OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 11 February 2003 [1]

Table of contents

1 — Original language: Spanish.

1. This is an appeal by Aalborg Portland A/S ('Aalborg') against the judgment of 15 March 2000 of the Fourth Chamber, Extended Composition, of the Court of First Instance in the case of *Cimenteries CBR and Others* v *Commission*.[2]

I — Facts

2. The judgment under appeal contains the following facts which are relevant to this appeal:

— From April 1989 to July 1990, the Commission carried out investigations into European cement producers and trade associations in the sector pursuant to Article 14(2) and (3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (now, after amendment, Articles 81 EC and 82 EC).[3] As a result of those investigations, the Commission decided on 12 November 1991 to initiate a procedure[4] against Aalborg, among other undertakings.[5]

— On 25 November 1991, the Commission sent the Statement of Objections to the 76 undertakings and associations of undertakings concerned, on which

2 — 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 [2000] ECR II-491.

3 — OJ, English Special Edition 1959-62, p. 87.

4 — Cases IV/33.126 and 33.322 — Cement.

5 — Paragraphs 2 and 3 of the judgment.

Aalborg submitted written observations and then oral submissions at the hearings held between 1 March and 1 April 1993. [6]

— The full text of the Statement of Objections, which was contained in a single document, was not sent to each of the undertakings or associations concerned. Each was sent the full index of the Statement of Objections and a list of all the documents, specifying which documents could be consulted. A number of undertakings and associations asked the Commission to send a copy of the chapters which were not included in the text of the Statement of Objections sent to them and requested access to all the documents in the file, except for internal or confidential documents. The Commission refused that request. [7]

— By Decision 94/815/EC of 30 November 1994 ('the Decision'), [8] the Commission found that Aalborg had infringed Article 85(1) of the EC Treaty [9] by its anti-competitive conduct in participating:

1. from 14 January 1983, in an agreement designed to ensure non-transhipment to home markets and to regulate cement transfers from one country to another (Article 1). This is known as 'the Cembureau agreement';

2. from 14 January 1983 to 14 April 1986, in agreements adopted at meetings of the Head Delegates and the Executive Committee meetings of Cembureau — The European Cement Association ('Cembureau') on the exchange of price information, designed to facilitate the implementation of the agreement described in Article 1 of the Decision (Article 2(1));

3. from 1 January 1984 to 31 December 1988, in concerted practices, having the same aim, relating to the circulation of information on:

6 — Paragraphs 3, 9 and 12 of the judgment.

7 — Paragraphs 4 to 6 of the judgment.

8 — OJ 1994 L 343, p. 1.

9 — Paragraph 22 of the judgment.

(a) Belgian and Dutch producers' minimum prices for supplies of cement by lorry and of the Luxembourg producer's prices, inclusive of rebates;

(b) the Danish and Irish producers' individual price lists, trade prices lists in force in Greece, Italy and Portugal, and average prices charged in Germany, France, Spain and the United Kingdom (Article 2(2));

4. from 28 May 1986, in an agreement on the setting-up of the Cembureau Task Force or European Task Force (Article 4(1));

5. from 17 June 1986 to 15 March 1987, in concerted practices designed to withdraw the Italian undertaking Calcestruzzi as a customer from the Greek producers and from Titan Cement Company, SA in particular (Article 4(3)(a));

6. within the framework of the European Cement Export Committee, from 14 March 1984 to 22 September 1989, in concerted practices relating to the exchange of information on the supply and demand situation in the importing third countries, the export prices chargeable, the import situation in the member countries and the supply and demand situation on the home markets and designed to prevent incursions by competitors on respective national markets in the Community (Article 5).

— The Commission ordered Aalborg to bring the infringements described to an end and to refrain from any agreement or concerted practice contrary to free competition in the markets for grey cement and white cement (Article 8), imposed a fine of ECU 4 008 000 plus interest with effect from expiry of the deadline set for payment, which was three months from the date of notification of the Decision (Articles 9 and 11).

3. Aalborg did not agree with the Commission's findings and brought proceedings before the Court of First Instance.

II — The proceedings before the Court of First Instance and the judgment under appeal

4. Aalborg requested the Court of First Instance to annul Articles 1, 2, 4(1) and (3)(a), 5, 8 and 12 of the Decision, in so far as those articles concerned it. In the alternative, it sought annulment of the fine or reduction of the amount thereof. In any event, it asked that the Commission be ordered to pay the costs.

5. By way of a measure of organisation of procedure, notified to the applicants between 19 January and 2 February 1996, the Court of First Instance requested the Commission to produce various documents, which it did on 29 February 1996, when it lodged: [10]

(1) the Statement of Objections as notified to undertakings concerned, now the applicants;

(2) the minutes of the oral hearing of each of the parties;

(3) the list of all the documents in the files;

(4) the boxes containing the documents supporting the Commission's conclusions in the Statement of Objections; and

(5) the correspondence between the Commission and the applicant undertakings during the administrative procedure.

6. Two further measures of organisation of procedure were notified to the parties on 2 October 1996 and on 18 and 19 June 1997, whereby the Court of First Instance took the necessary steps to enable the applicants to examine all the original documents in the file, with the exception of those containing business secrets or other confidential information and the Commission's internal documents. [11]

7. After providing them with copies of the whole file, the Court of First Instance invited the applicant undertakings and associations of undertakings to lodge a pleading specifying the documents to which they had not had access during the administrative procedure which could have affected their defence and to explain briefly why in their view the outcome of the administrative procedure might have been different had they been given the opportunity to consult them. The pleading was to

10 — See paragraph 163, read with paragraphs 5 and 95, of the contested judgment.

11 — See paragraphs 164 to 168 of the contested judgment.

be accompanied be a copy of each document examined. All but one of the applicants [12] lodged observations. The Commission responded to all the applicants. [13]

8. In the contested judgment, the Court of First Instance granted Aalborg's application in part and:

'— annul[led] Article 1 of Decision 94/815 in so far is it [found] that the applicant [had] participated in the infringement after 31 December 1988;

— annul[led] Article 2(1) of Decision 94/815 in so far as it [found] that there [had been] agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it [found] that the applicant [had] participated in the infringement after 19 March 1984;

— annul[led] Article 2(2) of Decision 94/815 as regards the applicant in so far as it [found] that the periodic circulation of information between Cembureau — The European Cement Association and its members [had] related, so far as concern[ed] the Belgian and Netherlands prices, to those two countries' producers' minium prices for supplies of cement by lorry and, so far as concern[ed] Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annul[led] Article 4(1) of Decision 94/815 in so far as it [found] that the applicant [had] participate in the infringement before 9 September 1986 and after 31 May 1987;

— annul[led] Article 4(3)(a) of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement before 9 September 1986;

— annul[led] Article 5 of Decision 94/815 in so far as it concern[ed] the applicant;

— fixe[d] the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 2 349 000;

12 — Ciments Luxembourgeois SA.

13 — Paragraphs 169 and 170 of the judgment.

— dismisse[d] the remainder of the application;

— order[ed] the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— order[ed] the Commission to bear two thirds of its own costs.'

9. Thus, the Court of First Instance held that Aalborg was liable for anti-competitive conduct for having participated:

(1) in the Cembureau agreement on non-transhipment to home markets of grey cement (Article 1 of the Decision) between 14 January 1983 and 31 December 1988;

(2) in exchanges of specific information on prices of grey cement (Article 2(1) of the Decision) between 14 January 1983 and 19 March 1984;

(3) between 1 January 1984 and 31 December 1988, in the periodic circulation of information on the Danish and Irish producers' individual price-lists, on the trade price-lists in force in Greece, Italy and Portugal and on the average prices charged in Germany, France, Spain and the United Kingdom (Article 2(2)(b) of the Decision);

(4) in the agreement on the setting-up of the Cembureau Task Force (Article 4(1) of the Decision), between 9 September 1986 and 31 May 1987;

(5) in concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers (Article 4(3)(1) of the Decision), between 9 September 1986 and 15 March 1987.

III — The procedure before the Court of Justice

10. When the appeal had been lodged and the written procedure completed, the Court of Justice, in the exercise of its powers under Article 119 of the Rules of Procedure, [14] by order of 5 June 2002 dismissed the second of Aalborg's pleas in law.

14 — Codified version, published in OJ 2001 C 34, p. 1.

11. As regards the remaining pleas in law, a common hearing took place on 4 July 2002 for the six appeals lodged against the judgment of the Court of First Instance. The appellant undertakings and the Commission attended.

IV — The appeal

12. Aalborg claims that the Court of Justice should set aside the contested judgment in its entirety, in so far as it concerns Aalborg, in so far as it confirmed the Decision, or that it should set the judgment aside at least in part. Failing that, it claims that the case should be referred back to the Court of First Instance for a fresh determination and that the Court of Justice should annul the fine in whole or in part and order the Commission to pay the costs incurred by Aalborg before both Community Courts.

13. In support of those claims, Aalborg puts forward five pleas in law, some of which are based on a number of arguments. As I have just said, the second of those pleas in law has been dismissed by order of 5 June 2002.

14. The complaints submitted by Aalborg and the replies thereto of the Commission are set out below; they are analysed in order to provide the reasons for my suggestions.

1 — *Breach of the rights of defence during the administrative procedure, in so far as the appellant was denied access to certain exculpatory documents (first plea in law)*

A — Arguments of the parties

15. At paragraphs 152 and 153 of the judgment, the Court of First Instance states that the Commission committed flagrant and substantive breaches of the principles governing access to the files by undertakings during an administrative procedure by denying them access to three quarters of the documents examined. Aalborg agrees with that assessment and also with the legal consequences which, in principle, the Court of First Instance associates with such circumstances, in particular, breach of the rights of defence, if it is established that, if the appellant had had access to a document and made submissions regarding its content, there would have been 'even a small... chance' that the outcome of the procedure would have been different. [15]

16. However, the appellant disagrees with the way in which the Court of First Instance applied that procedural rule and

15 — See paragraph 241 of the judgment.

even goes so far as to say that in practice it contradicts it. As proof, it provides three examples:

(a) Mr Toscano's notes (paragraph 1122 of the judgment); [16]

(b) the documents which show that the object of the meetings of 14 January 1983, 19 March and 7 November 1984 was dumping and a basing points system (paragraphs 1209 and 1210 of the judgment); [17] and

(c) the documents relating to the meeting held in Baden-Baden on 9 September 1986 (paragraphs 2888 and 2889 of the judgment). [18]

17. The appellant maintains that if it had had access to the above documents during the administrative procedure, it would have had a small possibility that the result of the administrative procedure would have been different. It disputes the assertion at which the Court of First Instance arrives on the matter at paragraphs 1132, 1211 and 2898 of the judgment under appeal, contrary to the criterion correctly set out at paragraph 237, which is pointless if a high degree of certainty as to that possibility is required. Furthermore, in the appellant's submission, in order to reject the relevance of those documents, the Court of First Instance made a fresh and narrower appraisal of the actual liability, which was different and more severe than the argument on which the Commission based the Decision; namely, that Aalborg's presence in Baden-Baden was due to its relevance to the European Task Force. Whereas the Commission charges the appellant in respect of all the meetings relating to that organisation, without appraising its failure to participate in any of them, the Court of

16 — Documents 33.322/314 to 317.

17 — These are (1) the file which the Cement Makers' Federation lodged with the Commission in 1973 when notifying the United Kingdom SPMA agreement (2) documents 33.126/1078 to 1088, 1147 to 1163, 2569 to 2578, 2591 to 2597, 5038 to 5051, 9010 to 9075 and 9078 to 9082), which showed that for many years the European cement industry, in particular the Belgian industry, maintained close contact with the Commission concerning the introduction of a basing point system; (3) the letter from Mr van Hove (documents 33.126/2412 to 2415); (4) documents 33.126/4982/54 and 66, 5295, 5296 and 6160 to 6165), which showed that it was dumped imports from Eastern Europe and Spain that preoccupied the European cement industry in 1983 and 1984; and (5) document 33.126/6162, which states that 'the rules of the economic game are not applied by the countries of the East and, in particular, by East Germany'.

18 — Namely: (1) the documents which illustrate the lawful lobbying activity carried out for the cement industry (documents 33.126/17158, 17163, 17164, 17168, 17627, 17629, 17630 and 17641 to 17653, in particular 17641 and 17646); (2) the internal note concerning the meeting of the Blue Circle 'Management Group' on 19 June 1986 (documents 33.126/10822 and 10823); and (3) the various documents which would have made it possible to prove the factual bases of the defence argument that the European cement industry was generally worried by imports from Greece and that the lawful lobbying initiatives were the only activities in which Aalborg took part (documents 33.126/16469, 11000, 11101, 11107 to 11109, 11074, 11075, 18961, 18962, 18963, 11004, 11021, 11022, 11062 to 11064, 11054 to 11060, 16183, 11028 to 11031, 11033 to 11038, 7723, 11072, 17173, 17174, 11126, 11130, 11131, 11138 to 11141, 11116, 11117, 18892 to 18997 and 15388, and 33.322/1319 to 1323).

First Instance based liability solely and exclusively on its presence in Baden-Baden. [19]

18. The relevance of the documents as evidence for the defence should therefore have been examined in the light of the objections communicated by the Commission and according to the objective of Aalborg, which sought to avoid being included in the Commission Decision, but not in the light of a situation in which the Court of First Instance merely determines whether a decision which has already been adopted may be maintained in force. In Aalborg's submission, the Court of First Instance made an error of law such that the judgment must be set aside in its entirety or, at least in part, in so far as it found the appellant responsible for the infringements referred to in Article 4(1) and (3)(a) of the Decision and found that the infringement of Article 1 extended beyond the three meetings of 14 January 1983, 19 March and 7 November 1984.

19. The Commission disputes Aalborg's arguments in their entirety and contends that the Court of First Instance correctly applied the test of examining the new evidence in the light of the content of the documents which the appellant would have wished to consult in the administrative procedure. Since, in reality, it constitutes an appraisal of the evidence, which is outside the scope of an appeal, the plea is in its view inadmissible.

20. In any event, the Commission contends that the plea is unfounded. The Court of First Instance's finding that there was no breach of the appellant's rights of defence is correct. The documents referred to by Aalborg confirm a fact which has never been denied, namely that the sector was concerned by dumping and State aid, problems which were discussed at the Head Delegates' meetings held in 1983 and 1984. At the same time, however, they are not capable of rebutting the evidence taken into account in the Decision that other matters contrary to free competition were dealt with at those meetings.

21. Aalborg replies that review of the application of the procedural rule used by the Court of First Instance, which has been employed elsewhere in the Community case-law, [20] is a strictly legal operation which may be reviewed and corrected in an appeal, in so far as the court below has rendered its judicial approach meaningless.

19 — See paragraphs 2656 and 2600 of the judgment.

20 — Aalborg cites the opinion of Advocate General Léger in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, points 120 and 121, and the judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4250, paragraph 81.

22. In its rejoinder, the Commission asserts that the practice contradicts Aalborg's pessimistic predictions, since in the contested judgment itself the Court of First Instance annulled parts of the Decision because two of the undertakings concerned had been denied access to certain documents during the administrative procedure. [21]

B — The lawfulness of the measures of organisation of procedure ordered by the Court of First Instance

23. In response to the claims concerning the lawfulness of the administrative procedure and in order, where necessary, to make good the damage caused by the lack of access to certain documents, the Court of First Instance requested the Commission to send the whole file and to make it available to the parties, [22] in order that, having perused the documents which they had not been able to examine during the investigation, they should identify them and explain why the outcome of the procedure could have been different had they been given the opportunity to consult them.

24. In the judgment, the Court of First Instance analysed the documents indicated by the applicants and the observations submitted by them and, in Aalborg's case, reached the decision set out at paragraph 15 of the operative part and at point 8 of this Opinion. The Court of First Instance proceeded according to the following principle: the appellants' rights of defence would have been infringed if there had been even a small chance that the outcome of the administrative procedure might have been different if they could have relied on the documents to which access had been denied. [23]

25. Aalborg questions the correct perspective in the examination of the relevance as exculpatory evidence of the documents which were not at its disposal during the administrative procedure. Must the Court place itself in front of the Statement of Objections and from the point of view of the person who claims that he should not be included in the Decision? Or, on the contrary, can the Court look at the matter from the aspect of someone who merely determines whether it is possible to maintain the Decision in force, once it has been adopted? By those questions, it calls in question, from the outset, the work carried out by the Court of First Instance in the contested judgment.

26. The procedure for finding infringements of Articles 81 and 82 EC is sanctionative by nature. As well as putting an end to anti-competitive practices, it seeks to punish the conduct which gave rise to them

21 — These were Cedest SA (Case T-38/95), paragraphs 2211 and 2286 and paragraph 11 of the operative part, and the Rugby Group plc (T-53/95), paragraphs 3406 to 3436 and paragraph 22 of the operative part.

22 — With the exception of documents containing business secrets or other confidential information and Commission internal documents.

23 — See paragraph 241 of the judgment.

and confers on the Commission the power to impose financial penalties on those responsible. To that end, the Commission has wide powers of investigation and inquiry but, precisely because of that nature and because one and the same body is invested with the power to conduct investigations and the power to take decisions, the rights of defence of those subject to the procedure must be recognised without reservation and respected. [24]

27. That is the import of the provisions of Regulation No 17, in particular Article 19, and of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under [Articles 81 EC and 82 EC]; [25] and that is the scope given to them by the case-law of the Court of Justice [26] and the Court of First Instance. [27] The European Court of Human Rights has extended the scope of the guarantees laid down in Article 6 of the European Convention on Human Rights to administrative proceedings of a disciplinary nature. [28]

The Charter of Fundamental Rights of the European Union [29] takes the matter further, since, in addition to providing that an accused is entitled to defend his legal position in a fair and public judicial procedure, before an independent and impartial tribunal previously established by law, [30] it also provides that every person has the right to be heard by the institutions of the European Union before any individual measure which could affect him or her adversely is taken and the right to have access to his or her file. [31]

28. The right to consult the file is another tool at the service of the right of defence. [32] It is not an end in itself. [33] The formal guarantees of the judicial or administrative procedure are explained according to that aim, which is simply the effective protection of the rights and legitimate interests of everyone. When there is a procedural

24 — On the rights of defence in proceedings in competition matters, see K. Lenaerts and I. Maselis, 'Le justiciable face à la Commission européenne dans les procédures de constatation d'infraction aux articles 81 and 82 EC', published in *Journal des tribunaux*, No 5973 (2000), pp. 496 to 504. Also of interest is the study by L. Goossens, 'Concurrence et droits de la défense: la phase administrative devant la Commission', in *Journal des tribunaux, Droit européen*, No 52 (1998), pp. 169 to 175, and No 53 (1998), pp. 200 to 204. Also of interest, in spite of its relative age, is the work by O. Due, former President of the Court of Justice, 'Le respect des droits de la défense dans le droit administratif communautaire', in *Cahiers de Droit Européen*, Nos 1 and 2 (1987), pp. 383 to 396.

25 — OJ 1998 L 354, p. 18. This regulation replaced Regulation No 99/63 EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), in force on the dates on which the administrative procedure was conducted in the present case.

26 — See in particular, and among the most recent decisions, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75 et seq.

27 — The judgment now under appeal is itself an example (see paragraphs 142 to 144 and 240).

28 — See the Engel and others v. the Netherlands judgment of 8 June 1976 (Series A no. 22) for military disciplinary proceedings and the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981 for disciplinary proceedings within a medical practitioners' professional body.

29 — OJ 2000 C 364, p. 1.

30 — See the second paragraph of Article 47 and Article 48(2).

31 — Article 41(2), first and second indents.

32 — As are the right to be heard, the right to be informed of the charge, the right to use the means of evidence relevant to the defence or, as the case may be, the right to legal assistance.

33 — See the Opinion of Advocate General Mischo of 25 October 2001 in Cases C-244/99 P and C-251/99 P, points 331 and 125 respectively, in which judgment was delivered on 15 October 2002, *PVC II* (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM and Others* v *Commission* [2002] ECR I-8375).

defect, when formalities are not correctly observed, there are legal consequences if the rights of defence are undermined. In other words, the concept of being unable to mount a defence is substantive, so that no matter how many defects there may be in the procedure, they are irrelevant if, in spite of everything, the person concerned has enjoyed the appropriate rights of defence.

29. However, the instrumental nature of the right of access to the file entails a further consequence. Even where access has not been properly granted, or where there have been defects in the way in which it was granted, and the person concerned has therefore been less able to defend himself, the decision subsequently adopted may be annulled only if it is found that, if the proper procedural routes had been scrupulously followed, the outcome could have been more advantageous for the person concerned or if, precisely because of the procedural defect, it is impossible to ascertain whether the decision would have been different. In each case the final decision must be annulled and, if appropriate, the procedure repeated in order to put it right.

30. In short, defects in the procedure do not have a life of their own in isolation from the substance of the case. If a decision taken in the wake of a defective procedure is annulled because, owing to the defects in the procedure leading to its adoption, it is wrong in substance, the decision is annulled because it is incorrect in substance, not because of the procedural defect. The defect in form assumes an independent existence only when, because it occurred, it is impossible to form an opinion about the decision which was adopted.

31. The foregoing considerations explain the measures of organisation of procedure ordered by the Court of First Instance.

32. As a result of the breach of procedural requirements consisting in the Commission's refusal to grant access to all the exculpatory documents in the file (complained of by the applicant undertakings and associations and found to exist by the Court of First Instance), it was necessary to analyse the impact of the procedural defect on the rights of defence. To that end, it was necessary to ascertain which exculpatory material had been withheld from the applicant undertakings and associations and to obtain their view on the matter. Upon seeing that material, the Court of First Instance considered the extent to which the Decision would have been different and more favourable to the applicants if that material could have been consulted and relied upon before the Commission.

33. Thus the Court of First Instance did not assume the role of the Commission or improperly occupy its position. On the

contrary, it confined itself, within the limits of its competence, to exercising judicial power to perfection, reviewing the legality of the administrative procedure before the Commission; and, adopting that approach, the Court of First Instance, which looks back to events which happened in the past, must express its views using all the material at its disposal in the present, which affords it richer resources and increases its prospects of success. [34]

34. The approach taken by the Court of First Instance does not reveal any breach of the case-law of the Court of Justice. In *Hercules Chemicals* v *Commission*, which I have already cited, it was held that when there has been an infringement of the rights of defence, it cannot be remedied by belated access to the documents in the file which allows the undertakings affected to derive pleas and arguments in support of the forms of order they are seeking, since it does not put them back into the situation they would have been in if they had been able to rely on those documents in presenting their written and oral observations to the Commission. [35]

35. The Court of First Instance did not purport to remedy *ex post facto* a breach of the rights of defence which had already taken place, but confined itself, initially, to ascertaining whether there had been such a breach. [36] Where it considered that there had, it annulled the Decision. [37] On the other hand, where an applicant had not been deprived of its rights of defence, it held that the procedural defect committed while the administrative file was being constituted was, all in all, irrelevant.

36. That, moreover, is the import of *Hercules Chemicals* v *Commission*. It is apparent upon reading paragraph 80 of that judgment that the deciding factor was not the procedural defect in itself but its effect on the rights of the defence, which may be zero if the undertaking concerned does not show that the fact that it was unable to consult certain exculpatory evidence deprived it of the means of convincing the Commission of its innocence.

C — The appraisal of the exculpatory evidence

37. In reality, the main part of Aalborg's complaint concerning this aspect amounts

34 — Like the historian, the judge reconstructs the past and, in doing so, must sift through evidence and testimony in order to reproduce the facts as and how they occurred. Neither the judge nor the historian can place himself in the position of the subjects of the investigation: they must step outside it. On the relations between law and history, see C. Ginzburg, *The Judge and the Historian (Marginal notes on the Sofri trial)*, Verso, London, 1999.

35 — Paragraphs 78 and 79.

36 — This is the test recently applied by the Court of Justice in *PVC II*, cited above, paragraph 315 et seq., notably paragraph 325.

37 — As it did in the case of Cedest SA (Case T-38/95): see paragraphs 2211 and 2286 of the judgment.

to a mere disagreement with the Court of First Instance's appraisal of the documents which Aalborg indicated when they were communicated to it.

38. It is sufficient to read the pages of the application in which that plea in law is set out [38] to confirm that the appellant is requesting the Court of Justice to intervene in an area which is prohibited to it as an appellate court. The establishment of the facts falls within the jurisdiction of the Court of First Instance, whose task it is to assess the available evidence. The Court of Justice can intervene in that regard only if, in the production of evidence, a provision or a general principle of Community law has been infringed or if, when the evidence was assessed, there was an infringement of the rules governing the burden of proof and the appraisal of evidence owing to the latter being illogical or arbitrary and therefore such as to distort the evidence. The Court of Justice can only repair an infringement of law by the Court of First Instance and never establish the facts, without prejudice to its jurisdiction to review their legal classification. [39]

39. The considerations which, in the light of the documents to which the Commission denied access during the administrative procedure, Aalborg puts forward concerning the subject-matter of the Head Delegates' meeting of 14 January 1983 and of the other two meetings held in 1984, and also concerning the conditions on which its representative attended the meeting, also of Head Delegates, held in Baden-Baden on 9 September 1986, are the expression of a different way of approaching the facts which in some way show an arbitrary or illogical assessment of the evidence on the part of the Court of First Instance.

40. Applying the judicial test set out at paragraph 241, the contested judgment states that the documents disclosed were not such as to alter the version of the facts established by the Commission in the Decision. The Court of First Instance held that Mr Toscano's notes and the other documents referred to by Aalborg confirmed that questions of importance to the cement sector, relating to dumping and State aid, were raised at the meetings but that they did not deny that anti-competitive agreements were adopted, a point which the Commission inferred from direct documentary evidence. [40] As may be seen, the discussion which Aalborg seeks to provoke

38 — See part I.4, points 1, 2 and 3 of the application (pp. 18 to 37 of the French translation), the content of which is summarised at points 13 to 17 of this opinion.

39 — See point 27 of my Opinion of 3 May 2001 in Case C-315/99 P *Ismeri* v *Court of Auditors* [2001] ECR I-5281 and the judgments cited at note 17 of that Opinion, also paragraph 19 of the judgment in *Ismeri* v *Court of Auditors*. Among the more recent dicta of the Court of Justice, see Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78.

40 — Those indicated in recitals 18, 19 and 45 of the Decision. In the judgment, see paragraph 1112 et seq. (in particular paragraphs 1130, 1131 and 1132), concerning Mr Toscano's notes, and paragraph 1211, read with paragraph 1183, concerning the other documents.

does not go beyond the assessment of the evidence or the establishment of the facts of the case.

41. The same applies to the documents relating to the Baden-Baden meeting, which in Aalborg's submission show what its representative's intention was in attending the meeting and make clear that, if it had been able to use them during the administrative procedure, there would have been a chance, however small, of convincing the Commission that it did not participate in the Cembureau Task Force. By this approach Aalborg discusses the Court of First Instance's assessment, at paragraphs 2888 to 2898 of the judgment, of the significance of such documents and of the impact on the outcome of the proceedings of the observations which, where appropriate, it would have been able to make during the administrative procedure. As I have already observed, this question does not fall to be discussed in an appeal. The judicial task of identifying the underlying facts of a dispute extends both to the establishment of the facts obtained directly from the evidence adduced and to the inferences which may be drawn from the interrelation between the different forms of evidence.

42. In other words, review of the application of the procedural rule used by the Court of First Instance is, as Aalborg points out, a strictly legal operation which may be examined in an appeal. However, the establishment of the assumptions of fact necessary for its application fall within the exclusive domain of the Court of First Instance, unless, as I have already observed, in carrying out that task it reverses the burden of proof or makes deductions which are illogical or arbitrary. However, the application does not reveal any infringement of that nature, so that the complaint amounts to a mere disagreement concerning the events forming the basis of the dispute.

43. This plea — the first plea — should therefore be rejected as inadmissible and unfounded.

2 — *The imputation of acts carried out by a different legal person (third plea in law)*

A — Arguments of the parties

44. The Court of First Instance approved the Decision of the Commission which attributed to Aalborg, a company formed on 26 June 1990 which, with effect from 1 January of that year, succeeded to the cement manufacturer Aktieselskabet Aalborg Portland-Cement Fabrik ('the former cement manufacturer'), responsibility for the agreement adopted on 14 January 1983, which was applied until 31 December 1988. In Aalborg's submission, the Court of First Instance made an error of law, because the material conditions for a transfer of responsibility

were not satisfied and, furthermore, the Court failed to respond to the complaint alleging a failure to state reasons in the Decision for transferring responsibility to it.

(a) The absence of the conditions for a transfer of liability

45. At paragraph 1336 of the judgment, the Court of First Instance states that Aalborg and the former cement manufacturer 'constitute the same economic entity'. The appellant reiterates that its formation and the acquisition of that undertaking were part of a reorganisation of the group to which it belongs. In reality it was a different legal entity, Blue Circle, which, holding 50% of the shares in Aalborg at the time when Aalborg became the owner of the former cement manufacturer, acquired half of its activities. Therefore, in the appellant's submission, the Court of First Instance erred in interpreting the facts and, furthermore, made an error of law.

46. The second error originates in the fact that, in accordance with the case-law,[41] in order for there to be a transfer of responsibility, it is necessary that the undertaking to which it was attributed no longer exists and that another has acquired its entire human and physical resources. Aalborg maintains that in the present case the former cement manufacturer has not ceased to exist, so that responsibility for the infringements found to have been committed cannot be transferred to Aalborg.

47. The Commission states that, no matter how the judgment is interpreted, the decisive fact is that it was always the same economic entity that was involved and, whatever the structure of the ownership of the former cement manufacturer, all the activities in the sector were transferred to Aalborg.

48. It contends that the continuity of the original company in the form of a holding company, of which it is a joint owner, cannot have the consequence that responsibility is attributed to the recently-formed entity. The decisive factor is that, in economic terms, it is the same company, since all the material and human resources which participated in the infringement were available to Aalborg on 1 January 1990.

49. In its reply, Aalborg maintains that it is impossible to speak of the same legal entity or the same economic entity when a third undertaking acquires 50% of the capital of the new company. The Commission replies that the economic entity is the same when all the means of production used in the manufacture of cement are transferred

41 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 74 to 88; Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9; and Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 145.

from one undertaking (the former cement manufacturer) to another (the appellant) which continues the industrial activity. The participation of a new undertaking (Blue Circle), which makes a capital investment, does not alter the fact that so far as production is concerned it is the same economic entity, a fundamental aspect for the purposes of the rules on competition.

(b) Lack of reasoning in the Decision concerning the person responsible

50. The judgment under appeal did not annul the Commission Decision for failing to state reasons when determining the person responsible for the infringement and therefore, in Aalborg's opinion, it must be set aside. At paragraph 1336 of the judgment the Court of First Instance states that in its reply to the Statement of Objections, Aalborg did not say that it could not be held responsible for the activities of the former cement manufacturer. In those circumstances, the Commission was not required to state in the Decision the reasons why Aalborg was deemed responsible for the activities of the former cement manufacturer. That criterion of passivity applied by the Court of First Instance must, in the appellant's submission, be rejected in its entirety as contrary to fundamental rights.

51. The Commission contends that there is no ground for accepting the appellant's argument on this point. The Statement of Objections shows that the infringements in question continued after 1990, so that it could not be required to provide detailed reasons for a fact which is of relevance to the present case. It further states that the Court of First Instance did not commit a procedural irregularity when it took into account the fact that in its reply to the Statement of Objections Aalborg acknowledged that it did not dispute the possibility that it would be held responsible for the acts of the former cement manufacturer.

52. In its reply, the appellant states that it had no reason to correct the reference to the addressee of the objections, since the Statement of Objections was based on a different theory from that subsequently accepted in the Decision, namely the fact that the cartel still existed. However, that approach was altered in the Decision, when the infringement was identified with reference to specific meetings and periods, so that the question of the addressee became essential. Aalborg could not and cannot be held responsible for the cartel during the period with which the Decision, unlike the Statement of Objections, connects the infringement, since at that time it had not even been formed.

53. In its rejoinder, the Commission contends that the appellant cannot complain,

without reason, of a difference between the Statement of Objections and the Decision. Both documents are based on the idea that the Cembureau agreement was still in existence, as may be seen from recital 65, paragraph 4, and from Article 1 read with Article 8 of the Decision. Consequently, the Commission was not required, when adopting its decision, to examine the possible consequences of the transfer of manufacturing activities from one undertaking to another.

B — The existence of reasoning

54. This complaint by Aalborg may be divided into two parts, one procedural and the other substantive. The first refers to the failure to state reasons when determining the legal person responsible.

55. From that aspect, the plea is inadmissible, since it is formulated not as a criticism of the judgment but as a reiteration of the argument set out in the application, which was answered at paragraph 1336 of the judgment. For the remainder, the defects in the reasoning on which the Decision is based do not affect the judgment under appeal, for the simple reason that the Court of First Instance states that the lacuna is irrelevant.

56. The complaint is also unfounded. The purpose of the statement of reasons which, under Article 253 EC, must accompany acts and provisions adopted by the Community institutions is to enable the persons concerned to ascertain the reasons for which a measure was taken and the competent court to have the specific facts so that it can exercise its power of review.[42] Consequently, that provision does not place the Community authority under a wider duty to state the reasons which support the decision or require that all the elements of fact and of law in the file are explained,[43] but only those relevant according to the circumstances of the case, the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.[44]

57. In the Statement of Objections the Commission set out certain of the facts in respect of which, no matter who was the actual author — the former cement manufacturer or Aalborg —, it attributed responsibility to Aalborg, which, in its reply to the Statement of Objections, did not formulate any consideration on the matter. Thus, the Commission was not required to explain a

42 — See, among the most recent authorities, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 65, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 28.

43 — See Case C-138/95 *Affish* [1997] ECR I-4315, paragraph 63, and *Italy* v *Council*, cited in the preceding footnote, paragraph 27.

44 — See *Italy and Sardegna Lines* v *Commission*, paragraph 65, and *Italy* v *Council*, paragraph 29.

finding which Aalborg itself did not question during the administrative procedure, since, as the Court of First Instance points out, [45] at no time did it claim that it could not be held responsible for the activities of its predecessor.

58. A separate question, which has no connection with the alleged lack of reasoning, [46] is whether, taking into account the order of the events, as set out in the Decision, it was appropriate to hold Aalborg responsible for the anti-competitive conduct of the former cement manufacturer. That is the second complaint raised in this plea in law.

C — An unwarranted transfer of responsibility

59. On this point, Aalborg begins by disputing the finding made at paragraphs 1335 and 1336 of the contested judgment that it and the former cement manufacturer 'constituted one and the same economic entity for the purposes of applying Article 85(1) of the Treaty'.

60. The fact is that, as this plea in law essentially states — according to the application —, the applicant was formed on 26 June 1990 and, with retroactive effect from 1 January of that year, it acquired the plant of the former cement manufacturer, which contributed the assets and liabilities corresponding to that activity and continued to exist as a holding company, owning 50% of the new company. At the material time, the United Kingdom group Blue Circle [47] owned the remaining 50% of Aalborg's shares.

61. If by the expression 'one and the same economic entity' the Court of First Instance wished to reflect the fact that Aalborg continued the activity of the former cement manufacturer, whose human and material resources were transferred to Aalborg, then to my mind its assessment is correct. But if, on the other hand, it means that in reality both are the same organisation or, put more graphically, 'the same person in different clothes', the Court of First Instance is mistaken, because the fact that the United Kingdom group Blue Circle owns half of the appellant's share capital cannot be ignored.

45 — See paragraph 1336 of the judgment.

46 — The fact that Aalborg did not raise the issue during the administrative procedure does not prevent it from raising it during the judicial procedure. There is no limit to the arguments which, in defence of their rights, the applicants may rely on before the Court of First Instance. They cannot make claims which they did not put forward during the administrative procedure (in the present case, that it was inappropriate to deliver a decision imposing sanctions), but in order to provide grounds for those claims they may rely on whatever legal grounds they deem appropriate, even though they have not used them before.

47 — 'Blue Circle Industries Plc... is a group which controls a number of companies throughout the world engaged in the production of cement and ready-to-use concrete and the marketing and transport of cement and clinker' (Decision, recital 5, paragraph 14). Clinker is a standard product from which all types of cement are derived; it is obtained by burning a mixture of calcareous materials containing chalk and lime, with argillaceous products such as shales, slate and sand (see the Decision, recital 6, paragraphs 1 and 2).

62. The decisive fact is that Aalborg continued the cement-manufacturing activities of its predecessor. The determination of the legal consequences of that fact, for the purpose of determining responsibility for practices contrary to free competition, forms the nucleus of this plea in law.

63. In providing its answer, the Court of Justice must begin by setting out a general principle of law, developed in order to limit the exercise of *ius puniendi* by the public authorities: the principle that punishment should only be applied to the offender, which complements the principle of culpability, whose first and most important manifestation is that only the perpetrator can be charged in respect of unlawful conduct.

64. That principle, like all the safeguards derived from criminal law, requires great caution when it is applied to administrative proceedings, since, when it comes to imposing penalties or making compensation for unlawful conduct, a system of objective responsibility, or strict responsibility, is unacceptable.

65. Although, in the case of legal persons, the principle must be applied in a different way, there is no reason to abolish the subjective element of guilt, which none the less undergoes a process of objectivisation. In collective entities there is no volitive element in the strict sense, but a legal fiction [48] allows infringements which are the consequence of their conduct to be attributed to them. There are no acts of the will, but there is the capacity to infringe the rules to which they are subject. The corollary is clear: a legal person cannot be imputed with an infringement which it has not carried out.

66. It happens, however, that when acting in a sector such as protection of competition in the internal market, it is necessary to face up to complicated conduct, manifested in agile behaviour by complex organisational structures. That reality and the principle of effectiveness, which demands an attentive defence of competition in the common market, form the basis of the case-law of the Court of Justice to which Aalborg refers in its appeal.

67. It emerges from that case-law that the anti-competitive conduct of one company may be attributed to another, which assumes responsibility, if two conditions are satisfied: first, that the new company pursues the activity of the author of the facts, to the point at which there is

48 — Legal persons are also a fiction.

'economic continuity' between the two; [49] second, that the old company has ceased to have legal existence. [50] The aim is to ensure that 'financial engineering' operations do not allow conduct which should be punished to go unpunished, thus frustrating the rules on competition.

68. Those requirements mean that the public interest of the Community is protected, since there is always one person against whom the power to impose penalties may be exercised: first, as a general rule, the perpetrator; and second, by way of exception where that person has ceased to exist, the person who has succeeded it and, taking over the material and personal resources of the business, pursues and continues the economic activity.

69. In the present case the second of those requirements is not satisfied. The entity which committed the facts in respect of which the proceedings were brought, the former cement manufacturer, continued to exist as a holding company, owning 50% of Aalborg's share capital. Consequently, Aalborg could not be held responsible for the conduct of that company and, in particular, for the infringement referred to in Article 1, which, as the Court of First Instance itself states, came to an end on 31 December 1988, thus before the date (1 January 1990) on which Aalborg took over the activity of the former cement manufacturer.

70. To my mind, the test applied by the Court of First Instance reveals a twofold error. First, it contradicts the case-law of the Court of Justice, which has held that 'it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking'. [51]

71. Second, because the 'one and the same economic entity' test, as the key to the transfer of responsibility from the former cement manufacturer to Aalborg, is based on an objective concept which is open to challenge. Irrespective of the mistake in the assertion, since a third party (Blue Circle) holds 50% of the appellant's share capital, fixing the objective in the activity and not in the person carrying it out, irrespective of

49 — See *Suiker Unie and Others* v *Commission*, paragraph 84, *CRAM and Rheinzink* v *Commission*, paragraph 9, and *Commission* v *Anic*, paragraph 145.

50 — *Commission* v *Anic*, paragraph 145. In that judgment the Court of Justice rejected the argument put forward, in order to avoid responsibility, by a company on which a fine was imposed, that it had transferred to another company the activity in which the infringement was committed. The Court of Justice held that 'the "economic continuity" test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed'.

51 — Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37.

the fact that the latter person exists and can answer for its acts, is tantamount to ignoring the principle of culpability and the principle that punishment should only be applied to the offender.

72. In reality, by taking that approach the Court of First Instance proposes a radical change: in exercising the power to impose penalties it would be necessary to trace the business activity, and to punish whoever is carrying it out at the time when the penalty is imposed; responsibility must remain linked with the business, with the activity, and not with the natural or legal person carrying it out. That approach, thus reduced to its basic elements, of ignoring the fact that the author of the conduct still exists and can answer for it, is unacceptable, since it disregards the abovementioned principles.

73. In accordance with the foregoing reasoning, I consider that this plea in law should be upheld and the contested judgment set aside in so far as the Court of First Instance dismissed Aalborg's application and did not annul the Decision.

74. I must make clear, however, that the scope of the judgment of the Court of Justice most go further than is apparently indicated by the first lines of the grounds of this plea in law, where Aalborg refers only to the Head Delegates' meeting of 14 January 1983 and to the infringement referred to at Article 1 of the Decision. However, it concludes the plea by requesting that the judgment under appeal be set aside in so far as, upholding the Decision on that point, it holds Aalborg responsible for the infringements found to have been committed. That approach makes sense because all the infringements referred to above were committed, carried out and completed before 1 January 1990, and the same reasons which in this case justify the annulment of Article 1 of the Decision require that the remaining provisions imposing sanctions also be annulled.

75. A solution such as the one I propose does not grant anything which the appellant has not sought, since by way of its first and principal claim Aalborg seeks annulment of the entire Decision, directly at first instance and indirectly on appeal, where it seeks to have the contested judgment set aside. Furthermore, while it is true that before the Court of First Instance Aalborg raised the question only in relation to the infringement found at Article 1, the fact is that it did raise the question, so that in the appeal, so far as the remaining articles are concerned, it is not a new plea which must be rejected.

3 — *Breach of the principles governing the imposition of fines (fourth plea in law)*

A — Arguments of the parties

76. Should the third plea in law be upheld, there would be no need to examine the

remaining pleas. However, in case the Court of Justice does not accept my suggestion, I shall proceed with my examination of the appeal and propose the answers which I consider to be in accordance with the law.

77. As regards the fine imposed on it, the appellant formulates three complaints: (a) the automatic method of calculating the fines was inappropriate, since it prevents the individual part played in the agreement by each of the companies and associations from being taken into account; (b) no mitigating circumstances were taken into account, in particular the 'peripheral nature' of the links between Aalborg and the Cembureau agreement; and, finally, (c) the Court of First Instance approved the test which the Commission used in order to distinguish between direct participants and indirect participants for the purpose of setting the fines.

78. Aalborg maintains that the Court of First Instance infringed the principles of proportionality and equal treatment by failing to appreciate the limited and passive part which it played in the Cembureau agreement or the zero impact which its participation had on the market. The Court of Justice should therefore annul the fine in its entirety or, in the alternative, in part only.

79. In the appellant's submission, the principle of proportionality was ignored by the application of a mechanical method of setting the fines, [52] in which there was no examination of the individual role of each undertaking.

80. The appellant further submits that the principle of equal treatment has been infringed because, notwithstanding its passive participation (it was held responsible because it did not distance itself from the agreement), the Court of First Instance decided to apply to it a penalty of 4% of its turnover, like the undertakings whose infringements were regarded as the most serious. On the other hand, the fines imposed on participants who were more active in the agreement but who, by chance, were not present at the meeting of 14 January 1983, were calculated at 2.8% of relevant turnover. Aalborg maintains that the Court of First Instance did not take into account essential features of the degree of culpability such as taking the initiative, making recommendations, actively restricting competition in the market and other matters with which the case-law normally associates the importance and seriousness of the infringement.

81. In its response, the Commission contends that, as the appellant itself recognises, examination by the Court of Justice of the amount of the fine must be limited. Therefore, this plea must be rejected as inadmissible in its entirety, as it seeks a reappraisal of the evidence and the factual circum-

52 — The Commission drew a distinction between 'direct' participants, namely those present at the meeting of 14 January 1983, and 'indirect' participants. The former were fined 4% of their 1992 turnover in the market for grey cement and the latter 2.8% of their corresponding turnover (see paragraphs 4731 and 4815 of the judgment).

stances. It further states that in any event the fine imposed on Aalborg was not the result of a mechanical calculation method. It is wholly consistent with the principles relied on in the appeal that, in order to determine responsibility in the context of a constellation of facts relating to a large number of undertakings, the companies should be grouped according to their participation as revealed by the evidence in the file. The groups thus established are the consequence of the application of the principle of equality.

82. Furthermore, in Recital 65, paragraph 9, of the Decision the Commission duly described the way in which each undertaking had participated in the infringements. Finally, at paragraphs 4785 and 4804 to 4989 of the judgment under appeal, the Court of First Instance examined the way in which the Commission determined the degree of culpability of the undertakings and the gravity of the infringements.

B — The criteria used by the Commission in imposing the fines

83. For the purpose of analysing these complaints, it is appropriate to refer to the structure of the body of the Decision and of the criteria used in setting the fines.

84. In the Decision, two distinct markets are envisaged, the market in grey cement and the market in white cement. As regards the first of these, it imputes the adoption of the Cembureau agreement, whereby agreement was reached on non-transhipment to home markets and the regulation of cement transfers from one country to another. Articles 2 to 6 cover bilateral or multilateral conduct designed to implement or facilitate the implementation of that 'single and continuous' agreement or to remove potential obstacles to its effectiveness, such as, for example, the so-called 'Greek threat'. Article 7 refers to anti-competitive conduct on the market in white cement.

85. The Commission imposed separate penalties for infringements relating to each market. [53]

86. As regards the market in grey cement, the only market in which anti-competitive conduct was imputed to Aalborg, the Commission decided not to penalise each individual type of conduct but to impose an overall fine on each undertaking, since the Cembureau agreement and all the measures

53 — See recital 65, paragraph 7, of the Decision.

implementing it were connected.[54] That approach is legitimate and is based on the Commission's power to adopt a single decision covering several infringements.[55]

87. The Commission further considered that all the undertakings and associations to which the Decision was addressed acceded to the Cembureau agreement and it set out the evidence used to confirm the participation of each of them. Thus, as regards Aalborg, it concluded that it acceded, as a member of Cembureau, to the agreement or principle of not transhipping to home markets at the time when it was agreed and approved and that it also participated in the measures and arrangements agreed to supplement it and/or assist in its application.[56]

88. 'However, within this general approach, [the Commission took] account of the role played by each undertaking in the conclusion of the... agreement', or in the measures and arrangements agreed to supplement and implement it. It also considered the duration of both.[57]

89. In accordance with the foregoing, the Commission identified two groups of undertakings and associations: first, those involved in the Cembureau agreement and second, the other undertakings, which were less involved and whose responsibility was therefore lesser.[58]

90. Within the former category, the Commission distinguished three subgroups: (1) that consisting of the undertakings and associations which, as members of Cembureau, had participated directly in the adoption of the agreement on non-transhipment to home markets and in measures directly protecting those markets (the Commission included Aalborg in this group); (2) a second subgroup composed of the companies which, through their most senior staff, had performed the function of Head Delegates within Cembureau either at the time when the agreement was concluded or during the period of its implementation; and (3) the final subgroup, made up of the

54 — See recital 65, paragraph 8, first indent, of the Decision.

55 — See *Suiker Unie and Others* v *Commission*, paragraph 111. On the determination of the amount of fines in complex infringements, reference should be made to E. David, 'La détermination du montant des amendes sanctionnant les infractions complexes: régime commun ou régime particulier?', *Revue trimestrielle de droit européen*, No 36(3), July-September 2000, pp. 511 to 545.

56 — See the Decision, recital 65, paragraph 3(a), and paragraph 9(a), first indent.

57 — Recital 65, paragraph 9, first subparagraph, of the Decision. See also paragraph 4950 of the judgment. The Commission set 'an aggregate fine on each undertaking in respect of its participation in the Cembureau agreement or principle and in the measures implementing it' (recital 65, paragraph 8, second indent).

58 — Recital 65, paragraph 9(a) and (b), of the Decision.

companies which had taken part in measures implementing the agreement and designed to protect home markets. [59]

91. In the second category, the Commission also distinguished between three levels of responsibility: (1) the undertakings which had participated only in the measures implementing the Cembureau agreement that were designed to channel production surpluses to non-member countries; (2) those which, although they had taken part in the measures designed directly to protect home markets, had tried to avoid implementing the Cembureau principle; and (3) Ciments luxembourgeois, which, although a direct member of Cembureau and although having participated in the Head Delegates' meetings at which the Cembureau agreement or principle was adopted, had not put any implementing measure into effect. [60]

92. The Commission fined the undertakings and associations in the first category 4% of their 1992 turnover in the market in grey cement. Those in the second category were fined 2.8% of their 1992 turnover in the same market. [61]

93. The Court of First Instance upheld Aalborg's application in part because, in calculating the fine which it imposed on it, the Commission considered that it had participated in the Cembureau cartel for 122 months, whereas the evidence before the Court showed that the actual duration of its participation was 71.5 months. [62] Then, taking into account that figure and applying the method of calculation used by the Commission, the Court of First Instance reduced the amount of the fine in proportion. [63]

94. It is this approach, whereby the Court of First Instance approved the distinction between direct participants and indirect participants, that in the appellant's submission constitutes an infringement of Article 15(2) of Regulation No 17 and a breach of the principles of equal treatment and proportionality in the imposition of the fines.

95. Couched in those terms, this plea is inadmissible in so far as it merely reproduces the very arguments set out in the application, to which the Court of First Instance responded at paragraphs 4965 to 4969 of the contested judgment. Aalborg says nothing new in this plea, nothing which was not discussed and determined in the judicial proceedings. It exploits the fact that the Court of First Instance applies

59 — Recital 65, paragraph 9(a), of the Decision.

60 — Recital 65, paragraph 9(b), of the Decision.

61 — See the letter sent on 7 July 1998 to the Court of First Instance by the Commission, in particular paragraphs 2 and 3. See also paragraphs 4738, 4957 and 4963 of the judgment under appeal.

62 — See paragraphs 4807 to 4814 of the judgment, specifically the second indent of paragraph 4814.

63 — See paragraph 4815 and the seventh indent of paragraph 29 of the operative part of the judgment under appeal.

the same criterion in setting the fines as the Commission did to reproduce a discussion which in reality is a criticism not of the judgment under appeal but of the administrative decision imposing the fines.

C — Compliance with the principles of proportionality and equal treatment

96. I consider at the outset that this plea in law is also unfounded.

97. The penalty has a twofold purpose: it is meant to be punitive and at the same time deterrent. It is intended to penalise conduct and to discourage those responsible, and also any other prospective offenders, from engaging in anti-competitive conduct. It must therefore be suitable for those purposes, while striking a proper balance so that the fine punishes the conduct which it penalises and at the same time is exemplary.

98. From the first aspect, the retributive aspect, as a corollary of the principle that the punishment must be applied solely to the offender, the penalty must be proportionate to the gravity of the infringement and to the further circumstances, both subjective and objective, which are present in each case. For that reason, the final sentence of Article 15(2) of Regulation No 17 provides that in fixing the amount of the fine, regard is to be had both to the gravity and also, if appropriate, to the duration of the infringement.

99. The Court of Justice has held that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and has further stated that no binding or exhaustive list of criteria has been drawn up. [64]

100. To my mind, there are three criteria central to this assessment: the nature of the infringement, the impact on competition and the geographical scope of the market concerned, and each of these must be considered from an objective aspect, that of the infringement itself, and from a subjective aspect, that of the undertaking responsible. [65]

64 — See Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; see also order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

65 — In the work cited above, E. David states that 'la gravité s'apprécie selon trois critères: la nature de l'infraction, son impact sur le marché lorsqu'il est mesurable et le marché géographique et à deux niveaux: ceux de l'infraction et de l'entreprise' (p. 552).

101. It is thus necessary to assess the content of the anti-competitive conduct, the extent of the market affected and, more specifically, the harm suffered by the economy; and for that purpose data such as the duration of the prohibited practice, the material nature of the market in question and the number and intensity of the implementing measures adopted are relevant.

102. At a subjective level, that of the undertakings responsible, the relevant circumstances include the relative size or market quota in the economic sector concerned and also whether the anti-competitive conduct was repeated.

103. The requirement that the penalty be proportionate to the gravity of the infringement has the consequence that when an infringement has been committed by a number of persons,[66] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each.[67] That is a requirement of the principle of equal treatment, which demands that the fine be the same for all undertakings in the same situation and prevents those in a different situation from being punished with a similar penalty.

66 — By definition, infringements of Article 81 EC assume collective conduct.

67 — See *Suiker Unie and Others* v *Commission*, cited above, paragraph 623, and *Hercules Chemicals* v *Commission*, cited above, paragraph 110.

104. The Court of First Instance adopted that approach in approving and applying the criteria used by the Commission in setting the fines. Far from corresponding to an arbitrary classification of the companies and associations responsible, those criteria are the result of a detailed analysis of the participation and conduct of each of them. That is clear from paragraphs 3, 5 and 9 of recital 65 to the Decision, which, it must not be forgotten, contains an extensive first part, in which the facts are set out and the roles played by the various entities and associations concerned are described.

105. All the practices, which of necessity were not the same in each case, pursued the same anti-competitive objective, and for that reason, for the purpose of imposing penalties, they could be grouped as regards gravity in one or more categories according to the impact on the market and the effect on free competition.

106. There is nothing unlawful in that approach, since, as I have already said, the gravity of an infringement may be assessed regard being had to the harm which the conduct has caused to the economy. As the Court of First Instance stated at paragraph 4966 of the contested judgment, each of the undertakings which participated in the Cembureau agreement 'sought to ensure non-transhipment to home markets by means of the number of measures deemed necessary in the light, in particular, of its commercial interests and the geographical situation of its natural

market. The fact of having taken part, in the light of those factors, in fewer unlawful measures does not consequently reflect a lesser degree of adhesion to the Cembureau agreement and, therefore, a lesser responsibility in the infringement'. The position was the same as regards the damage to competition.

107. Thus, Aalborg's suggestion that other undertakings which were also included in the group bearing greater responsibility participated in the cartel to a more intensive degree is misplaced, even if its involvement were regarded not as intentional but as negligent, because, for the purposes of competition, infringements committed carelessly are no less serious than those committed deliberately. The Court of First Instance was not required to ascertain, in order to determine the gravity of the infringement, whether it had been committed on purpose or negligently. [68] In competition matters, the degree of culpability determines the penalty but is not a criterion for the setting of the fine. [69]

108. Nor is there a breach of the principle of equal treatment if the yardstick employed is the companies in the group bearing 'less responsibility'. The reasons stated by the Commission, and approved by the Court of First Instance, [70] for distinguishing the two categories of undertakings satisfy an objective and reasonable criterion, as does the effect of the conduct on competition and, in particular, on the partitioning of home markets. Thus, the practices referred to in Articles 2, 3 and 4 of the Decision, in so far as they were aimed at the direct protection of those markets, were deemed most serious, while those described in Articles 5 and 6, which 'had less direct effects', [71] were classified as less serious.

109. Consequently, if the criteria used by the Commission are consistent with the principles governing the imposition of fines, the reduction which the Court of First Instance made by following the same rules also satisfied them.

68 — See order in *SPO and Others* v *Commission*, cited above, paragraphs 55 and 57.

69 — According to the case-law of the Court of Justice, Article 15(2) of Regulation No 17 deals with two distinct matters. First, it lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); these include the condition concerning the intentional or negligent nature of the infringement (first subparagraph). Secondly, it governs determination of the amount of the fine, which depends on the gravity and duration of the infringement (order in *SPO and Others* v *Commission*, cited above, paragraph 53, and judgment in *Ferriere Nord* v *Commission*, also cited above, paragraph 32).

70 — See recital 65, paragraph 9, of the Decision and paragraph 4968 of the judgment.

71 — Paragraph 4968, *in fine*, of the contested judgment.

110. Having regard to the foregoing considerations, this plea in law must be rejected as inadmissible and unfounded.

4 — *The infringement was time-barred (fifth plea in law)*

A — Arguments of the parties

111. Before the Court of First Instance, Aalborg stated that the administrative procedure commenced with notification of the Statement of Objections, on 27 November 1991. Before that date, the Commission did not send it any request for information or carry out any investigations at its premises. Consequently, under Articles 1 and 2 of Regulation No 2988/74 concerning limitation periods,[72] no penalty can be imposed on it, since the last evidence of its participation in the illegal acts refers to 9 September 1986, when its representative attended the meeting in Baden-Baden, i.e. more than five years before it received the Statement of Objections. That argument was rejected in paragraph 4797 of the judgment under appeal, in which it was held that the appellant had participated continuously from 14 January 1983 to 31 December 1988 in the infringement in respect of which fines were imposed in Article 9 of the Decision, so that, when the Statement of Objections was notified to it, the power of the Commission to impose a fine was not time-barred.

112. On this point, Aalborg believes that the contested judgment should be set aside on three grounds: first, because it incorrectly holds that the agreement lasted until 31 December 1988, classifying the annual exchanges of information as measures implementing the agreement referred to in Article 1 of the Decision; second, because, also erroneously, it attributes responsibility for the infringement referred to in Article 4(1) of the Decision, namely belonging to the Cembureau Task Force, beyond 9 September 1986 and, thus, also for the conduct defined in Article 4(3)(a), designed to withdraw Calcestruzzi as a customer from the Greek producers; and, third, because in rejecting the objection that the proceedings were time-barred, it failed to state reasons.

113. In order to substantiate the first two aspects of this plea, the appellant refers to the nature of the exchanges of price information, to its participation in the Cem-

72 — Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

bureau Task Force and in the 'Calcestruzzi actions' and also to the duration of those practices.

114. The Commission contends that the last two parts of the fifth plea are inadmissible in so far as they imply that the Court of Justice should adjudicate on the facts and on the appraisal of the evidence, although Aalborg seeks to present them as errors of law. In any event, the Commission submits, the responsibility of the appellant undertaking was not time barred, since time was interrupted in 1989, when the other participants in the Cembureau agreement were the subject of investigations.

115. On this last point, Aalborg replies that the principle of legal certainty has the effect that investigations carried out in respect of other persons and not notified to it cannot interrupt the relevant time; in its rejoinder, the Commission invokes Article 2(2) of Regulation No 2988/74 and the judgment of the Court of First Instance in *Limburgse Vinyl Maatschappij and Others* v *Commission*. [73]

116. Aalborg concludes this final plea by claiming that the contested judgment must be set aside because it contains an error of law in so far as it did not annul the Decision for failure to state reasons in respect of the limitation period.

117. The Commission contends that a detailed examination of recitals 46 to 65 of the Decision and of paragraphs 4330 to 4333 and 4459 et seq. of the contested judgment disprove the appellant's contentions.

B — No unlawful omission

118. To begin at the end, with the unlawful omission, the plea is inadmissible, if it is taken to mean that the complaint is directed against the Commission's silence, and manifestly unfounded, if it is regarded as challenging the 'inadequate' reasoning of the Court of First Instance.

119. If Aalborg's complaint is directed against the Commission's behaviour, it is misplaced, since the object of an appeal is the contested judgment and not the prior administrative procedure. In order to found the objection before the Court of Justice, it is not sufficient to reproduce without more the arguments already raised at first instance.

73 — Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 [1999] ECR II-931.

120. If, on the other hand, the appellant's complaint is that the Court of First Instance did not give it an 'adequate' response, the complaint proceeds from a premiss which is incorrect. It is sufficient to read paragraphs 4796 and 4797, together with paragraphs 4331 and 4332, of the judgment under appeal to confirm that the Court of First Instance examined the question before stating that the infringement attributed to Aalborg was not time-barred. That statement of reasons perfectly satisfies the requirement, since it sets out the facts which serve as a premiss and the legal reasons which support it, thus providing Aalborg and this appellate Court with the precise findings to enable them to challenge and review the decision at first instance.

C — The correctness of the response of the Court of First Instance

121. In the appellant's submission, the exchanges of price information do not deserve to be classified as implementing the Cembureau agreement and, consequently, the period during which the infringement was committed cannot be extended to 31 December 1988. Nor can the appellant be held responsible for setting up the European Task Force and for the Calcestruzzi action because of its passive presence at the Baden-Baden meeting; and there is even less reason for extending its responsibility for those facts to 31 May and 15 March 1987, respectively.

122. Since it could not take another form, the response to this plea must proceed from the facts held to be proved in the contested judgment, which, in so far as it refers to Aalborg, states that it participated in the Head Delegates' meetings of 14 January 1983 and 19 March and 7 November 1984. It also participated in the specific exchanges of information on prices between 14 January 1983 and 19 March 1984 and in the periodic exchanges of information between 1 January 1984 and 31 December 1988. Finally, it participated in the measures adopted within the framework of the agreement relating to the European Task Force between 9 September 1986 and 31 May 1987. Thus, the Court of First Instance concluded that the appellant's participation in the Cembureau agreement and the implementing measures lasted from 14 January 1983 to 31 December 1988.[74]

123. I am therefore able to state that, as regards the setting-up of the European Task Force and the Calcestruzzi actions, there is one aspect of the plea which must be rejected. That concerns the finding that Aalborg's participation in those practices lasted until 31 May and 15 March 1987, respectively. That assertion is an evidential inference which is neither arbitrary nor unreasonable and which, accordingly, is not amenable to appeal on a point of law.

74 — See paragraphs 4330 to 4332 of the judgment.

124. The Court of First Instance states that following the Baden-Baden meeting, at which the European Task Force was set up, other meetings were held, the last one in Luxembourg at the end of May 1987, which gave rise to the inference that the concurrence of all the wills manifested at the first meeting continued to exist until that date,[75] notwithstanding the absence from the other meetings of one or more of the participants in the agreement. An undertaking which had expressed its adherence to the agreement and did not openly make known that it was dissociating itself from the agreement could be presumed to be continuing to participate in it.[76] That conclusion appears to be reasonable and there is no reason why it should be reviewed by the Court of Justice.

125. As regards the duration of the infringement relating to the Calcestruzzi actions, the argument is also inadmissible because, as will be appreciated on reading the contested judgment, Aalborg did not raise the issue at first instance and, accordingly, as a new issue, it cannot be dealt with on appeal. At paragraphs 3301 to 3310 of the judgment under appeal, the arguments of certain applicants concerning the duration of the infringement are set out, but there is not the slightest reference to any of those raised by Aalborg, which, furthermore, has not complained in the appeal of any failure to address the matter. The only possible interpretation is that the question was not raised before the Court of First Instance and, accordingly, cannot be raised on appeal either.

126. However, two questions remain: the so-called responsibility for 'non-dissociation' and the classification of the exchanges of price information as implementing the Cembureau agreement.

127. If a company participates with its competitors in the market in one or more meetings from which an anti-competitive agreement emerges, the technique of presumptions makes it possible to infer, unless the contrary is expressly shown, that that company forms part of the cartel, especially if it subsequently takes part in measures to implement the anti-competitive agreement.

128. Proof by presumptions is based on the logic of reason and also on common understanding and experience. For that purpose, it is necessary to proceed from certain proven events which, by a mental

75 — See paragraphs 2794 to 2796 of the contested judgment.
76 — See paragraphs 2814 and 2815 of the judgment.

process consistent with the rules of human discretion, make it possible to consider that certain facts are proven.

129. That is what the Court of First Instance did. Starting with certain uncontested facts (Aalborg's presence at the meetings, the adoption of anti-competitive agreements, Aalborg's failure openly to distance itself from those agreements and its participation in the exchanges of price information), it found as a proven fact that Aalborg formed part of the cartel. That opinion is reasonable, it is consistent with the rules of human discretion and it appears to be adequately explained in the contested judgment. [77]

130. That is what the Court of Justice meant in *Commission* v *Anic*, cited above, where it held that the Court of First Instance was entitled to conclude, without unduly reversing the burden of proof, that since it was established that Anic had participated in the meetings at which price initiatives had been decided on, planned and monitored, it was for Anic to adduce evidence that it had not subscribed to those initiatives. [78] As will be appreciated, for the Court of Justice, an undertaking's participation in an anti-competitive agreement would be demonstrated by proof by presumptions, without prejudice to the possibility that that presumption, like all presumptions *iuris tantum*, may be rebutted by other evidence.

131. The same legal principle shows that the Court of First Instance was correct to regard the exchanges of price information as measures implementing the Cembureau agreement.

132. In so far as it refers to the exchanges of price information, [79] the Court of First Instance, in holding that the Commission's finding was correct, proceeded from certain fully proven and undisputed facts: (1) the Head Delegates' meetings at which concern for the marked fall in the level of certain prices was expressed and at which specific exchanges of information on prices took place; (2) the table headed 'Domestic prices', referred to at paragraph 1646 of the contested judgment, distributed at the Head Delegates' meeting of 30 May 1983; [80] and (3) the existence of the

77 — See paragraph 1426 (the Cembureau agreement), paragraphs 2600 and 2656 (the setting-up of the European Task Force) and paragraphs 3202 to 3205 (the Calcestruzzi action).

78 — See paragraph 96. The Court of Justice held to the same effect in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-1439, paragraph 181.

79 — In particular those described at Article 2(2)(b) of the Decision, which are those to which Aalborg refers in this plea in law.

80 — The judgment mistakenly states that this table was distributed at the meeting of 14 January 1983, but at recital 16, paragraph 5, the Decision refers to the meeting of 30 May 1983.

exchanges, apt to indicate trends in the price differences between the countries in which the members of Cembureau were established, [81] and to provide information with the purpose of setting prices set at dissuasive levels. [82] The Court of First Instance concluded from those facts that the regular exchange of information was, following the adoption of the Cembureau agreement, placed at its disposal to facilitate the implementation of the agreement. [83]

133. The fact that the last Head Delegates' meeting at which the Cembureau agreement was discussed took place on 7 November 1984, and that the exchanges of information continued until 31 December 1988, is not evidence capable of rebutting the abovementioned conclusion. There is nothing illogical or inconsistent about the fact that once the system had been put in place it should continue to function without the need for further Head Delegates' meetings.

134. For the remainder, the Court of First Instance does not state at any point in the judgment that the sharing of information was intrinsically lawful. On the contrary, what it does state is that, irrespective of whether the exchange of information might be contrary to free competition, it was necessary to determine whether it pursued the same anti-competitive purpose as the Cembureau agreement, i.e. whether it was intended to implement that agreement. [84] Accordingly, the perplexity to which Aalborg refers in its appeal where it states that the exchange of information, carried out lawfully and without any effect on competition, changes overnight, because of the Cembureau agreement, into anti-competitive conduct, is unfounded.

135. After what has been said, the arguments put forward by Aalborg to advance the date of termination of the infringements are demolished, so that the limitation period on which it relies and the consequent infringement of Article 1 of Regulation No 2988/74 must be rejected and, accordingly, this plea must be rejected.

81 — See paragraph 1643 of the judgment under appeal.

82 — The exchanges 'in fact enabled an undertaking with an order from a potential customer in another member country to know the general level of prices in force at that time in that country and to align its export prices accordingly, so as to dissuade that customer from seeking cement outside his country, and so avoid competing with local producers' (paragraph 1642 of the judgment).

83 — See paragraphs 1644 to 1646 of the judgment.

84 — See paragraphs 1634 and 1638 of the contested judgment.

V — Recapitulation and proposal

136. Since the second of the pleas in law was declared inadmissible in part and unfounded in part by order of 5 June 2002, I suggest that the first, fourth and fifth pleas be rejected and that the third plea be upheld, for the reasons stated, which means that the contested judgment must be set aside.

137. Since the judgment under appeal is unlawful, the Court of Justice, because it has all the relevant material before it, may determine Aalborg's claims, [85] even if only for basic reasons of procedural economy. [86]

138. By virtue of the considerations which I set out at points 73 to 75 above, Aalborg's application must be granted in full and the Commission Decision annulled in so far as it concerns Aalborg.

139. Because the appeal must be allowed in full, the Commission must be ordered to pay the costs of the proceedings, as Aalborg has requested in its application, in accordance with Article 87(2) of the Rules of Procedure of the Court of First Instance. [87]

VI — Costs

140. The costs of this appeal must also be borne by the Commission, pursuant to the first paragraph of Article 122, read with the first subparagraph of Article 69(2) of the Rules of Procedure of the Court of Justice.

85 — In my opinion in Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, footnote 70, I pointed out that it is an option recognised in Article 54 of the EC Statute of the Court of Justice, which provides: 'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.' One of the cases in which the opportunity offered by that provision may be taken is that of error *in iudicando*, provided that the account of the facts is complete and sufficient to give final judgment and no evidence needs to be taken. This course appears to have been taken in the case-law of the Court of Justice, although the Court has never stated for what reason it considers that the state of the proceedings enables it to give judgment itself, confining itself to laconic statements such as 'this is the case' (Case C-345/90 P *Parliament* v *Hanning* [1992] ECR I-949, particularly at I-989; and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, at I-2648).

In short, it will be appropriate for the Court of Justice to give judgment on the substance where it is clear from the documents before it that the case is ready for judgment (see J. Héron, *Droit judiciaire privé*, Montchrétien, Paris, 1991, p. 517; J. Vincent and S. Guinchard: *Procédure civile*, Dalloz, Paris, 1994, p. 922), in view of the fact that the Community legislature has created it as a modern court of cassation, enjoying full freedom to give final judgment where it considers that it is necessary to do so (see J. Nieva Fenoll, *El recurso de casación ante el Tribunal de Justicia de las comunidades Europeas*, Bosch, Barcelona, 1998, p. 430).

86 — The Decision was adopted in 1994.

87 — Consolidated version, published in OJ 2001 C 34, p. 39.

VII — Conclusion

141. Having regard to all the foregoing, I propose that the Court of Justice should:

(1) uphold the third plea in law raised by Aalborg;

(2) set aside the contested judgment in its entirety;

(3) grant Aalborg's application and annul Commission Decision 94/815/EC of 30 November 1994 in its entirety in so far as it concerns that undertaking;

(4) order the Commission to pay the costs incurred in the proceedings at first instance and in the present appeal.