficulties in the application or interpretation of the texts

102 In the present case, it should be noted, first, that the case at the origin of the Cement decision and then of the *Cement* judgment was particularly complex. In that regard, the applicant's argument that the complexity of the context of the case is irrelevant must be rejected. On the contrary, that context permits the complexity of the situations to be regulated to be measured, within the meaning of the case-law.

103 The procedure, which lasted more than three years, involved both international and national associations and numerous undertakings established in non-member countries and also virtually all the Community undertakings in the cement sector. The investigation carried out by the defendant required the presence of a large number of factors.

104 The Court of First Instance referred to the complexity of the case when it stated, at paragraph 654 of the *Cement* judgment, that 'the Court held ... in *Suiker Unie* v *Commission* ..., which was also a complex case, that a period of two months was reasonable [to prepare a reply to a statement of objections]'.

105 Furthermore, concerning the time taken by the investigation, the Court of First Instance observed at paragraph 709 of the *Cement* judgment that '[t]he period of 31 months which elapsed between the investigations in April 1989 and dispatch of the [statement of objections] in November 1991 was reasonable, taking into account ... the scope and the difficulties of an investigation into almost the whole European cement industry' and that '[t]he fact that it took the Commission 20 months after the end of the hearings to adopt the contested decision, on 30 November 1994, is not an infringement of the principle that the duration of administrative proceedings relating to competition policy should be reasonable, since the decision had to be sent to 42 undertakings and associations of undertakings, concerned 24 separate infringements, and had to be drawn up in the nine official Community languages.'

106 The applicant itself acknowledged, in its letter to the defendant dated 28 September 2001, that the case was characterised by extreme complexity. The applicant referred, in particular, to the subject-matter and the nature of the dispute, to its importance from the aspect of Community law and also to the difficulties of the case and to the number of undertakings concerned.

107 It should be noted, second, that the situations to be regulated in the present case were all the more complex because the undertakings concerned by the Commission's investigation were direct or indirect members of Cembureau. In the latter case, which applied to the applicant's situation, the undertakings concerned were represented within Cembureau by their respective associations.

108 It should be noted, third, that, as regards the part of the Cement decision which specifically concerned the applicant, the defendant was faced with a range of probative documents whose interpretation was unclear.

109 Thus, as regards the grounds which led to the annulment of the Cement decision, so far as the applicant was concerned, the Court of First Instance stated first of all (at paragraphs 3790 and 3792 of the *Cement* judgment):

'It is not ... apparent [from Article 1 of the ECEC statutes of 6 December 1979, from Article 1 of the statutes of 26 September 1986, from the minutes of the meeting held in Paris on 23 January 1979 and from an internal memorandum of Ciments Français of 7 March 1989] that the real object of the members of the ECEC was to reinforce the rule that there should be no transhipment to European home markets ... Although [the Blue Circle memorandum of 1 December 1983] refers to a link between the rule that there should be no transhipment to home markets and the channelling of production surpluses, it cannot be presumed, on the basis of the mere existence of an export committee, that its members intended, through their activities in it, to "prevent incursions by competitors on respective national markets in the Community".'

110 As regards the direct or indirect affiliation of the members of the ECEC to Cembureau, the Court of First Instance observed (at paragraphs 3799 and 3800 of the *Cement* judgment):

'Admittedly, for the parties to the Cembureau agreement which took part in the activities of the ECEC after the conclusion of that agreement, the information exchanged during ECEC meetings concerning third country markets helped them to channel their production surpluses to non-European destinations and as such therefore facilitated the implementation of the Cembureau agreement. Amongst the members of the ECEC are several direct members of Cembureau (FIC, SFIC, Aalborg, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI), whose participation in the Cembureau agreement is not in any doubt, as they participated in the meetings of the Head Delegates at which the Cembureau agreement was concluded and/or confirmed ... However, that finding does not mean that the cooperation organised within the framework of the ECEC between all its members had as its object the reinforcement of the rule that there should be no transhipment to home markets.'

111 As regards the relationships between the ECEC and the European Export Policy Committee ('the EPC'), the Court of First Instance observed (at paragraphs 3806 and 3821 of the *Cement* judgment):

'[t]he Court finds, having regard to the evidence to which the Commission refers in the contested decision [i.e. the documents mentioned at recital 32 of the Cement decision], that the members of the ECEC always took the view that the characteristics and identity of their export committee were independent of those of the EPC ... Even if it is accepted that non-transhipment to home markets was the rule underlying cooperation in the EPC, the documents referred to in recital 32 of the contested decision do not therefore support the conclusion that the links which existed between the ECEC and the EPC had influenced the activities of the ECEC in such a way that the members of the ECEC had adopted the rule of not transhipping to internal markets for their activities within the ECEC.'

112 As regards, last, the fact that the ECEC's activities were not restricted to large-scale exports, the Court of First Instance considered (at paragraphs 3825, 3827 and 3828 of the *Cement* judgment):

'The Commission cannot, however, rely on [the] minutes [of the ECEC meeting of 22 March 1985] in order to prove that the cooperation within the ECEC aimed to reinforce the rule that there should be no transhipment to home markets through the channelling of production surpluses ... The Court finds that none of the minutes cited in ... paragraph [3826] prove a link between imports from non-member countries and the principle of non-transhipment to home markets ... In any event, the mere fact that on some occasions the situation of imports from non-member countries was examined does not prove that "the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets" ... As regards the documents referred to in recital 33, paragraph 5, of the contested decision, it is true, as the Commission submits, that some minutes refer to some information on the situation in the member countries. However, the mere mention of an item of information relating to an internal market of the Community at a meeting of the ECEC or of the ECEC Steering Committee does not necessarily prove that the activities of the ECEC aimed to "reinforce the rule that there should be no transhipment to home markets".'

113 It follows that, without fundamentally calling in question the Commission's analysis as regards the application of Article 85(1) of the EC Treaty to the agreements in question, the Court of First Instance confined itself in the *Cement* judgment to challenging the Commission's appraisal of the probative nature of certain documents used for the purpose of establishing the infringement in respect of certain applicants. In particular, it appears that the divergence in interpretation between the Court of First Instance and the Commission on that point concerned only a marginal activity of the cartel, namely that carried out in the context of cooperation between the parties within the ECEC, with a view to channelling their production surpluses with the aim of thus reinforcing the rule on non-transhipment to home markets, namely the market-sharing that constituted the real 'core' of the cartel. Furthermore, although the Court of First Instance annulled the Cement decision in so far as it concerned the applicant, it none the less found that the Commission had a certain amount of evidence of such a kind as to accredit its argument that the cooperation within the ECEC had the object and effect of reinforcing the rule on non-transhipment to home markets and it was only after making a detailed appraisal of the content of the documents in question that the

Court of First Instance arrived at the conclusion that, seen in their entirety and taking account, in particular, of the explanations provided by the undertakings concerned, those documents did not allow it to be established to the requisite legal standard that the activity within the ECEC reinforced the rule on non-transhipment to home markets.

114 For all of those reasons, regard being had to the fact that *Cement* was a particularly complex case, involving a very large number of undertakings and almost the entire European cement industry, to the fact that the structure of Cembureau made the investigation difficult owing to the existence of direct and indirect members, and to the fact that it was necessary to analyse a great number of documents, including in the applicant's specific situation, it must be held that the defendant was faced with complex situations to be regulated.

115 Last, it is necessary to take account of the difficulties in applying the provisions of the EC Treaty in matters relating to cartels (see, by analogy, *Corus UK* v *Commission*, paragraph 8 above, paragraph 46). Those practical difficulties were all the greater because the factual elements of the case in question, including in the part of the decision concerning the applicant, were numerous.

116 On all of those grounds, it must be held that the breach of Community law found in the *Cement* judgment as regards the part of the decision concerning the applicant is not sufficiently serious.

117 As regards the principle of fairness, which would render mandatory reimbursement of the bank guarantee charges, the applicant does not explain how that principle is intended to confer rights on individuals or how there is a sufficiently serious breach of that principle in the present case. The same applies to the principle of diligence which in the applicant's submission is borne by the defendant. Those arguments are therefore inoperative.

118 In the light of the foregoing, the first condition which, according to the case-law, allows the non-contractual liability of the Community to be incurred is not satisfied in the present case.

The condition relating to the existence of a causal link between the conduct and the alleged damage

119 In any event, the Community can be held liable only for the damage which is a sufficiently direct consequence of the unlawful conduct of the institution concerned (see, in particular, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21; Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 52; Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118; and Case T-333/01 *Meyer* v *Commission* [2003] ECR II-117, paragraph 32).

120 In the present case, it should first of all be borne in mind that, under Article 9 of the Cement decision, fines of EUR 3.841 million and EUR 1.85 million respectively were imposed on Alsen Breitenburg and on Nordcement. Under the first paragraph of Article 11 of that decision, the fines were to be paid within three months of the date of notification of the decision. Under the second paragraph of Article 11, moreover, the fines attracted automatic interest upon expiry of that period.

121 Under the first paragraph of Article 192 of the EC Treaty (now Article 256 EC), the Cement decision was enforceable in that regard, since it imposed a pecuniary obligation on persons other than States, notwithstanding the action for annulment

of that decision initiated under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). Pursuant to the first sentence of Article 185 of the EC Treaty (now Article 242 EC), actions brought before the Community judicature do not have suspensory effect (Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 50 to 52).

122 It is common ground that the applicant, in derogation from those provisions, did not pay the fine imposed on it in Article 9 of the Cement decision, as the Commission, in the letter notifying the applicant of that decision, gave it the opportunity to provide a bank guarantee as security for payment of the fine until such time as the *Cement* judgment had been pronounced. An undertaking which brings an action against a Commission decision imposing a fine on it has a choice: it can pay the fine on its becoming payable, together with default interest, should any such interest have accrued, at the rate set by the Commission in its decision; or it can apply for suspension of operation of the decision pursuant to the second sentence of Article 185 of the EC Treaty; or, last, if the Commission so allows, it can provide a bank guarantee as security for payment of the fine and default interest, in accordance with the conditions laid down by the Commission (*CB* v *Commission*, paragraph 121 above, paragraph 54).

123 In those circumstances, the applicant cannot validly maintain that the bank guarantee charges which it incurred in the present case are the direct consequence of the unlawfulness of the Cement decision. The damage which it alleges in that regard is the consequence of its own decision not to comply with the obligation to pay the fine, in derogation from the rules laid down in the first paragraph of Article 192 of the EC Treaty and the first sentence of Article 185 of the EC Treaty, within the period prescribed by the Cement decision, by providing a bank guarantee.

124 It should further be emphasised that the two options open to the applicant, namely to bring an action against the Cement decision and also an application for suspension of operation of that decision (at least as regards payment of the fine) and to provide a bank guarantee in accordance with the option offered by the

Commission, were real alternatives to immediate payment of the fine. Those options were, moreover, left entirely to the discretion of the undertakings (see, to that effect, *CB* v *Commission*, paragraph 121 above, paragraphs 54 and 55). Those options were therefore not mandatory in nature as a consequence of the Cement decision. Furthermore, a number of undertakings (like the applicant) opted to provide bank guarantees, whereas others preferred to comply with the financial obligation arising under the Cement decision and to pay the relevant fine (see, in that regard, the *Cement* judgment, paragraph 5116). If the applicant had decided to pay the fine, it would thus have avoided having to pay the bank guarantee charges (see, in relation to default interest, *CB* v *Commission*, paragraph 121 above, paragraph 83).

125 None of the arguments put forward by the applicant is capable of calling that conclusion in question.

126 In particular, as regards the alleged circumstance that the considerations set out at paragraph 57 of *Corus UK* v *Commission*, paragraph 8 above, may be transposed to the present case, it must be held that at that point in the judgment the Court of First Instance held not, as the applicant suggests, that the undertakings to which a decision imposing fines was addressed did not have a choice between paying the fine immediately and providing a bank guarantee, but that, first, by paying the fine, the undertaking merely complied with the operative part of a decision which was enforceable notwithstanding the action which it had brought before the Court of First Instance and, second, that the provision of a bank guarantee rather than immediate payment of the fine was a simple option allowed by the Commission to the undertaking concerned.

127 In any event, and without embarking here on an examination of possible damage or a detailed analysis of the differences between Article 34 CS and Article 233 EC, it must be emphasised that the considerations in the judgment in *Corus UK* v *Commission*, paragraph 8 above, which led the Court of First Instance to hold that, in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringing the competition rules, the Commission is under an obligation to reimburse not only the principal amount of the fine which has been wrongly paid,

but also the default interest on that amount, are not applicable where the undertaking concerned has provided a bank guarantee. It must be borne in mind that in *Corus UK* v *Commission*, paragraph 8 above, the Court of First Instance based that obligation, at paragraphs 54 to 56, on the fact, first, that the obligation to reimburse in full the fine which has been wrongly paid cannot disregard the time elapsed, which has reduced the value of the fine, and, second, that failure to pay default interest would entail the unjust enrichment of the Community, which is contrary to the general principles of Community law.

128 Neither of those considerations can be relied on by the applicant in the present case.

129 As regards the first consideration, it should be observed that where a bank guarantee has been provided, the Commission is not required to reimburse a fine that was wrongly paid, since, ex hypothesi, the fine was not paid. The undertaking has therefore suffered no loss in value as regards the fine that it was required to pay immediately to the Commission, in light of the enforceable nature of the contested decision (second paragraph of Article 192 of the EC Treaty) and the absence of suspensory effect of actions brought before the Court of First Instance (first sentence of Article 185 of the EC Treaty). As stated above, the only financial damage that may have been sustained by the undertaking concerned is the consequence of its own decision to provide a bank guarantee in order to be in a position, in derogation from the rules set out above, not to pay the fine immediately, even though it has not secured a suspension of enforcement of the decision imposing the fine.

130 As regards the second consideration, moreover, it must be held that, contrary to the situation in *Corus UK* v *Commission*, paragraph 8 above, the Commission's failure to assume responsibility for the charges incurred in providing a bank guarantee does not entail any undue enrichment of the Community, since the bank guarantee charges are paid not to the Community but to a third party. Observance of the general principle prohibiting undue enrichment does not justify such reimbursement in any circumstances. Quite to the contrary, if the Commission were to assume

responsibility for the charges incurred in providing a bank guarantee, that would allow the undertaking concerned to be placed in the situation in which it was before the contested decision was adopted, but the Commission, on the other hand, would be penalised, since it would be required to reimburse to the undertaking sums of which it did not have the benefit.

131 Taking those factors into account, the causal link between the conduct attributed to the defendant and the alleged damage cannot in this case be qualified as sufficiently direct.

132 In the light of the foregoing, and without there being any need to adjudicate on the damage alleged to have been sustained, the action based on Article 235 EC and the second paragraph of Article 288 EC, as concerns the costs of the bank guarantee after 31 January 1998, must be dismissed as unfounded.

Costs

133 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay all the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action as inadmissible in so far as it is based on Article 233 EC;**

2. **Dismisses as inadmissible the alternative request that the action, in so far as it is based on Article 233 EC, be interpreted as being an action for annulment or for failure to act;**

3. **Dismisses as inadmissible the claim for damages, as regards the bank guarantee charges incurred by the applicant before 31 January 1998;**

4. **Dismisses the remainder of the application as unfounded;**

5. **Orders the applicant to pay the costs.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 21 April 2005.

H. Jung J. Azizi

Registrar President