

JUDGMENT OF THE COURT (Fifth Chamber)

7 January 2004 *

In Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P,

Aalborg Portland A/S, established in Aalborg (Denmark), represented by K. Dyekjær-Hansen and K. Høegh, advokaterne (C-204/00 P),

Irish Cement Ltd, established in Dublin (Ireland), represented by P. Sreenan SC, instructed by J. Glackin, Solicitor, with an address for service in Luxembourg (C-205/00 P),

Ciments français SA, established in Paris (France), represented by A. Winckler, avocat, with an address for service in Luxembourg (C-211/00 P),

Italcementi — Fabbriche Riunite Cemento SpA, established in Bergamo (Italy), represented by A. Predieri, M. Siragusa, M. Beretta, C. Lanciani and F. Moretti, avvocati, with an address for service in Luxembourg (C-213/00 P),

* Languages of the case: Danish, English, French and Italian.

Buzzi Unicem SpA, formerly Unicem SpA, established in Casale Monferrato (Italy), represented by C. Osti and A. Prastaro, avvocati, with an address for service in Luxembourg (C-217/00 P),

and

Cementir — Cementerie del Tirreno SpA, established in Rome (Italy), represented by G.M. Roberti and P. Criscuolo Gaito, avvocati (C-219/00 P),

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, seeking to have that judgment set aside in part,

the other party to the proceedings being:

Commission of the European Communities, represented in Case C-204/00 P by R. Lyal and by H.P. Hartvig, acting as Agents, and in the other cases by R. Lyal, and also by N. Coutrelis, avocat (C-211/00 P) and by A. Dal Ferro, avvocato (C-213/00 P, C-217/00 P and C-219/00 P), with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, D.A.O. Edward (Rapporteur) and A. La Pergola, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrars: H. von Holstein, Deputy Registrar, and H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 July 2002, when Aalborg Portland A/S was represented by K. Dyekjær-Hansen, Irish Cement Ltd by P. Sreenan SC, Ciments français SA by A. Winckler and by F. Brunet, avocat, Italcementi — Fabbriche Riunite Cemento SpA by M. Siragusa, C. Lanciani and F.M. Moretti, Buzzi Unicem SpA by C. Osti, Cementir — Cementerie del Tirreno SpA by G.M. Roberti and by G. Bellitti, avvocato, and the Commission, in Case C-204/00 P, by R. Lyal and H.P. Hartvig and, in the other cases, by R. Lyal, and also by N. Coutrelis (C-211/00 P) and by A. Dal Ferro (C-213/00 P, C-217/00 P C-219/00 P)

after hearing the Opinion of the Advocate General at the sitting on 11 February 2003,

gives the following

Judgment

- 1 By applications lodged at the Court Registry between 24 and 31 May 2000, Aalborg Portland A/S ('Aalborg'), Irish Cement Ltd ('Irish Cement'), Ciments français SA ('Ciments français'), Italcementi — Fabbriche Riunite Cemento SpA ('Italcementi'), Buzzi Unicem SpA ('Buzzi Unicem'), which, resulting from the merger between Fratelli Buzzi SpA and Unicem SpA ('Unicem'), is relying in the present proceedings only on the interests of Unicem, and Cementir — Cementerie del Tirreno SpA ('Cementir') each brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 15 March 2000 in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491 ('the judgment under appeal'), whereby the Court of First Instance, inter alia, confirmed most of the infringements found against them in Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1, hereinafter 'the Cement Decision'), but over a shorter period than that determined in that decision.

I — Facts

- 2 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 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

The Statement of Objections

- 3 On 25 November 1991, the Commission sent to the 76 undertakings and associations of undertakings concerned a Statement of Objections ('SO') pursuant to Article 2(1) of 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).

- 4 The SO draws a basic distinction between two types of objectionable practices, namely practices at international level and practices at national level in certain Member States. However, the full text of the SO, which is contained in a single document, was not sent to each of the undertakings and associations involved in the proceeding. Each received only the part of the SO setting out the infringements established against it. The chapters relating to practices engaged in at international level were sent to only 61 undertakings and associations, while the chapters relating to conduct at national level were only sent to the undertakings and associations established in the Member State in question.

- 5 The Commission did not append to the SO the documents supporting its conclusions or the other documents which it considered relevant. In view of the large number of documents in question, it prepared a box of documents ('the Box'), which was made available to each addressee of the SO when it inspected the file at the end of 1991.

- 6 The Commission drew up a list of all the documents itemised under file numbers IV/33.126, IV/33.322 and IV/27.997 specifying which documents were accessible to each addressee of the SO ('the List'). As regards access to the file relating to the

administrative procedure ('the investigation file'), each undertaking or association had access to the documents which the Commission had obtained from that undertaking or association together with the documents relating to the chapters of the SO which had been sent to it. The addressees had access only to the national file of the Member State on whose territory they were established.

7 As the Commission refused to accede to the addressees' requests that it send them the chapters of the SO which they had not received and to grant them access to all the documents in the investigation file, except for internal or confidential documents, certain undertakings and associations brought actions before the Court of First Instance seeking annulment of the Commission's refusal to send the documents requested and, in proceedings for interim measures, sought the suspension of the procedure initiated against them by the Commission (Joined Cases T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R and T-15/92 R *Cimenteries CBR and Others v Commission* [1992] ECR II-1571).

8 By 31 March 1992 all the applicants in the present proceedings had submitted observations on the SO sent to them by the Commission. They were heard between 1 March and 1 April 1993. The hearings were divided into three series of sessions: one on the cement market, which all the undertakings and associations of undertakings were able to attend; one on the international part of the SO, which only those undertakings and associations of undertakings which received that part of the SO were able to attend; and one on each of the national chapters, which the undertakings and associations of undertakings of the relevant Member State were able to attend separately.

9 Following the written replies to the SO and the oral explanations provided at the hearings, the Commission decided on 23 September 1993 to drop the objections relating to the national agreements ('the decision to drop the national

objections'). It also decided to drop the objections relating to the international part of the SO as against 12 German undertakings and also six Spanish undertakings and, consequently, to discontinue the proceeding against them.

- 10 On 5 October and 23 November 1994, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions.

The Cement Decision

- 11 At the close of the administrative procedure, on 30 November 1994, the Commission adopted the Cement Decision, whereby it imposed fines on 42 undertakings and associations active in the grey cement market. The amounts of the fines imposed varied between ECU 40 000 and ECU 32 492 000 and came to a total of ECU 242 420 000. The Cement Decision also ordered six undertakings active in the white cement market to pay fines of between ECU 554 000 and ECU 1 088 000 and coming to a total of ECU 5 546 000.

- 12 As regards the grey cement market, Article 1 of the Cement Decision found the existence of a general agreement designed to ensure non-transshipment to home markets and to regulate cement transfers from one country to another, in breach of Article 85(1) of the Treaty. In the case of the six appellants, the Commission found that the infringement had begun on 14 January 1983, the date on which a meeting took place of the Head Delegates of European cement producers who were members of Cembureau — European Cement Association ('Cembureau'). Apart from Ciments français, all the appellants were members of that association.

13 The Cembureau Agreement was considered by the Commission to be a single and continuous agreement in that it was implemented in the framework of bilateral or multilateral agreements and concerted practices, the existence of which is found in Articles 2 to 6 of the Cement Decision ('the implementing measures'). Essentially, according to that decision, those measures consisted of:

- agreements between Cembureau and its members on the exchange of price information in order to facilitate the implementation of the Cembureau Agreement (Article 2(1) of the Cement Decision);

- concerted practices between Cembureau and its members on the circulation of information on prices designed to facilitate the implementation of the Cembureau Agreement (Article 2(2) of the Cement Decision);

- concerted practices between French undertakings and an Italian undertaking (Article 3(1) of the Cement Decision); an agreement concerning the Spanish and Portuguese markets (Article 3(2) of the Cement Decision); agreements and concerted practices concerning the French and German markets (Article 3(3) of the Cement Decision);

- collusion between a number of European producers in reaction to imports of Greek cement and clinker into the Member States in the mid-1980s. That collusion led to the setting-up of the European Task Force ('the ETF') (Article 4(1) of the Cement Decision), the setting-up of Interciment SA ('Interciment'), having as its purpose the carrying-out of the persuasive and dissuasive measures against those threatening the stability of the markets

(Article 4(2) of the Cement Decision) and participation in agreements and concerted practices on the adoption of measures to prevent and/or reduce imports of Greek cement and clinker into the Member States, in particular on the Italian market (Article 4(3) and (4) of the Cement Decision); and

- concerted practices within the framework of two committees, the European Cement Export Committee ('ECEC') (Article 5 of the Cement Decision) and the European Export Policy Committee ('EPC'), relating in particular to the exchange of information on prices and to the supply and demand situation in the importing non-member countries and on the home markets and designed to prevent incursions by competitors on respective national markets in the Community.

14 As regards the white cement market, Article 7 of the Cement Decision finds that six undertakings participated in agreements and concerted practices within the framework of the White Cement Committee, relating in particular to non-shipment to home markets.

15 According to the operative part of the Cement Decision, the appellants in the present proceedings all participated, either directly or indirectly, in the Cembureau Agreement in the grey cement market sector. More particularly, that decision describes their participation in the implementing measures as follows:

- all the appellants in the present proceedings, with the exception of Ciments français, participated in the exchanges of information referred to in Article 2 of that decision;

- Ciments français participated in the concerted practices referred to in Article 3(1)(b) and (3)(a) of that decision;

- all the appellants in the present proceedings participated in the setting-up of the ETF referred to in Article 4(1) of that decision;

- Ciments français, Italcementi, Unicem and Cementir participated in the setting-up of Interciment, referred to in Article 4(2) of that decision;

- all the appellants in the present appeals participated in the concerted practices designed to withdraw Calcestruzzi SpA ('Calcestruzzi') as a customer from the Greek producers referred to in Article 4(3)(a) of that decision, but only Italcementi, Unicem and Cementir participated in an agreement relating to the contracts having as their aim the prevention of imports of Greek cement by Calcestruzzi, as referred to in Article 4(3)(b) of that decision;

- all the appellants, with the exception of Ciments français, participated in the concerted practices within the framework of the ECEC, referred to in Article 5 of that decision; and

- Ciments français participated in the concerted practices within the framework of the EPC referred to in Article 6 of that decision.

16 The Cement Decision set an aggregate fine on each undertaking, taking into account the role played by each of them in concluding the Cembureau Agreement or in adopting implementing measures, and also the duration of the infringements.

17 Article 9 of the Cement Decision imposes on the appellants, 'in respect of the infringement found in Article 1, which was put into effect, in particular, by the conduct set out in Articles 2-6', in the grey cement market sector, fines of the following amounts:

- for Aalborg, ECU 4 008 000,

- for Irish Cement, ECU 3 524 000;

- for Ciments français, ECU 24 716 000;

- for Italcementi, ECU 32 492 000;

- for Unicem, ECU 11 652 000;

- for Cementir, ECU 8 248 000.

- 18 As regards the white cement market sector, Ciments français and Italcementi were fined ECU 1 052 000 and ECU 1 088 000 respectively for their participation in the agreements referred to in Article 7 of the Cement Decision.

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

- 19 By applications lodged at the Registry of the Court of First Instance between 14 February and 12 April 1995, 41 of the undertakings and associations concerned by the Cement Decision, including the present appellants, brought proceedings before the Court of First Instance.
- 20 They claimed, *inter alia*, that the Cement Decision should be annulled in whole or in part and, in the alternative, that the fines imposed on them by that decision should be annulled or reduced.
- 21 Between 1996 and 1997, the Court of First Instance, following complaints alleging infringements of essential procedural requirements during the administrative procedure, ordered various measures of organisation of procedure ('measures of organisation of procedure') in order to enable the applicants at first instance to identify the passages of the SO and the relevant documents which had not been sent to them during the administrative procedure.

22 More particularly, the Court of First Instance requested:

- the Commission to produce various documents, including the SO as notified to each undertaking or association concerned, the minutes of the hearing of that party, the List, the Box and the correspondence exchanged during the administrative procedure between the Commission and the undertaking or association concerned during the administrative procedure ('the measures of 19 January to 2 February 1996');

- the Commission to authorise the applicants at first instance in question to consult the national chapters of the SO at its premises and, in regard to each of the national agreements and concerted practices, to give them access to the same national file as that sent during the administrative procedure to the addressees of the SO established in the Member State concerned ('the measure of 2 October 1996');

- the applicants at first instance to identify the passages of the SO and the relevant documents which had not been sent to them during the administrative procedure and to explain in what respect the outcome of the administrative procedure might have been different if those items had been made available to them during that procedure;

- the Commission (by decision notified on 27 February 1997) to specify exactly which documents were rendered accessible to the applicants at first instance following the adoption of the measure of 2 October 1996 and to identify them on the List. It follows in that regard from the Commission's reply of 8 and 17 April 1997 that it gave them access, however, to only around a quarter of files IV/33.126 and IV/33.322 as a whole;

— the Commission, by decisions notified on 18 and 19 June 1997, to lodge at the Registry, by 30 September 1997 at the latest, the originals of all documents itemised on the List in files IV/33.126 and IV/33.322 except for documents containing business secrets or other confidential information and the Commission's internal documents. The Commission was requested to specify the nature of each internal document on the List. It was also requested to replace the confidential documents in the investigation file with non-confidential versions or non-confidential summaries;

— the 39 applicants at first instance concerned to consult, at the Registry of the Court of First Instance, the original, non-confidential versions of the documents lodged by the Commission. They were allowed to lodge a pleading specifying any document to which they had not had access during the administrative procedure which could have affected their defence and explain briefly why the outcome of the administrative procedure might have been different if the document in question had been made available to them. The Commission was allowed to lodge a response in those cases.

23 The hearings took place before the Court of First Instance on 16, 18, 23, 25 and 30 September 1998 and on 2, 7, 9, 14, 16 and 21 October 1998.

24 On 15 March 2000, the Court of First Instance delivered the judgment under appeal, joining for the purposes of the judgment all the cases relating to the Cement Decision.

25 In Case T-39/95 *Ciments français v Commission*, the Court of First Instance, at paragraph 12 of the operative part of the judgment under appeal:

- ‘— annul[led] Article 1 of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 17 February 1989 and in so far as it [found] that the applicant [had] implemented the Cembureau agreement by participating in the infringement referred to in Article 3(1)(b);

- annul[led] Article 3(3)(a) of Decision 94/815 in so far as it [found] that the applicant [had] participated in an agreement on the sharing of the Saarland market and in so far as it [found] that the applicant [had] participated in an infringement of Article 85(1) of the Treaty after 12 August 1987;

- annul[led] Article 4(1) of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 31 May 1987;

- annul[led] Article 4(2) of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 7 November 1988;

- annul[led] Article 4(3)(a) of Decision 94/815 in so far as it concern[ed] the applicant;

- annul[led] Article 6 of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement before 18 November 1983;

- fixe[d] the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 12 519 000;

- fixe[d] the amount of the fine imposed on the applicant by Article 10 of Decision 94/815 at EUR 1 051 000;

- 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.’

²⁶ In Case T-44/95 *Aalborg Portland v Commission* the Court of First Instance, at paragraph 15 of the operative part of the judgment under appeal:

‘— annul[led] Article 1 of Decision 94/815 in so far as 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' minimum 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] participated 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;

- dismis[s]e[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.’

27 In Case T-50/95 *Unicem v Commission*, the Court of First Instance, at paragraph 19 of the operative part of the judgment under appeal:

- ‘— annul[led] Article 1 of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement before 9 September 1986 and after 3 April 1992;

- annul[led] Article 2(1) of Decision 94/815 in so far as it concern[ed] the applicant;

- 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 Cem-bureau — The European Cement Association and its members [had] related, so far as concern[ed] the Belgian and Netherlands prices, to those two countries’ producers’ minimum prices for supplies of cement by lorry and, so far as concern[ed] Luxembourg, the prices, inclusive of rebates, of that country’s producer and in so far as it [found] that the applicant [had] participated in the infringement before 9 September 1986;

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

- annul[led] Article 4(2) of Decision 94/815 in so far as it concern[ed] the applicant;

- 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 6 399 000;

- 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.’

28 In Case T-60/95 *Irish Cement v Commission*, the Court of First Instance, at paragraph 29 of the operative part of the judgment under appeal:

- ‘— annul[led] Article 1 of Decision 94/815 in so far as 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’ minimum 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] participated 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 2 065 000;

- dismis[s]e[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.’

29 In Case T-65/95 *Italcementi — Fabbriche Riunite Cemento v Commission*, the Court of First Instance, at paragraph 34 of the judgment under appeal:

- ‘— annul[led] Article 1 of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement before 19 March 1984 and after 3 April 1992;

- 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 before 19 March 1984 and after that date;

- 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 Cem-bureau — The European Cement Association and its members [had] related, so far as concern[ed] the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concern[ed] Luxembourg, the prices, inclusive of rebates, of that country's producer, and in so far as it [found] that the applicant [had] participated in the infringement before 19 March 1984;

- annul[led] Article 4(1) of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 31 May 1987;

- annul[led] Article 4(2) of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 7 November 1988;

- 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 25 701 000;

- dismis[s]e[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.’

30 In Case T-87/95 *Cementir — Cementerie del Tirreno v Commission*, the Court of First Instance, at paragraph 39 of the operative part of the judgment under appeal:

- ‘— annul[led] Article 1 of Decision 94/815 in so far as it [found] that the applicant [had] participated in the infringement after 3 April 1992;

- 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 14 January 1983;

- 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 related, so

far as concern[ed] the Belgian and Netherlands prices, to those two countries' producers' minimum 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) and (2) of Decision 94/815 in so far as they concern[ed] the applicant;

- 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 7 471 000;

- dismise[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.'

III — Forms of order sought in the appeals

31 Aalborg claims that the Court should:

- primarily, set aside the judgment under appeal in so far as it concerns Aalborg, in so far as it upholds the Cement Decision in regard to it, and refer the case back to the Court of First Instance for a fresh adjudication;

- in the alternative, set aside the judgment under appeal in part in so far as it concerns Aalborg, in so far as it confirms the Cement Decision in regard to it, and refer the case back to the Court of First Instance for a fresh adjudication;

- primarily, annul the fine in its entirety and, in the alternative, annul it in part; and

- order the Commission to pay the costs incurred in the present case by Aalborg before the Court of First Instance and the Court of Justice.

32 Irish Cement claims that the Court should:

- set aside the judgment under appeal in whole or in part in so far as it confirms the Cement Decision in regard to Irish Cement;

- in the alternative, declare the Cement Decision void and/or reduce the fine imposed on Irish Cement; and

- order the Commission to pay the costs.

33 Ciments français claims that the Court should:

- set aside the judgment under appeal in part, on the basis of Article 225 EC and Article 54 of the EC Statute of the Court of Justice;

- annul the Cement Decision on the basis of Article 230 EC;

- in the alternative, reduce the fine imposed on Ciments français on the basis of Article 229 EC and Article 17 of Regulation No 17; and

- order the Commission to pay the costs.

34 Italcementi claims that the Court should:

- primarily, set aside the judgment under appeal in its entirety;

- in the alternative, set that judgment aside in part;

- annul the Cement Decision in part, in so far as the Court should allow the appeal against that judgment;

- reduce the fine to such amount as the Court should deem appropriate;

- refer the case back to the Court of First Instance should the Court consider that the state of the matter does not allow it, in whole or in part, to give final judgment in the matter; and

- order the Commission to pay the costs incurred before the Court of First Instance and the Court of Justice.

35 Buzzi Unicem claims that the Court should:

- primarily, set aside the judgment under appeal and annul the Cement Decision and order the Commission to pay the costs;

- in the alternative, should the Court decide not to set aside the judgment under appeal, reduce the penalty imposed on Unicem; and

- in any event, adopt such other provision as may be necessary or as the Court may consider appropriate or just.

36 Cementir claims that the Court should:

- primarily, set aside the judgment under appeal in whole or in part and, consequently, annul the Cement Decision in whole or in part and annul, or at least reduce, the fine imposed on Cementir;
- in the alternative, set aside the judgment under appeal in whole or in part and refer the case back to the Court of First Instance for an adjudication on the substance in the light of the guidance which the Court will provide to it; and
- order the Commission to pay the costs incurred before the Court of First Instance and the Court of Justice.

37 The Commission contends that the Court should:

- as regards the appeal introduced by Ciments français, declare the application for annulment of the Cement Decision inadmissible and dismiss the remainder of the action as unfounded; and, in the alternative, dismiss the action as unfounded in its entirety;

- as regards the other appeals, dismiss them as inadmissible in so far as the pleas put forward cannot be examined in an appeal and, for the remainder, dismiss them as unfounded; and

- order all the appellants to pay the costs incurred by the Commission in connection with these appeals.

IV — Procedure before the Court of Justice and pleas in law

- 38 By reasoned orders of 5 June 2002, the Court dismissed at the outset as manifestly inadmissible and/or manifestly unfounded, under Article 119 of the Rules of Procedure, a number of the pleas in law and arguments put forward by the appellants.
- 39 The pleas in law put forward by Aalborg which were not dismissed at the outset by the order of 5 June 2002 in Case C-204/00 P *Aalborg Portland v Commission*, not published in the ECR, allege:
- breach of the rights of defence owing to the lack of access to documents liable to contain exculpatory evidence;

 - incorrect imputation of liability for the infringements of Article 85 of the Treaty;

- breach of the basic principles applicable to the setting of fines;

- infringement of 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).

40 The pleas in law put forward by Irish Cement which were not dismissed entirely at the outset by the order of 5 June 2002 in Case C-205/00 P *Irish Cement v Commission*, not published in the ECR, relate to:

- lack of competence of the Court of First Instance;

- a procedural defect;

- infringement of Community law and manifest errors of assessment as regards the procedural rules protecting the rights of the defence and the relevance of certain documentary evidence;

- a failure to state reasons and a failure to respond to the appellant's arguments.

41 The only pleas in law put forward by Ciments français which were not dismissed at the outset by the order of 5 June 2002 in Case C-211/00 P *Ciments français v Commission*, not published in the ECR, concerned:

- an error of assessment in respect of the turnover used in calculating the amount of the fine imposed on Ciments français;

- breach of the principle of proportionality in relation to the amount of that fine.

42 The pleas in law put forward by Italcementi that were not dismissed at the outset by the order of 5 June 2002 in Case C-213/00 P *Italcementi — Fabbriche Riunite Cemento v Commission*, not published in the ECR, allege:

- breach of the rights of the defence owing to incomplete access to the documents in the investigation file;

- breach of the rights of the defence, insufficient reasoning and inconsistency with an earlier decision in respect of the dropping of the national complaints;

- incorrect application of Community law and a contradiction in the reasoning as regards the assessment of the unlawful nature of the agreement relating to the agreements signed with Calcestruzzi in 1987;

- breach of the principles of fairness, proportionality and non-discrimination as regards the intangibility of the fine;

- breach of Article 15(2) of Regulation No 17 and inadequate reasoning as regards the assessment of the gravity of the infringement found in Italcementi's case;

- breach of that provision as regards the assessment of the duration of the infringement found in Italcementi's case.

⁴³ The pleas in law put forward by Buzzi Unicem that were not entirely dismissed at the outset by the order of 5 June 2002 in Case C-217/00 P *Buzzi Unicem v Commission*, not published in the ECR, concern:

- breach of the rights of the defence, misapplication of the legal provisions and incorrect and contradictory reasoning in respect of:
 - the refusal to authorise access to the SO and to the documents in the investigation file,

- the dropping of the national objections,

- the contracts concluded between Calcestruzzi and the Italian producers,

- Unicem’s participation in the ETF,

- the link between the ETF and the Cembureau Agreement;

- an alleged breach of the principle *ne bis in idem* and of the principle of equal treatment;

- an alleged breach of the right of non-self-incrimination;

- a manifest error in assessing probative documents;

- an error of law and insufficient reasoning concerning the designation of Unicem as a ‘direct member’ of Cembureau;

— an alleged infringement of Article 190 of the EC Treaty (now Article 253 EC), of Article 15(2) of Regulation No 17, of the principle of equal treatment and of the principle of proportionality as regards:

— the imposition of a single fine for all the infringements established on the market for grey cement,

— the assessment of liability in the infringement relating to participation in the Cembureau Agreement,

— the calculation of the duration of the infringement.

⁴⁴ The pleas in law put forward by Cementir that were not wholly dismissed at the outset by the order of 5 June 2002 in Case C-219/00 P *Cementir — Cementerie del Tirreno v Commission*, not published in the ECR, concern:

— breach of the rights of the defence as regards access to the investigation file;

— error of law, defective reasoning and breach of the rights of the defence as regards:

— the existence of the Cembureau agreement,

— the exchanges of price information,

— the measures referred to in Article 4(3) and (4) of the Cement Decision,

— an error of law and defective reasoning as regards the concept of a single and continuous agreement;

— an error of law and an incorrect assessment of the criteria for the calculation of the penalty imposed on Cementir.

45 On account of the connection between them, the present cases should be joined for the purposes of the final judgment, in accordance with Article 43 of the Rules of Procedure.

V — The review exercised by the Court in the present appeals

46 It is appropriate to make a number of preliminary observations concerning the judicial review carried out in an appeal and also the legal and factual context in which anti-competitive conduct is investigated and sanctions imposed. The purpose of these observations is to shed light on the legal framework within which the Court will examine the present appeals.

The role of the Court in an appeal

- 47 In an appeal, the Court's task is limited to examining whether, in exercising its power of review, the Court of First Instance made an error of law. Under Article 225 EC and Article 51, first paragraph, of the EC Statute of the Court of Justice, an appeal must be limited to points of law and must lie on grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the applicant or infringement of Community law by the Court of First Instance.
- 48 An appeal may therefore be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts (see, *inter alia*, Case C-284/98 P *Parliament v Bieber* [2000] ECR I-1527, paragraph 31).
- 49 It follows that the appraisal of the facts by the Court of First Instance does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, *inter alia*, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others v Commission* [2001] ECR I-4717, paragraph 78).
- 50 Article 225 EC, Article 51, first paragraph, of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice provide, in particular, that where the appellant alleges distortion of the evidence by the Court of First Instance, he must indicate precisely the evidence alleged to have been distorted by that Court and show the errors of appraisal which, in his view, led to that distortion.

- 51 The requirements resulting from those provisions are not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment of the Court of First Instance, simply repeats or reproduces verbatim the pleas in law and arguments already put forward before that Court, including those which were based on facts expressly rejected by that Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see, inter alia, the order in Case C-317/97 P *Smanor and Others v Commission* [1998] ECR I-4269, paragraph 21, and the judgment in Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 35).
- 52 It is on the basis of those considerations, in particular, that the Court rejected at the outset as manifestly inadmissible certain of the pleas in law and arguments put forward by the appellants (see paragraph 38 of this judgment).

The legal and factual context of the review of anti-competitive practices and agreements

- 53 Participation by an undertaking in anti-competitive practices and agreements constitutes an economic infringement designed to maximise its profits, generally by an intentional limitation of supply, an artificial division of the market and an artificial increase in prices. The effect of such agreements or of such practices is to restrict free competition and to prevent the attainment of the common market, in particular by hindering intra-Community trade. Such harmful effects are passed directly on to consumers in terms of increased prices and reduced diversity of supply. Where an anti-competitive practice or agreement is adopted in the cement sector, the entire construction and housing sector, and the real-estate market, suffer such effects.

- 54 The aim of the powers given to the Commission by Regulation No 17 is to enable it to carry out its duty under Article 89 of the EC Treaty (now, after amendment, Article 85 EC) of ensuring that the rules on competition are applied in the common market. As may be seen from the preceding paragraph, it is consistent with the general interest to avoid anti-competitive practices and agreements, to discover them and to impose sanctions.
- 55 Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.
- 56 Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.
- 57 In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.
- 58 Furthermore, the Commission may be faced with difficulties inherent in the complex structures of certain operators, with restructuring and with changes in the legal personality of undertakings.

59 It is appropriate, in that context, to observe that Article 85 of the Treaty refers to the activities of 'undertakings'. For that provision to apply, a change in the legal form and name of an undertaking does not necessarily have the effect of creating a new undertaking free of liability for the anti-competitive behaviour of its predecessor when, from an economic point of view, the two are identical (see, to that effect, Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, paragraph 9).

60 However, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (Case C-176/99 P *ARBED v Commission* [2003] ECR I-10687, paragraph 21).

61 In order to ensure the effectiveness of the investigative power conferred on it by Article 11(1) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking, if necessary by adopting a decision, to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in that undertaking's possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct.

62 Regulation No 17 places the undertaking being investigated under a duty of active cooperation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission (Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 27).

- 63 In carrying out its task, the Commission must however ensure that the rights of the defence are not impaired during preliminary inquiry procedures, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 15).
- 64 The rights of the defence are fundamental rights forming an integral part of the general principles of law, whose observance the Court ensures (see, to that effect, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 25 and 26), drawing inspiration for that purpose from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') (see Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraphs 37 and 38).
- 65 Thus, when requesting information, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (see *Orkem v Commission*, cited above, paragraph 35).
- 66 Equally, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 10, and Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 21).

67 In that sense, Regulation No 17 provides that the parties are to be sent a statement of objections which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. However, that may be done summarily and the decision is not necessarily required to be a replica of the Commission's statement of objections (*Musique Diffusion française and Others v Commission*, cited above, paragraph 14), since the statement of objections is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 70). For that reason, the Commission may, and even must, take into account the factors emerging from the administrative procedure in order, inter alia, to abandon such objections as have been shown to be unfounded (*Musique Diffusion française and Others v Commission*, cited above, paragraph 14).

The right of access to the file

68 A corollary of the principle of respect for the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence (see, to that effect, Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, paragraph 81, and Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraphs 125 to 128). Those documents include both incriminating evidence and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (see Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraphs 9 and 11; Case C-51/92 P *Hercules Chemicals v Commission* [1999] ECR I-4235, paragraph 75; and 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 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 315).

- 69 It may be that the undertaking draws the Commission's attention to documents capable of providing a different economic explanation for the overall economic assessment carried out by the Commission, in particular those describing the relevant market and the importance and the conduct of the undertakings acting on that market (see, to that effect, *Solvay v Commission*, cited above, paragraphs 76 and 77).
- 70 The European Court of Human Rights has none the less held that, just like observance of the other procedural safeguards enshrined in Article 6(1) of the ECHR, compliance with the adversarial principle relates only to judicial proceedings before a 'tribunal' and that there is no general, abstract principle that the parties must in all instances have the opportunity to attend the interviews carried out or to receive copies of all the documents taken into account in the case of other persons (see, to that effect, Euro. Court H.R., the *Kerojärvi v Finland* judgment of 19 July 1995, Series A No 322, § 42, and the *Mantovanelli v France* judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 33).
- 71 The failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement (see, to that effect, Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraphs 7 and 9) and, second, that the objection could be proved only by reference to that document (see Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraphs 24 to 30, and *Solvay v Commission*, cited above, paragraph 58).
- 72 If there were other documentary evidence of which the parties were aware during the administrative procedure that specifically supported the Commission's findings, the fact that an incriminating document not communicated to the person concerned was inadmissible as evidence would not affect the validity of the objections upheld in the contested decision (see, to that effect, *Musique Diffusion française and Others v Commission*, cited above, paragraph 30, and *Solvay v Commission*, cited above, paragraph 58).

- 73 It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence.
- 74 On the other hand, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission (see *Solvay v Commission*, paragraph 68).
- 75 It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence (see *Hercules Chemicals v Commission*, paragraph 81, and *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 318), in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine (see, to that effect, *Solvay v Commission*, paragraph 98).
- 76 The possibility that a document which was not disclosed might have influenced the course of the proceedings and the content of the Commission's decision can be established only if a provisional examination of certain evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded (see *Solvay v Commission*, paragraph 68).

- 77 In the context of that provisional analysis, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see order of 17 September 1996 in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 40). As stated at paragraph 49 of this judgment, its assessment of the facts does not, provided the evidence is not distorted, constitute a question of law which is subject, as such, to review by the Court of Justice.

Establishment of the liability of the undertakings

- 78 As the Council very recently stated in the fifth recital of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence.

- 79 Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.

- 80 In the Cement Decision, the Commission concluded that there was a cartel in the cement sector in which, it claimed, 42 undertakings and associations, including the present appellants, had participated. That decision was essentially upheld by

the Court of First Instance, which, in the exercise of its power to review the Commission's findings as to the degree of the undertakings' involvement and participation in the cartel, amended the fines. Apart from alleging errors of law and in the reasoning in the judgment under appeal, the appellants essentially dispute the Court of First Instance's findings concerning their participation in the cartel and the degree or duration of that participation.

81 According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 155, and Case C-49/92 P *Commission v Anic* [1999] ECR I-4125, paragraph 96).

82 The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

83 The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (*Commission v Anic*, paragraph 87).

- 84 In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.
- 85 Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, paragraph 50).
- 86 Neither is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission v Anic*, paragraph 90).
- 87 Where the liability of undertakings for anti-competitive conduct results, according to the Commission, from their participation in meetings having such conduct as their purpose, it is for the Court of First Instance to ascertain whether those undertakings had the opportunity, both during the administrative procedure and before that Court, to rebut the findings thus made and, where appropriate, to prove circumstances which cast the facts established by the Commission in a different light and thus allow another explanation of the facts to be substituted for the one adopted by the Commission.

88 In an appeal, it is for the Court to ascertain that the Court of First Instance did not make any errors of law or in its reasoning or distort the evidence.

The criteria material to the setting of the fine

89 Article 15(2) of Regulation No 17 lays down the conditions which must be fulfilled to enable the Commission to impose fines for anti-competitive conduct. The infringement must thus have been committed intentionally or negligently. Furthermore, the amount of the fine is set according to the gravity of the infringement and, where appropriate, to its duration (see Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 32).

90 As regards the gravity of the infringement, the Court has held that it has to be determined by reference to criteria such as the particular circumstances of the case, its context and the dissuasive effect of the fines (see *Ferriere Nord v Commission*, paragraph 33).

91 Objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements.

92 Where an infringement has been committed by a number of persons, the relative gravity of the participation of each of them will be examined (see 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 622 and 623).

VI — Pleas in law

A — *Pleas alleging procedural defects and breach of the rights of the defence*

(1) Pleas concerning the role of the Court of First Instance in the organisation of the procedure

Arguments of the parties

- ⁹³ Aalborg, Irish Cement, Italcementi, Buzzi Unicem and Cementir claim that the Court of First Instance infringed procedural or substantive rules by not automatically annulling the Cement Decision even though it expressly acknowledged at paragraph 152 of the judgment under appeal that the Commission had not given proper access to the investigation file, since it had denied access to approximately three quarters of the documents therein.
- ⁹⁴ Italcementi and Buzzi Unicem refer to the judgment in *Hercules Chemicals v Commission*, cited above, and claim that the parties' right to peruse the documents in the investigation file is the essential corollary of the right of defence, which is closely linked to the right to be heard, to the presumption of innocence, to the need to respect the principle *audi alteram partem* during the procedure and to the fundamental principle of equality of arms between the Commission and the undertakings concerned. The right of access to those documents should be regarded as a fundamental right for the purposes of Article F of the Treaty on European Union (now, after amendment, Article 6 EU) and also under Article 6 of the ECHR and Article 42 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

- 95 The right of access to the file must therefore be effective in the context of the administrative procedure, which takes place before the Commission, and not in the context of a subsequent stage. It cannot be accepted that the Commission, in its double role of notifying authority and authority which determines whether the alleged infringements did in fact exist, should be authorised to decide unilaterally whether the documents in its possession are useful and to prevent the undertaking concerned from having knowledge of them in order to prepare its defence strategy in the adversarial proceedings in which it participates with the Commission services. That is *a fortiori* the case since the Court of First Instance has no jurisdiction to reserve to itself the right, in the judicial context, to make assessments of the relevance of documents, for the purposes of taking evidence, which should have been made at the level of the administrative investigation.
- 96 Irish Cement, Italcementi, Buzzi Unicem and Cementir emphasise that a breach of the rights of the defence at the stage of the administrative procedure cannot be put right during the procedure before the Court of First Instance and accuse the Court of First Instance of having attempted, by adopting measures of organisation of procedure, to make good the Commission's failure to comply with procedural requirements. That approach is inconsistent with *Hercules Chemicals v Commission* and *Solvay v Commission* and with Case T-36/91 *ICI v Commission* [1995] ECR II-1847 and Case T-37/91 *ICI v Commission* [1995] ECR II-1901, and also with the Opinion of Advocate General Warner in Case 30/78 *Distillers Company v Commission* [1980] ECR 2229.
- 97 That approach does not fall within the jurisdiction conferred on the Court of First Instance and therefore alters the balance of powers and of functions established by the Treaty.
- 98 While the Commission recognises that the organisation of access to the investigation file was not as transparent as it should have been, it claims that the argument that non-disclosure of documents during the administrative procedure constitutes a procedural defect automatically entailing annulment of

the decision taken at the close of that procedure is contrary both to the case-law referred to in the preceding paragraph and to the general principles of law.

- 99 The Court of First Instance ascertained whether and to what extent a procedural irregularity of such a kind as to entail annulment of the Cement Decision had actually occurred. In ordering the measures of organisation of procedure referred to, it did not organise access to the file at a subsequent stage with the intention of making good any defects in the access granted by the Commission but sought to examine whether, by not making available to the parties documents which would have been of use in their defence, the Commission had indeed adversely affected the rights of the defence. Consequently, it did not exceed its jurisdiction.

Findings of the Court

- 100 It is common ground that during the administrative procedure the Commission did not communicate the great majority of the documents in the investigation file and that it did not give the present appellants proper access to the investigation file, so that the administrative procedure was indeed irregular in that regard.
- 101 However, as the Court of First Instance pointed out at paragraph 240 of the judgment under appeal, it could not annul the contested decision in whole or in part unless it was found that the lack of proper access to the investigation file given to the undertakings concerned during the administrative procedure had prevented them from perusing documents which were likely to be of use in their defence and had thus infringed their rights of defence.

- 102 In the context of an action brought before the Court of First Instance against the decision closing an administrative procedure, it is open to that Court to order measures of organisation of procedure and to arrange full access to the file, in order to determine whether the Commission's refusal to disclose or communicate a document may be detrimental to the defence of the undertaking concerned.
- 103 As that examination is limited to a judicial review of the pleas in law, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see *Solvay v Commission*, paragraphs 98 and 103). It is common ground that belated disclosure of documents in the file does not put the undertaking which has brought the action against the Commission decision back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission (see *Hercules Chemicals v Commission*, paragraph 79).
- 104 Nor can it be denied that an infringement of the rights of the defence at the stage of the administrative procedure cannot be remedied by the mere fact that access was made possible at a later stage, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought (see *Hercules Chemicals v Commission*, paragraph 78, and *Limburgse Vinyl Maatschappij and Others v Commission*, paragraph 318).
- 105 In the present case, contrary to what the appellants maintain, the Court of First Instance did not in any way attempt to replace the Commission in its investigative role or to remedy the procedural defects attributable to the Commission when it ordered the measures of organisation of procedure. In that regard, it merely carried out, within the framework of the tasks assigned to it, a provisional examination of the evidence in order to ascertain whether there had been an infringement of the rights of the defence.

106 As the Court of First Instance did not err in law in ordering the measures of organisation of procedure rather than in annulling the Cement Decision at the outset, the pleas concerning the role of the Court of First Instance in the organisation of the procedure are unfounded.

(2) Pleas concerning the Court of First Instance's assessment of the usefulness of the documents in the defence of the undertakings concerned

Arguments of the parties

107 The appellants put forward a number of arguments whereby they challenge the analytical framework set out by the Court of First Instance at paragraphs 241 to 248 of the judgment under appeal.

— The 'objective link' criterion

108 Italcementi and Cementir maintain that the requirement, as stated by the Court of First Instance, for an objective link between the documents which were not disclosed and an objection adopted against the undertaking concerned in the Cement Decision is wholly arbitrary and unfounded. Its application amounts essentially to depriving the fundamental right of access to the investigation file of all meaning.

- 109 First, that requirement ignores the general nature of the right of access to the investigation file, which extends to all the documents in the file. Thus, it means that even such a serious restriction of the exercise of the rights of the defence during the investigation does not necessarily constitute a procedural defect capable of rendering the final decision invalid. Second, by excluding documents which, although having no direct link with the objections specifically adopted against the undertaking concerned, are such as to cast a different light on the context of the market and also on the undertaking's conduct and the degree of its participation in the facts in issue, the Court of First Instance failed to have regard to the principle that any infringement must be assessed in its economic and factual context.
- 110 That is *a fortiori* the case when the documents might contain exonerating evidence and therefore assume essential importance for the merits of the objections adopted against a specific undertaking. By providing useful information about the market, they could influence the very meaning and probative force of documents considered to contain proof of the infringement.
- 111 On the other hand, the Commission fully approves the condition of an objective link applied by the Court of First Instance in the judgment under appeal. A document having no link with objections raised in the Cement Decision cannot be associated with the infringement found in that decision and it is difficult to make out how a document unrelated to the objections adopted against an undertaking might be of use in its defence.

— The criterion relating to the impact of the non-disclosure of documents

- 112 Irish Cement, Italcementi, Buzzi Unicem and Cementir dispute the Court of First Instance's assertion, at paragraph 247 of the judgment under appeal, that the

non-disclosure of a document could constitute an infringement of the rights of the defence only where, in the light of the evidence adduced by the Commission in support of the objections referred to in the contested decision, the document would have had any — even a small — chance of altering the outcome of the procedure.

- 113 First of all, Italcementi criticises the application of that principle in the present case. It submits that there is a clear and arbitrary discrepancy between the theoretical examination to which the Court of First Instance expressly stated that it intended to limit its own checks and the practical examination of the usefulness of the various undisclosed documents which it actually carried out in the large part of the judgment under appeal.
- 114 Italcementi and Cementir maintain that the Court of First Instance confused the assessment of the procedural pleas raised by the applicants at first instance with the substantive analysis of the actual usefulness of documents in order to assess the substance of the objections adopted by the Commission. It thus ultimately substituted its own assessment for the assessment which the Commission should have carried out during the administrative procedure. In so doing, the Court of First Instance acted as a court of last — and sole — instance and deprived the undertakings concerned of their right to have their situation examined first by the administrative authority and then by the judicial authority.
- 115 Irish Cement claims that the Court of First Instance did not have jurisdiction to draw the conclusions which it reached because it was impossible for that Court effectively to place itself in the same situation, with the same degree of knowledge and understanding, as that in which the Commission had been in 1992 and 1993.
- 116 Next, Irish Cement, Italcementi, Buzzi Unicem and Cementir claim that, in adopting that arbitrary criterion, the Court of First Instance erred in law and

failed to apply the principles established in *Hercules Chemicals v Commission*, *Solvay v Commission* and Case T-36/91 *ICI v Commission*. Irish Cement maintains that the distinction on which the Court of First Instance rejected that case-law is based on circular reasoning which amounts to prejudging the outcome of the dispute.

- 117 Both Italcementi and Buzzi Unicem put forward the fact that in *Hercules Chemicals v Commission* the Court of Justice held that it was not necessary for the undertakings to prove after the event that if they had had knowledge of the file during the administrative procedure the Commission would have been led to adopt a radically different decision from the one which it did in fact adopt. It is sufficient for them to prove that the documents that were not disclosed could have been of some use in their defence.
- 118 That less restrictive rule of assessment could also preclude the Court of First Instance, in the context of its judicial review, from making an analytical assessment of the significance and the implications of the various documents that remained inaccessible during the investigation stage.
- 119 Last, Italcementi, Buzzi Unicem and Cementir maintain that, contrary to the principle that it is for the Commission to adduce evidence that an infringement has been committed, the approach adopted by the Court of First Instance has the consequence of reversing the roles, by placing on the undertakings concerned the burden of showing that the documents of which they had not thus far had knowledge are in themselves capable of rebutting the conclusions formulated in the Commission decision.

— The relevance of direct documentary evidence

- 120 First of all, with reference to the weakness of the evidence which the Commission adduced in support of the existence of the Cembureau Agreement, both Irish Cement and Italcementi dispute the Court of First Instance’s assertion at paragraph 260 of the judgment under appeal that the Commission based the finding of infringements in the SO and in the Cement Decision ‘solely on [direct] documentary evidence’. Cementir contends that that criterion — which led the Court of First Instance to carry out a kind of postponed inquiry into the meaning and the implications of the documents which were not communicated — has no basis in the Community case-law.
- 121 Italcementi maintains that, in concluding that it had subscribed to the object of the Cembureau Agreement merely by participating in the meeting of Head Delegates of European cement producers belonging to Cembureau on 19 March 1984 (‘the meeting of 19 March 1984’) without publicly manifesting its dissent, the Court of First Instance based itself on a wide interpretation of the concept of direct evidence and accepted a disproportionate use of presumptions, which provides a ground for setting aside the judgment under appeal.
- 122 Next, Irish Cement, Italcementi and Cementir criticise the Court of First Instance for having misinterpreted the judgment in Case T-37/91 *ICI v Commission* by requiring the applicants at first instance to prove that the documents in the investigation file which remained inaccessible contradicted the tenor of the direct evidence used by the Commission. The Court of First Instance thus precluded at the outset the usefulness of documents which might have provided an alternative economic explanation for the cement producers’ conduct on the market. That approach seriously limited their ability to defend themselves.

- 123 Cementir further submits that in Case T-37/91 *ICI v Commission* the Court of First Instance clearly confined itself to an *ex ante* assessment and did not carry out an *ex post* assessment of the specific content and the evidential relevance of each document that had not been communicated.
- 124 Last, Buzzi Unicem claims that the reasoning of the Court of First Instance is contradictory. It clearly stated at paragraph 264 of the Cement Decision, in a manner incompatible with the principles stated in the preceding paragraph of that judgment, that the submission of other economic explanations could not in any event have altered the outcome of the administrative procedure, precisely because the substance of the Commission's argument relied on direct documentary evidence.

Findings of the Court

- 125 The question whether the Court of First Instance applied correct criteria in order to determine whether the Commission's exclusion of a specific document adversely affected an undertaking's rights of the defence is a question of law amenable to review by the Court of Justice. The same applies to the question whether a document must be qualified as an 'exculpatory document' capable of being of use in an undertaking's defence (see, to that effect, *Corus UK v Commission*, paragraph 131).
- 126 As regards, first, the criterion of an objective link, it cannot be for the Commission alone, who notifies any objections and adopts the decision imposing a penalty, to determine the documents of use in the defence of the undertaking concerned (see *Solvay v Commission*, paragraphs 81 and 83). However, the Commission is allowed to preclude from the administrative procedure evidence

which has no relation to the allegations of fact and of law in the SO and which therefore has no relevance to the investigation. An applicant cannot properly put forward as a ground of annulment the fact that irrelevant documents were not communicated to it.

127 In that regard, an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertaking concerned is alleged to have committed (see *Solvay v Commission*, paragraph 60).

128 Contrary to what Italcementi and Cementir maintain, the criterion of an objective link does not preclude documents containing exculpatory evidence or even indications of the context of the market or the conduct of the operators present on that market, provided that it relates objectively to any objections adopted against the undertaking concerned.

129 The Court of First Instance therefore did not err in law in holding, at paragraph 241 of the judgment under appeal, that it was necessary to determine whether there was an objective link between the documents which were not made accessible during the administrative procedure and an objection adopted against the undertaking concerned in the Cement Decision.

130 As regards, next, the assessment criteria which the Court of First Instance employed in the present case in order to ascertain whether the non-disclosure of a document could have harmed the defence of an undertaking during the administrative procedure, it is necessary to do as the Court of First Instance

did at paragraphs 237 to 248 and 281 to 379 of the judgment under appeal and draw a distinction between access to documents which may exculpate the undertaking and access to documents establishing the existence of the infringement which it is alleged to have committed (see Case T-37/91 *ICI v Commission*, paragraph 60).

- 131 The Court of First Instance did not err in law in holding, at paragraphs 241 and 247 of the judgment under appeal, that it must assess whether, in the light of the evidence adduced by the Commission in support of the objections formulated in the Cement Decision, disclosure of a document would have had even a small chance of altering the outcome of the administrative procedure if the undertaking concerned had been able to rely on it during that procedure. It merely stated the condition that the undertaking must show that a document could have been useful in its defence.
- 132 Such an examination necessarily implies that the Court of First Instance carries out a comparative and provisional analysis of the probative value of the documents that were not disclosed and also of the evidence that the Commission regards as sufficient to lead to the findings made in the Cement Decision. When the Commission establishes that the undertaking in question has participated in an anti-competitive measure, it is for that undertaking to provide, using not only the documents that were not disclosed but also all the means at its disposal, a different explanation for its conduct. It follows that the complaints alleging reversal of the burden of proof and breach of the presumption of innocence are unfounded.
- 133 Last, the Court of First Instance did not err in law in holding at paragraphs 260 to 264 of the judgment under appeal that when, both in the SO and in the contested decision, the Commission relied solely on direct documentary evidence to show various infringements and the participation of undertakings in those infringements, the undertakings must prove that the evidence that was inaccessible to them during the administrative procedure was at variance with the thrust of that evidence. Contrary to Buzzi Unicem's contention, moreover, there is no inconsistency in those paragraphs.

134 In the light of the foregoing, the pleas relating to the Court of First Instance's assessment of the usefulness of certain documents in the defence of the undertakings concerned must be rejected.

(3) The various pleas relating to the application by the Court of First Instance to the facts of the present case of the criteria concerning the probative value of the documents that were not disclosed

Arguments of the parties

135 Aalborg, Irish Cement and Cementir criticise the Court of First Instance for having applied too strictly in the present case the principles which it set out at paragraph 247 of the judgment under appeal concerning the evaluation of the documents that were not disclosed.

— The evidence relating to the existence of the Cembureau Agreement (the infringement referred to in Article 1 of the Cement Decision)

136 First, Cementir criticises the Court of First Instance for having refused to reopen the oral procedure in spite of the fact that the Commission had expressly acknowledged at the hearing before that Court that undertakings concerned should have had access during the administrative procedure to Mr Toscano's note of 17 February 1983 ('Mr Toscano's note'), which concerned the meeting of the Head Delegates of the European cement producers who were members of Cembureau held on 14 January 1983 ('the meeting of 14 January 1983') and which indicated that the problems of dumping were discussed at that meeting. Those statements are fundamental to a proper assessment of the relevance of Mr Toscano's note and thus of the consequences of the lack of access to that document during the administrative procedure.

- 137 Second, Aalborg, Irish Cement and Cementir contend that the Court of First Instance's finding, at paragraphs 1122 to 1132 of the judgment under appeal, that the use of Mr Toscano's note in the context of their defence would not have had even a small chance of altering the outcome of the administrative procedure is manifestly incorrect.
- 138 Irish Cement maintains that the Court of First Instance did not answer its argument that Mr Toscano's note invalidated the Commission's interpretation of the objective or the content of the meeting of 14 January 1983. Cementir claims that that note, which refers exclusively to discussions about dumped imports from other European countries, provides a different interpretation of the agenda of the meeting. The Court of First Instance should therefore have considered that the note was a document 'of use' in the defence and that the failure to communicate it infringed the rights of the defence.
- 139 In Aalborg's submission, Mr Toscano's note, which is an internal document providing a direct account of the meeting of 14 January 1983 without referring in any way to an anti-competitive agreement, could clearly have had a decisive influence on the outcome of the administrative procedure.
- 140 Irish Cement accuses the Commission of having erred in ascribing greater importance to the preparatory documents for the meeting of 14 January 1983 on which the Commission relied than to an authentic minute of the actual meeting. The Court of First Instance gave no explanation for its reason for rejecting the argument that one passage in Mr Toscano's note confirmed that the participants in the meeting intended to comply with the Community competition rules.

141 According to Irish Cement, the Court of First Instance was also mistaken to conclude that Mr Toscano's note did not appear to constitute an exhaustive account of the meeting. The Court of First Instance therefore fell into the trap of circular reasoning and effectively shifted the burden of proof from the Commission to the undertaking.

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142 Cementir further contends that the probative value of Mr Toscano's note is made stronger by two other documents referred to at paragraph 1131 of the judgment under appeal, which contain no trace of a discussion of the rule on non-transshipment to home markets. Consequently, there is a range of probative evidence that clearly refutes the Commission's argument that the theme of intra-Community trade dealt with during the meeting of 14 January 1983 necessarily implied that the participants in that meeting intended to conclude an anti-competitive agreement.

143 Aalborg criticises the Court of First Instance for having incorrectly concluded, at paragraphs 1209 to 1213 of the judgment under appeal, that several documents relating to dumping and a basing point system were not of such a nature as to shed a different light on the various items of direct documentary evidence referred to in the SO and in the Cement Decision.

144 First, Aalborg claims that it would have been able to refer, during the administrative procedure, to the notification files lodged by the United Kingdom Cement Makers' Federation ('the CMF') and also to contacts between the European cement industry and the Commission concerning the introduction of a basing point system ('the BPS') in order to show that Mr Van Hove's presentation at the meeting of 14 January 1983 related to a lawful parity point system and that the object of the discussions was the introduction at bilateral or European level, without infringing Community competition law, of a price formation system comparable to the BPS.

145 Second, Aalborg contends that it could have relied on various other documents (including Mr Van Hove's letter of 18 February 1983 and document 33.126/6162, referring to the 'rules of the game') to support its argument that dumping was the topic to which the meetings held in 1983 and 1984 were really devoted.

146 The Court of First Instance therefore applied a stricter test than that laid down in the Community case-law. The error of law thus made should, in Aalborg's submission, lead to the judgment under appeal being set aside in its entirety.

— The evidence relating to the price information exchanges (the infringements referred to in Article 2 of the Cement Decision)

147 Cementir criticises the Court of First Instance for having refused to take into account certain documents which confirmed that the prices charged by a company vary significantly according to a number of factors. Those documents, it maintains, were of objective use for the purposes of the defence, since they showed that the exchanges of price information could not in any way contribute to the implementation of the alleged Cembureau Agreement. They are therefore of such a kind as to cast a different perspective on the evidence taken into account by the Commission.

— The evidence relating to the meeting at which the ETF was set up (the infringement referred to in Article 4(1) of the Cement Decision)

148 Aalborg maintains that several documents containing exculpatory evidence, including the minutes of the meetings of the CMF, an internal memorandum of

Blue Circle Industries plc ('Blue Circle') and other documents relating to lobbying initiatives, could have supported its argument that its presence at the meeting of the European cement producers belonging to Cembureau in Baden-Baden (Germany) on 9 September 1986 ('the meeting of 9 September 1986'), at which the ETF was set up, was not a sign of its participation in the unlawful ETF agreement. Aalborg participated only in a meeting to prepare, in the context of lobbying activities, for an action, to take place the following day in Strasbourg (France), to raise the awareness of members of the European Parliament to the problem of unlawful subsidies granted by the Hellenic Republic to its cement industry.

149 More particularly, Aalborg emphasises the importance of those documents as exculpatory evidence in that they show that it remained passive during a brief meeting where the other participants were aware that it was there for a different, lawful purpose. Those documents should therefore have influenced the degree of its liability for the ETF and the amount of the fine imposed.

150 Aalborg criticises the Court of First Instance for having wrongly concluded at paragraphs 2888 to 2898 of the judgment under appeal that none of its observations would have had even a small chance of altering the outcome of the administrative procedure. In its submission, the Court of First Instance did not apply in practice the criterion which it described at paragraph 241 of the judgment under appeal. Its approach requires the undertaking concerned to prove beyond doubt that a different decision, based on an assessment of different evidence, would have been taken if the documents concerned had been disclosed. In reality, the Court of First Instance gave to that criterion a scope so limited that no case remains in which even very serious breaches of the right of access to the file and, accordingly, of the rights of defence of the undertakings could have any consequences.

151 The Court of First Instance therefore made an error of law in applying the criterion of the usefulness of the documents for the defence as established in the

Community case-law, with the effect that the judgment under appeal must be set aside in its entirety or, in any event, in part, in so far as it confirms the infringements relating to the ETF.

— The evidence relating to the agreements with Calcestruzzi (the infringement referred to in Article 4(3) of the Cement Decision)

152 Cementir criticises the Court of First Instance for having failed to explain its reason for not taking into account the following documents, which, it claims, confirm that its participation in the agreements with Calcestruzzi was based on purely commercial considerations:

— the minutes of the meeting of 23 July 1986 of the board of directors of Heracles General Cement Company ('Heracles') (documents 33.126/19878 to 19880), which, according to Cementir, show that Heracles and Titan Cement company SA ('Titan') had concluded agreements between them in order to be able to make joint supplies in Italy and confirm the substance of its argument that, in the light of the significant volume of Calcestruzzi's demand, Cementir had to participate in an agreement involving other producers and signed solely for commercial reasons;

— documents 33.126/2945 to 2951, 2934, 2935, 3065 to 3068 and 2954 to 2966, which, according to Cementir, show that certain Italian producers had taken 'local' measures to protect their market against imports from Greece, but which had nothing to do with the Cembureau agreement;

— documents 33.126/19369 to 19377, 19387, 19389 and 19412 and also 20275 to 20282, 20294, 19889, 19781, 20124 to 20137, 20140 to 20156, 19433, 20001, 19401 and 19410, which, according to Cementir, support its argument that the agreements with Calcestruzzi had no damaging effect on the trade in cement between Italy and Greece, thus showing the great extent to which Greek imports had penetrated the Italian market.

153 Cementir reiterates that there was no direct evidence that its adherence to the agreements with Calcestruzzi was linked to discussions within the ETF and maintains that the Court of First Instance did not properly assess the relevance of the documents in question in order to ensure the full exercise of the rights of the defence and that, in particular, it overlooked evidence of definite importance which cast a completely different light on Cementir's commercial conduct.

— The evidence relating to the agreement between Italian cement producers (the infringement referred to in Article 4(3)(b) of the Cement Decision)

154 Italcementi maintains that the Court of First Instance made an error of interpretation when it considered, at paragraph 118 of the Cement Decision, that the inseparable link between the national agreements and concerted practices and the international agreements and concerted practices existed only in one direction, since the Cembureau agreement and the measures for implementing it at international level in no way depended on the existence of the national agreements and concerted practices.

155 Italcementi criticises the Court of First Instance for having held, on the basis of that false reasoning, that the evidence of the existence of unlawful agreements at national level was of no interest and had no impact on intra-Community relations. The Court of First Instance therefore failed, in breach of the rights of the defence, to examine the documents which Italcementi had produced in support of its complex and detailed analysis of the relations between cement producers at national level, which was carried out after it consulted the administrative file.

Findings of the Court

— The evidence relating to the existence of the Cembureau Agreement

- 156 As regards the Court of First Instance's refusal to accede to Cementir's request that it reopen the oral procedure, that Court correctly recognised, at paragraph 1123 of the judgment under appeal, that Mr Toscano's note was relevant to the defence in that it related directly to the objections formulated by the Commission and that, accordingly, that document in the investigation file should have been communicated to the undertakings under investigation.
- 157 However, the non-disclosure of that note does not automatically mean that there was a breach of the rights of the defence. The sole purpose of what the Commission said at the hearings before the Court of First Instance was to reiterate that position and what it said therefore does not in any way constitute an admission. Nor did its declarations have any decisive impact on the course of the procedure.
- 158 As regards the Court of First Instance's assessment of whether or not Mr Toscano's note was of use in the defence of the undertakings concerned as an exculpatory document, the Court of First Instance never denied that that note proved that the problem of imports of dumped cement had been discussed at the meeting of 14 January 1983 (see paragraph 1130 of the judgment under appeal). However, according to the Court of First Instance's assessment, when read in the light of the other evidence, the note could not be considered an accurate and exhaustive account of the discussions which took place at that meeting and was not of such a nature as to shed a different light on the direct documentary evidence on which the Commission had relied (see paragraphs 1129 and 1130 of the judgment under appeal).

- 159 The appellants have not stated precisely what evidence was distorted by the Court of First Instance and have not demonstrated the errors that led to that distortion.
- 160 Contrary to Irish Cement's contention, moreover, the Court of First Instance did not wrongly ascribe more importance to the preparatory documents for the meeting of 14 January 1983 on which the Commission relied than to the minutes of that meeting, but it considered that Mr Toscano's note lacked relevance by comparison with the evidence adduced by the Commission.
- 161 Nor can the complaints which Irish Cement derives from the Court of First Instance's failure to respond to its arguments concerning Mr Toscano's note be accepted. The Court of First Instance answered those arguments in detail at paragraphs 1126 to 1130 of the judgment under appeal and rejected them as unfounded; and Irish Cement cannot challenge the reasoning of the Court of First Instance on the sole ground that it preferred a different interpretation.
- 162 According to the Court of First Instance, the various items of documentary evidence referred to at points 9 and 61 of the SO and also at recitals 18, 19 and 45 of the Cement Decision established to the requisite legal standard that at the meeting held on 14 January 1983 the Head Delegates agreed on the principle of non-transshipment to home markets. According to the Court of First Instance's assessment, the exculpatory documents on which the applicants at first instance relied proved, at the very most, that the problems of dumping and the BPS had also been discussed at that meeting. They were not capable of shedding a different light on the various items of direct documentary evidence on which the Commission had relied (see paragraphs 1183 and 1211 of the judgment under appeal).
- 163 The Court of First Instance concluded that all of those documents were irrelevant by comparison with the evidence on which the Commission had relied.

164 Aalborg merely reproduces word for word the arguments which it had already raised before the Court of First Instance, without stating precisely what evidence has been distorted by the Court of First Instance or showing the errors that might have led to that distortion. For the reasons set out at paragraphs 47 to 52 of this judgment, those arguments must therefore be rejected.

— The evidence relating to the price information exchanges

165 Cementir's plea alleging infringement of the rights of the defence challenges the Court of First Instance's finding that the price information exchanges constituted a measure for the implementation of the Cembureau Agreement. Contrary to what Cementir contends, it is clear from paragraphs 1772 and 1773 of the judgment under appeal that the Court of First Instance found that those documents had been taken into account by the Commission during the administrative procedure but did not seem to it to be sufficiently convincing in the light of the other evidence at its disposal. The additional comments that Cementir would have been able to make at the material time in order to establish the variable nature of the information on price exchanges would therefore not have invalidated the assessments made by the Commission. It follows that there was no breach of the rights of the defence.

— The evidence relating to the meeting of 9 September 1986

166 As regards the Court of First Instance's assessment of the evidence relating to the meeting of 9 September 1986, the Court of First Instance observed at paragraph 2890 of the judgment under appeal that the Commission had properly taken into account in the Cement Decision the political dimension and the economic background of the problem connected with imports from Greece. However, it found that the documents relied on by Aalborg could not have prevailed over the documents on the basis of which the Commission had found that, at the same time as the lobbying action, the appearance of the imports issue had given rise to the setting-up of the ETF for the purposes of considering dissuasive and

persuasive measures capable of eliminating cheap imports of cement (principally those from Greece) into Western Europe.

167 Contrary to Aalborg's contention, the Court of First Instance did not require Aalborg to demonstrate that the Cement Decision would have been different had Aalborg been able to rely on the exculpatory documents. In that particular case, the Court of First Instance heard Aalborg's arguments concerning the real reason why its representative, Mr Larsen, participated in the meeting of 9 September 1986 and the impact that the exculpatory documents could have had on the Commission's assessment of the gravity and the duration of its participation in the ETF.

168 However, the Court of First Instance rejected those arguments in the light of the evidence adduced by the Commission. First, as the Court of First Instance held at paragraph 2891 of the judgment under appeal, the allegedly exculpatory documents could not have invalidated the Commission's finding that Mr Larsen had attended the meeting of 9 September 1986, at which the setting-up of the ETF, its anti-competitive purpose, its composition, the organisation of its tasks and the various measures which it was given to consider were in turn discussed.

169 Second, as the Court of First Instance observed at the same paragraph of the judgment under appeal, any observations that Aalborg might have made during the administrative procedure on the basis of the allegedly exculpatory documents in order to show that it had taken part in that meeting solely for the purpose of political action could not have disguised the total lack of evidence to show that at the meeting of 9 September 1986 it had expressly informed the other participants that it was attending the meeting with quite different objects in mind.

170 In reality, this complaint merely reproduces pleas already raised before the Court of First Instance and seeks to obtain a reconsideration of the application submitted to that Court.

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— The evidence relating to the agreements with Calcestruzzi

171 As regards the evidence relating to the agreements with Calcestruzzi, it clearly follows from paragraphs 3390 and 3391 of the judgment under appeal that Cementir is merely reiterating before the Court of Justice the complaints already formulated before the Court of First Instance and rejected by it as unfounded following a detailed statement of its reasons. In that regard, Cementir cannot accuse the Court of First Instance of any failure to state reasons.

172 Contrary to Cementir's contention, the Court of First Instance accepted, at paragraph 3392 of the judgment under appeal, the probative force of the minutes of the meeting of the ETF held on 11 February 1987 ('the meeting of 11 February 1987') and the meeting of 15 March 1987, at which the Italian representative presented a report on developments in the agreement between the Italian cement manufacturers and Calcestruzzi's parent company, Ferruzzi (see recital 27, paragraph 5, of the grounds of the Cement Decision). In addition, that evidence is given further weight by the fact that Cementir signed agreements and contracts with Calcestruzzi, Italcementi and Unicem on 3 and 15 April 1987 whereby they jointly undertook to meet all the cement requirements of the Calcestruzzi group and Cementir undertook to cooperate with the Italian cement producers (see recital 27, paragraph 6, of the grounds of the Cement Decision). Cementir also took an active part in the negotiations with Titan and the other Italian producers in Luxembourg in May 1987 ('the Luxembourg meeting', see recital 27, paragraphs 7 to 10, of the grounds of the Cement Decision).

173 The Court of First Instance therefore considered that that bundle of evidence constituted convincing proof of an agreement between Italcementi, Unicem and

Cementir, designed to avoid the threatened imports of cement from Greece by Calcestruzzi. It considered that the arguments put forward by Cementir in relation to its commercial motives and the economic context of the Italian market faced with heavy penetration by Greek exports were not capable of upsetting the conclusions to which the evidence relied on by the Commission led.

- 174 As Cementir has confined itself to challenging the assessment of the evidence by the Court of First Instance, its complaints cannot be examined by the Court of Justice and must be rejected.

— The evidence relating to the agreements between Italian cement producers

- 175 As regards the evidence relating to the agreements and concerted practices between Italian cement producers, the SO draws a clear distinction between the collusion at national level in Italy, namely the agreements with Calcestruzzi which led to the formation of the Società Italiana per le Promozioni ed Applicazioni del Calcestruzzo SpA ('SIPAC') and the collusion between cement producers having effects at international level, namely the concerted practices between Italcementi, Unicem and Cementir intended to take away from the Greek producers a customer who was important to their penetration of the Italian market.

- 176 It is clear that the collusion at international level did not in any way depend on the existence of the national collusion. The Court of First Instance's reasoning is therefore not contradictory in that regard.

- 177 The objection in respect of the relevance of the documents concerning the relations between Italian cement producers at national level contains no reference

from which it is possible to identify the arguments presented before the Court of First Instance, the documents relied on to support it or even the contested paragraphs of the Cement Decision. More particularly, by failing to provide that information, Italcementi has not demonstrated the errors which, in its submission, led the Court of First Instance to distort the evidence.

- 178 In the light of the foregoing, the pleas relating to the application by the Court of First Instance to the circumstances of the case of the criteria relating to the probative force of documents which were not disclosed must be rejected.

(4) Pleas alleging breach of the rights of defence as regards the decision to drop the national objections

Arguments of Italcementi

- 179 Italcementi criticises the Court of First Instance, first, for having refused to censure the breach of the rights of the defence consisting in the failure to communicate beforehand the decision to drop the national objections and, second, for having ignored the contradiction between that decision and the Cement Decision.

- 180 If the decision to drop the national objections had been communicated to Italcementi before it was definitively adopted, it could at the very least have persuaded the Commission to confine its accusations to the effects of the conclusion of the agreement between the Italian cement producers which were directly bound by the Cembureau Agreement. In Italcementi's submission, there is not the slightest link between the purpose of the Cembureau Agreement and the execution of the supply contracts concluded between the Italian cement producers and Calcestruzzi.

- 181 Italcementi also claims that there is a contradiction between the Commission's decision to drop its objections at national level, as described in Chapters 3 to 9 and 13 to 19 of the SO, and Article 4(3)(b) of the Cement Decision, which confers international status on the infringement alleged to have been committed by the Italian producers by virtue of their participation in an agreement designed to prevent imports of Greek cement by Calcestruzzi.
- 182 According to Italcementi, the Court of First Instance incorrectly stated that that agreement was also referred to in the part of the SO devoted to the international objections, thus implying that there had been no contradiction between the decision to drop the national objections and the Cement Decision. Italcementi claims that, in Chapters 2 and 10 of the SO, devoted to the international objections, there is no reference to an agreement between Italian cement producers designed to block Greek imports. On the contrary, the relations between those producers were analysed in Chapter 13, point 70, of the SO, entitled 'Agreements and practices set out in Chapter 3 — Italy'.
- 183 Italcementi states that the decision to drop the national objections does, however, expressly refer to Chapters 3 and 13 as forming part of those of which the object is abandoned. The Court of First Instance carried out a superficial analysis of the Cement Decision, in regard to the SO and the decision to drop the national objections, by failing to find that Article 4(3)(b) of the Cement Decision was illegal and to censure the conduct of the Commission on that point.
- 184 More specifically, it maintains that, had it had the opportunity to express its views on the Commission's intentions to drop the national complaints, it would have pointed out that anomaly and perhaps been able to persuade the Commission to change its attitude or to withdraw its accusations concerning the relations between the Italian cement producers and Calcestruzzi.

185 In that regard, Italcementi disputes the Court of First Instance's finding that the arguments that Italcementi might have been able to put forward in respect of the consequences of the dropping of the national objections would not have had even a small chance of inducing the Commission not to sanction the agreement between the Italian cement producers and Calcestruzzi as an expression of the Cembureau Agreement. Since the former agreement is the only aspect of the national objections not to have been dropped by the Commission, it is not logical to preclude the possibility that those arguments might have convinced the Commission.

Findings of the Court

186 As regards, first of all, the alleged contradiction between the decision to drop the national objections and the Cement Decision, it is true that the withdrawal of Chapters 3 and 13 of the SO, on Italy, had the effect of withdrawing the accusations relating to the setting-up, following agreements between Italcementi, Unicem, Cementir and Calcestruzzi, of the subsidiary, SIPAC, through which the three Italian cement producers cooperated in jointly meeting all the cement requirements of the Calcestruzzi group and in applying price reductions.

187 Despite withdrawing those accusations, the Commission continued to examine the international effects of the agreement between Italcementi, Unicem and Cementir relating to those agreements with Calcestruzzi before finding them liable for the infringement referred to in Article 4(3)(a) of the Cement Decision.

188 Contrary to Italcementi's contention, however, that examination and that finding by the Commission are in no way incompatible with the decision to drop the national objections. The Commission merely drew a distinction between the measures having purely national consequences and those having international effects.

- 189 As regards, next, the alleged absence of any reference in the SO to an agreement between Italcementi, Unicem and Cementir, as the Court of First Instance stated at paragraph 443 of the judgment under appeal, it is clear from point 61(h)(iv) of the SO, which forms part of Chapter 10 of the part of the SO on the international objections and which is reproduced in recital 55, part (a), paragraph 1 of the Cement Decision, that '[t]he pressure brought to bear on Calcestruzzi and the non-implementation of the contract on the purchase of cement from Titan are the result of agreements and/or concerted practices between the Italian producers Italcementi, Unicem and Cementir and between them and the other participants in the Cembureau Task Force..., the aim being to take away from the Greek producers a customer who was important to their penetration of the Italian market'.
- 190 That extract from the SO draws a clear distinction between, on the one hand, the 'concerted practices between the Italian producers Italcementi, Unicem and Cementir' (which form the subject-matter of the objections formulated in Article 4(3)(b) of the Cement Decision) and, on the other hand, the concerted practices between those Italian producers and the other participants in the ETF (which form the subject-matter of the objections formulated in Article 4(3)(a) of the Cement Decision).
- 191 Consequently, Italcementi's argument that the Court of First Instance incorrectly failed to have regard to the absence of any reference in the part of the SO dealing with the international objections to an agreement between those Italian producers alone cannot be accepted.
- 192 As regards, last, the need to afford Italcementi the opportunity to express its views on the dropping of the national objections, the Court of Justice has held that communication to the parties concerned of further objections is necessary only if the result of the investigations leads the Commission to take new facts into account against the undertakings or to alter materially the evidence for the

contested infringements (see Case 53/69 *Sandoz v Commission* [1972] ECR 845, paragraph 14).

- 193 In the present case, as the Court of First Instance rightly observed at paragraphs 439 and 440 of the judgment under appeal, the dropping of the national objections did not in any way change the legal and factual context of the objections raised against Italcementi. It was even in Italcementi's interest that they should be dropped. Accordingly, respect for the rights of the defence did not require that Italcementi should be allowed to submit its observations afterwards.
- 194 Furthermore, Italcementi had already had the opportunity to attempt to persuade the Commission to restrict its accusations concerning the link between the conclusion of the agreement between the Italian cement producers and the Cembureau Agreement, first when it presented its comments on the SO (of which the part relating to the international objections referred to the concerted practices between the cement producers) and, second, when it was heard by the Commission between March and April 1993.
- 195 Furthermore, since the part of the SO relating to the international objections was expressly aimed at the concerted practices between the Italian cement producers, the arguments disputing the Court of First Instance's finding, at paragraph 447 of the judgment under appeal, that the comments which Italcementi might have been able to make on the dropping of the national objections would clearly not have led the Commission to drop the international objection relating to the agreement between the Italian cement producers, are of no avail.
- 196 In view of the foregoing, the pleas alleging breach of the rights of the defence in respect of the decision to drop the national complaints must be rejected.

(5) The plea relating to the right to cross-examine the authors of the documents relied on by the Commission

Arguments of Irish Cement

- 197 Irish Cement criticises the Court for having wrongly rejected, at paragraph 1399 of the judgment under appeal, its argument that the internal memoranda of Blue Circle (documents 33.126/11332 to 11337) and the statement of Mr Kalogeropoulos (documents 33.126/19875 to 19877) were inadmissible because it had not had an opportunity to cross-examine the authors of those documents.
- 198 In its submission, the use against it of those documents, which did not originate within Irish Cement and whose authors it was unable to cross-examine, constitutes a breach of the fundamental principles of justice and fair procedures.

Findings of the Court

- 199 As the Court of First Instance observed at paragraph 1399 of the judgment under appeal, the Blue Circle internal memoranda and the statement of Mr Kalogeropoulos did not constitute the sole or decisive basis of the finding made against Irish Cement, since other documents, which Irish Cement had the opportunity to consult and to comment on, showed that the Cembureau agreement was concluded at the Head Delegates meetings and that Irish Cement participated in those meetings.

200 As the procedure before the Commission is purely an administrative procedure, the Commission is not required to afford the undertaking concerned the opportunity to cross-examine a particular witness and to analyse his statements at the investigation stage. As for the ECHR, it does not lay down the rules on evidence as such (see the *Mantovanelli v France* judgment, § 34).

201 Accordingly, the Court of First Instance made no error of law when it rejected Irish Cement's arguments on the ground that Regulations No 17 and No 99/63 make no provision for the author of a document to be cross-examined by the undertaking against which it is used and held that there had been no breach of the rights of the defence in that regard.

202 The plea must therefore be rejected as unfounded.

(6) The plea alleging breach of the right not to give self-incriminating evidence

Arguments of Buzzi Unicem

203 Buzzi Unicem criticises the Court of First Instance for having failed to apply the principle in *Orkem v Commission*, in that it refused to recognise that the Commission had breached Unicem's rights of defence by basing its arguments on declarations made by the parties during the procedure, contrary to the principle which precludes self-incriminating evidence.

- 204 First, the Court of First Instance wrongly concluded at paragraph 733 of the judgment under appeal that the Commission was entitled to rely, as against Unicem, on the recognition of the existence of an infringement which emanated from parties other than Unicem. If such a declaration cannot be used against the party who made it, it necessarily follows that it cannot be adduced as evidence of the unlawful conduct of another undertaking, on pain of infringing the principle of equal treatment and the defence.
- 205 Second, in Buzzi Unicem's submission, the reasoning at paragraph 735 of the judgment under appeal is incorrect. The Court of First Instance's assertion that the undertakings were not required to respond to a request for information pursuant to Article 11(1) of Regulation No 17 has no relevance for Unicem since the information which concerned it was provided on the basis of Article 14(2) of that regulation.

Findings of the Court

- 206 Buzzi Unicem does not claim that the Commission questioned Unicem about particular practices or measures in such a way as to constrain it to admit infringements. The breach of the rights of the defence alleged by Buzzi Unicem was caused only by the answers given by Cembureau on the occasion of an investigation pursuant to Article 14(2) of Regulation No 17 and by the latter's replies in the wake the SO.
- 207 In carrying out the task conferred on it by Article 89 of the Treaty, the Commission is entitled to question the undertaking under investigation about the conduct of all the other undertakings concerned. Furthermore, Regulation No 17 places the undertaking under an obligation to cooperate actively and the

Commission may reduce the amount of any fine imposed on that undertaking to reflect its cooperation in the investigation (see, to that effect, Case T-13/89 *ICI v Commission* [1992] ECR II-1021, paragraph 393).

208 Those considerations also apply as regards the questioning of associations of undertakings concerning the individual conduct of their members. To acknowledge the existence of a right to silence, as defined by *Buzzi Unicem*, which would have the effect of protecting the members of an association of undertakings by preventing the association from giving evidence against its members, would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the common market are observed.

209 It follows that the Court of First Instance did not err in law when it held, at paragraph 733 of the judgment under appeal, that the Commission had not infringed *Unicem's* right not to give evidence against itself on the ground that the replies in issue emanated from *Cembureau* and not from *Unicem*.

210 The plea must therefore be rejected as unfounded.

211 It follows from all of the foregoing that the pleas relating to alleged procedural defects and a breach of the rights of the defence must be rejected in their entirety.

B — *The substantive pleas*

- 212 The appellants have put forward various pleas criticising the Court of First Instance for having made errors of law, errors in its reasoning and errors in its assessment of the probative documents when it confirmed their participation in the Cembureau Agreement and in the measures adopted to implement that agreement.
- 213 The Commission claims that, by certain of those pleas, the appellants are, in essence, merely criticising the findings of fact made by the Court of First Instance or inviting the Court of Justice to establish the facts in different terms from those used by the Court of First Instance.

(1) Pleas alleging errors of law, flawed reasoning and distortion of evidence as regards the existence of the Cembureau Agreement (the infringement referred to in Article 1 of the Cement Decision)

Arguments of the parties

— The legal characterisation of the evidence as ‘[direct] documentary evidence’

- 214 Irish Cement, Italcementi, Buzzi Unicem and Cementir challenge the Court of First Instance’s assertion at paragraph 260 of the judgment under appeal that the Commission relied ‘solely on [direct] documentary evidence’ to establish the existence of the Cembureau Agreement in regard to them.

215 More specifically, Italcementi emphasises the weakness of the only direct documentary evidence which the Commission adduced to support the existence of the Cembureau Agreement, namely the evidence relating to the characterisation of the undertakings concerned as members of Cembureau, to the participation of certain of those undertakings in the meetings of 14 January 1983 and 19 March 1984 and also to the meeting of Head Delegates of the European cement producers belonging to Cembureau held on 7 November 1984 ('the meeting of 7 November 1984'), and likewise to the content of the agenda of those meetings. In its submission, the Court of First Instance considered that the mere fact that Italcementi had participated in the meeting of 19 March 1984, without having openly manifested its dissent, justified the conclusion that Italcementi had intended to subscribe to the object of the Cembureau Agreement. Such a conclusion is based not on direct evidence but on a presumption.

216 Cementir further submits that the existence of consensus among certain undertakings as to the conclusion of the Cembureau Agreement must be established on the basis of firm and clear evidence which leaves no room for reasonable doubt. The conclusions formulated by the Court of First Instance, which confirm the Commission's findings concerning the meetings of Head Delegates within Cembureau and also the conclusion of the alleged Cembureau Agreement, have no basis in legal logic and result from the distortion of essential evidence. In arriving at the legal characterisation of Cementir's conduct, the Court of First Instance therefore infringed the principles of the burden of proof and of the presumption of innocence; and, furthermore, that characterisation is not properly reasoned.

217 Buzzi Unicem observes that none of the documents relied on in that regard by the Commission mentions Unicem. It maintains that the Court of First Instance reached the conclusion that the Cembureau Agreement was unlawful by means of presumption and in a purely interpretative manner. The Court of First Instance made an error of reasoning by not commenting on the fact that Unicem was not mentioned in those documents. Buzzi Unicem maintains that the Court of First Instance's reasoning is confused, imprecise and contradictory on many points.

— The statement of Mr Kalogeropoulos

- 218 Irish Cement, Buzzi Unicem and Cementir maintain that the Court of First Instance was manifestly mistaken in its assessment of the relevance of the statement of Mr Kalogeropoulos at paragraph 904 of the judgment under appeal. That statement, made in 1986, does not support the Commission's hypothesis that an agreement had been concluded at the meeting of 14 January 1983. Nor did the Court of First Instance reply to their submission that the statement of Mr Kalogeropoulos was a political statement intended to explain the problems of Heracles and also to attempt to justify and extend the State aid granted to that undertaking.

— The Blue Circle memoranda

- 219 Irish Cement maintains that the Court of First Instance did not respond to the arguments disputing the probative value of the Blue Circle internal memoranda. Those memoranda do not show that the Cembureau Agreement or principle was that which had been accepted at the meeting of 14 January 1983.
- 220 Buzzi Unicem maintains that the memoranda, which do not mention Unicem, do not constitute direct evidence of the completion of the Cembureau Agreement or of Unicem's participation in that agreement; and in any event, they do not demonstrate that the Cembureau Agreement applied to the whole of Europe.
- 221 Cementir states that it is not mentioned anywhere in the Blue Circle internal memoranda, which were drafted by a third party whom Cementir did not know. It further criticises the Court of First Instance's finding that the memoranda could

not be interpreted as meaning that they related to dumped imports from non-member countries. In Cementir's submission, the memoranda cannot as such constitute such a definite indication — still less direct evidence — of its liability.

— The admission by Cembureau

- 223 Buzzi Unicem maintains that the admission by Cembureau (documents 33.126/11525 and 13568 to 13573) contains no reference to Unicem's participation in the Cembureau Agreement and cannot therefore constitute direct evidence of its involvement in that agreement. The Court of First Instance made an error of reasoning by failing to adjudicate on that point.

— The letters convening the meeting of 14 January 1983

- 223 Irish Cement, Buzzi Unicem and Cementir dispute the probative value ascribed by the Court of First Instance at paragraphs 934 to 940 of the judgment under appeal to the letters convening the meeting of 14 January 1983.
- 224 Irish Cement criticises the Court of First Instance for having failed to examine its argument that Mr Braz de Oliveira's letter was not a letter convening the Head Delegates meeting, since the author had acted not as an official representative of Cembureau but solely as a member of its Executive Committee. The sole purpose of the letter was to inform the other two members of that committee, namely the Danish and Irish representatives, that a meeting was to be held.

225 Buzzi Unicem criticises the Court of First Instance for having failed to note that the example of ‘appropriate measures’ given in the letter convening the meeting related solely to transfers between Belgium and the Netherlands.

226 Cementir criticises the Court of First Instance’s finding at paragraphs 935 and 936 of the judgment under appeal that the two versions of the letter convening the meeting (namely the letter signed by Mr Braz de Oliveira, which refers to transfers of cement between the countries of origin of the members of Cembureau and the ‘official’ convocation to the meeting of 14 January 1983, which omits such a reference) were in no way inconsistent. Cementir maintains that the Court of First Instance reached that conclusion by deduction.

227 Cementir further maintains that the Court of First Instance’s finding at paragraph 940 of the judgment under appeal that the so-called ‘official’ convocation is relevant evidence against it is based on wholly irrelevant grounds. In that regard, it maintains that it never received the letter from Mr Braz de Oliveira which referred to transfers of cement. Nor did it participate in the meeting of the Cembureau Executive Committee of 5 November 1982 to which, according to the Court of First Instance, that letter referred and during which the need to protect the cement industry from ‘serious problems’ by taking ‘appropriate measures’ was supposed to have been discussed.

— The Chairman’s draft introductory statement for the meeting of 14 January 1983

228 Cementir maintains that the Court of First Instance was wrong to conclude on the basis of the purely provisional text of the Chairman’s introductory statement for the meeting of 14 January 1983 that the setting of ‘rules of the game’ by economic operators constituted an anti-competitive agreement. Since the docu-

ment merely expressed a wish that rules be set, it cannot provide definite and clear evidence of the fact that Cementir gave its consent to an anti-competitive agreement, lasting, moreover, for almost 10 years. The Court of First Instance's conclusion is therefore manifestly illogical and incorrectly reasoned. It is the consequence of a radical distortion of the document in question for the purposes of the legal characterisation of the conduct of that undertaking.

- 229 Cementir further criticises the Court of First Instance for having wrongly confirmed that it was liable for the conclusion of the Cembureau Agreement by virtue of the fact that the Chairman of the meeting of 14 January 1983 had announced that no minutes of the meeting would be taken. The absence of minutes cannot constitute direct and positive evidence of the conclusion of the agreement. The fact that the participants in the meeting wished to keep any action secret is of no relevance in establishing Cementir's participation in the meeting.

— The meetings of 19 March and 7 November 1984

- 230 Cementir disputes the Court of First Instance's assessment of the 'confirmatory' nature of the meeting of 19 March 1984 and states that it was not present at that meeting.

- 231 Cementir and Buzzi Unicem criticise the Court of First Instance's reasoning where it states that the fact that the Head Delegates declared themselves in favour of an agreement between Spanish and Greece producers ('the Hispano-Greek agreement') supported the conclusion that at the meeting of 7 November 1984 the Head Delegates had manifested their intention to confirm their adherence to the alleged Cembureau Agreement. Such a declaration cannot be regarded as a firm and clear indication of the existence of the alleged Cembureau Agreement without infringing the principle of the presumption of innocence.

232 Cementir maintains that the Court of First Instance erred in characterising the very nature of the evidence when it regarded as direct evidence an item of evidence which in reality was arrived at by logical deduction and therefore constitutes indirect evidence. That error also shows that the Court of First Instance's reasoning is inconsistent.

233 Buzzi Unicem claims that the Court of First Instance was wrong to reject the argument whereby it disputed the Commission's interpretation of the document of 12 November 1984 summarising the discussions at the meeting of 7 November 1984 ('the Summary Notes') on the ground that the expression 'achieve a firm undertaking between the major European exporters' in that document does not prove that an agreement was concluded between the European producers. Nor can Unicem have formed part of the group of large cement exporters.

— Other exculpatory evidence

234 In Cementir's submission, the Court of First Instance paid only scant attention to evidence such as the fact that between 1983 and 1985 there were two meetings of Head Delegates at which intra-Community trade was not discussed; the finding that Cementir participated in only two of the five meetings concerned, the second of which definitely did not deal with the topic of intra-Community trade; and the fact that Cementir participated in Cembureau's activities only to a very slight extent, since it concentrated its activities on local customers.

235 Cementir maintains that the Court of First Instance's rejection of those items of evidence does not reflect a correct assessment of the conduct of the various undertakings. Faced with fragmentary, uncertain and equivocal evidence, which

essentially focused on the nature of the discussions alleged to have taken place at the meeting of 14 January 1983, and given the confusion between direct and indirect evidence, the evidence referred to in the preceding paragraph could not be regarded as wholly lacking in probative value.

Findings of the Court

- 236 Irish Cement, Italcementi, Buzzi Unicem and Cementir criticise the Court of First Instance for having ignored the fact that the documents on which the Commission had relied did not constitute irrebuttable evidence of the conclusion of the Cembureau Agreement and of their involvement in that agreement. Those complaints appear to be based on an incorrect interpretation of 'direct evidence'.
- 237 Contrary to what Italcementi and Cementir contend, the Court of First Instance did not improperly reverse the burden of proof or infringe the presumption of innocence. The Court of First Instance concluded, first, that the documents referred to in recital 18 of the Cement Decision, namely the Blue Circle internal memoranda, the statement of Mr Kalogeropoulos and the statements of Cembureau itself (documents 33.126/11525 and 13568 to 13573) expressly mentioned the existence of an agreement between European cement producers having as its object non-transshipment to internal markets and the regulation of sales from one country to another (see paragraph 920 of the judgment under appeal) and, second, that the documents referred to in recitals 19 and 45 of the Cement Decision indicated that an agreement within the meaning of Article 85(1) of the Treaty had been concluded at the meeting of 14 January 1983 (see paragraph 1003 of the judgment under appeal). The Court of First Instance was therefore correct, at paragraph 862 of the judgment under appeal, to characterise those documents as '[direct] documentary evidence' of the existence of the Cembureau Agreement.

238 As the arguments relating to the relevance of the statement of Mr Kalogeropoulos are merely a word for word reproduction of the pleas already raised before the Court of First Instance and as they identify no error of law, they must be rejected in the context of the present appeals, in accordance with the principles set out at paragraph 51 of this judgment.

239 As regards the complaint alleging a defect in the reasons for rejecting in the judgment under appeal the argument relating to the nature of that statement, it is sufficient to state that the Court of First Instance expressly referred to that argument at paragraph 902 of the judgment under appeal before rejecting it as not credible at paragraph 907 of that judgment on the ground that the statement contained no reference to State aid to Heracles or any justification for the latter's earlier conduct. That detailed reasoning is not open to criticism.

240 The reason for challenging the probative value of the Blue Circle internal memoranda on the ground that they did not mention either the Cembureau agreement or the parties to that agreement is based on the same error as that identified at paragraph 236 of the present judgment concerning the scope of '[direct] evidence'. As the Court of First Instance observed at paragraphs 876 to 878 of the judgment under appeal, first, those memoranda refer to an agreement, a principle or a policy of not transshipping to internal European markets which the memoranda link to Cembureau. Second, Blue Circle had an active role within Cembureau and Mr Reiss, the author of the memoranda and regional director in Blue Circle's export division, participated in various meetings of the EPC. Those factors are sufficient for both memoranda to be characterised as '[direct] evidence' of the existence of the Cembureau Agreement.

241 The status of the memoranda as '[direct] evidence' is in no way undermined by the fact that they do not expressly refer to the undertakings concerned. On the contrary, the participation of those undertakings in the Cembureau Agreement is clear from their participation in the Head Delegates meetings or, in Unicem's

case, from its participation in an implementing measure, namely the setting-up of the ETF, by the presence of its representative, Mr Albert, at the meeting of the subgroup 'stick actions' on 17 March 1987 ('the meeting of 17 March 1987').

- 242 Cementir merely criticises the Court of First Instance's findings and does not demonstrate the errors which, it claims, led that Court to distort the evidence. Its criticism is merely an attempt to substitute its version of the events for the Court of First Instance's assessment.
- 243 As regards Cembureau's statements, the Court of First Instance, after mentioning Cembureau's assertion that the references to the Cembureau Agreement in the Blue Circle internal memoranda were to 'established practices and ethics that have gradually evolved through contact with businesses and economic development in various countries', concluded at paragraph 917 of the judgment under appeal that Cembureau had not denied the existence of a concurrence of wills on its part and that of its members concerning good neighbour rules or established practices and ethics.
- 244 Even though Cembureau's admission does not refer expressly to Unicem, it has probative force as regards the existence of the concurrence of wills necessary to found an agreement within the meaning of Article 85(1) of the Treaty. As its admission does not concern Unicem's participation in the agreement, the Court of First Instance did not err in its reasoning when it failed to adjudicate on the argument that Unicem was not mentioned in the admission.
- 245 The arguments relating to the letters convening the meeting of 14 January 1983 merely criticise the merits of the Court of First Instance's findings of fact and merely reiterate a version of the facts which has already been rejected by the Court of First Instance. As regards the alleged failure to state reasons in assessing the status of the letter from Mr Braz de Oliveira, the Court of First Instance set out at paragraph 933 of the judgment under appeal Irish Cement's argument that

the letter had been sent by its author, acting in his personal capacity, only to the Danish Head Delegate (Mr Larsen) and his Irish counterpart (Mr Dempsey). However, it rejected that argument at paragraph 934 of the judgment under appeal, on the ground that the letter convening the meeting had been ‘sent to Aalborg and to Irish Cement... at the request of the Cembureau Chairman, Mr Jean Bailly’. That clear and logical reasoning is not open to criticism.

246 Buzzi Unicem’s argument concerning transfers between Belgium and the Netherlands must be rejected, since it contains no elements of law.

247 As regards the argument based on the consistency between Mr Braz de Oliveira’s letter and the ‘official’ convocation of the meeting of 14 January 1983, Cementir’s complaints relate only to the interpretation of the evidence by the Court of First Instance and do not identify any distortion of evidence. Even though the letters convening that meeting do not mention Cementir by name, in the light of all the evidence they confirm the anti-competitive objective of the meeting of 14 January 1983, which Cementir attended.

248 The arguments relating to the introductory statement of the Chairman of the meeting of 14 January 1983 are based on the same error as that identified at paragraph 235 of this judgment as regards the scope of the concept of ‘[direct] evidence’. Although the Chairman did not propose the adoption of a formal agreement within Cembureau, he expressed the desire that the participants in the meeting should agree on ‘rules of the game’. The fixing by economic operators of ‘rules of the game’ applicable to their conduct on the market unquestionably constitutes, in the light of the Community case-law, an agreement for the purposes of Article 85(1) of the Treaty. No distortion of the evidence and no failure to state reasons can be established in that regard. As regards the criticism based on the probative value of the absence of minutes of that meeting, it merely reproduces the pleas already rejected by the Court of First Instance at paragraph 976 of the judgment under appeal.

- 249 As regards the meeting of 19 March 1984, the Court of First Instance held at paragraph 1353 of the judgment under appeal that Cementir's responsibility for the conclusion of the Cembureau agreement derives from the fact that, by virtue of its presence at one or more meetings of Head Delegates at which a concurrence of wills emerged or was confirmed in respect of the principle of non-transshipment to home markets and the regulation of cement transfers from one country to another, it had subscribed to or at least given the impression to the other participants that it subscribed to the subject-matter of the Cembureau Agreement. The Court of First Instance did not err in law when it held, at paragraph 1376 of the judgment under appeal, that the mere presence of Cementir at one of the Head Delegates meetings at which the Cembureau Agreement was concluded or confirmed sufficed for a finding that it had participated in the concurrence of wills which had been reached. The Court of First Instance's assessment of the 'confirmatory' nature of the meeting of 19 March 1984 is therefore in no way rendered invalid by the fact that Cementir was not present at that meeting.
- 250 As regards the meeting of 7 November 1984, the Court of First Instance considered the various possible interpretations of the 'Summary Notes' and rejected Unicem's and Cementir's arguments that, in particular, the sole purpose of the Hispano-Greek agreement referred to in the document was to stabilise prices of exports outside Europe. According to the Court of First Instance, which has unlimited jurisdiction to assess the evidence adduced before it, the Head Delegates, by supporting that agreement, pursued a double objective, namely, first, to obtain better export prices and, second, to avoid the risk of a destabilisation in Europe. According to the Court of First Instance, non-transshipment to home markets and the channelling of exports went hand in hand (see paragraphs 1034 to 1036 of the judgment under appeal).
- 251 The arguments which Buzzi Unicem and Cementir draw in that regard from an alleged incorrect characterisation of the evidence and of the inconsistent nature of the reasoning of the Court of First Instance in reality seek only to call in question findings of fact, which is not permissible in appeal. More specifically, the arguments alleging incorrect characterisation of the evidence are drawn from an incorrect interpretation of the concept of '[direct] evidence'.

252 Since the support for the Hispano-Greek agreement manifested at the meeting of 7 November 1984 had precisely the same aim as the Cembureau Agreement, namely to prevent destabilisation of the European markets, the Court of First Instance correctly concluded at paragraph 1046 of the judgment under appeal that the ‘Summary Notes’ were relevant evidence, in so far as they indicated that the concurrence of wills in regard to the principle of non-transshipment to home markets and the regulation of sales from one country to another had been reaffirmed at that meeting. The Court of First Instance therefore did not in any way distort the evidence or, moreover, employ illogical reasoning when, at paragraph 1037 of the judgment under appeal, it confirmed the correctness of the conclusion set out in recital 45, paragraph 2, second subparagraph, of the Cement Decision, that the content of the Cembureau Agreement had again been confirmed at the meeting of 7 November 1984.

253 As regards the existence of other Head Delegates meetings between 1983 and 1985, moreover, at which intra-Community trade was not discussed, the Court of First Instance’s assessment of the probative force of what was alleged to be exculpatory evidence adduced in rebuttal of the evidence presented by the Commission is not, as such, amenable to review by the Court of Justice and there is nothing in the arguments put forward by Cementir to justify calling that assessment in question in the present case. The Court of First Instance did not distort the evidence when it held, at paragraph 1049 of the judgment under appeal, that the documents showing that intra-Community trade was not discussed at the meetings held on 30 May 1983 and 10 June 1985 were not such as to shed a different light on the body of documentary evidence presented by the Commission and showing that an agreement not to tranship to home markets had been concluded, and then confirmed, at the meetings held on 14 January 1983, 19 March and 7 November 1984.

254 The pleas relating to alleged errors of law, flawed reasoning and the distortion of evidence concerning the existence of the Cembureau Agreement must therefore be rejected as inadmissible and/or unfounded.

(2) Pleas relating to alleged errors of law, flawed reasoning and distortion of evidence as regards the single and continuous nature of the Cembureau Agreement

Arguments of the parties

255 Italcementi, Buzzi Unicem and Cementir criticise the Court of First Instance for having wrongly regarded the Cembureau Agreement and the implementing measures as a 'single agreement', since it considered that the object was the same in all cases and found that the parties were the same.

256 According to Buzzi Unicem, the concept of 'single agreement' presupposes conduct that is single, uninterrupted and continuous in time. It maintains that the actions examined during the administrative and judicial stages do not constitute such conduct. That, it submits, is proved by the long intervals between the Head Delegates meetings. The gap of 14 months between the meeting of 14 January 1983 and the meeting of 19 March 1984 means, in the light of the judgment in Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, that those meetings cannot be regarded as sufficiently close in time to support an inference of the continuation of a single conduct. The precise repetition of the conduct attributed to the undertakings referred to by the Cement Decision in the context of a 'single unlawful design', rather than in the context of a 'single agreement', could have led the Commission and the Court of First Instance to set the fine on the basis of the role played by each undertaking.

257 Italcementi criticises the Court of First Instance for having incorrectly held that, once it was inferred that they adhered to the principle of the Cembureau Agreement, all the conduct of the undertakings concerned on the market could only constitute implementing measures confirming the actual application of the

agreement. As those measures are alleged to be intended to implement an agreement the existence of which was deemed to have been established directly by documentary evidence, they are presumed to have been proved by direct documentary evidence.

Findings of the Court

- 258 An infringement of Article 85(1) of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision (see, to that effect, *Commission v Anic*, paragraph 81). When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.
- 259 In the present case, contrary to Buzzi Unicem’s contention, it is artificial to subdivide into a number of distinct actions the Cembureau Agreement, which is characterised by a series of efforts pursuing a single economic end, namely non-transshipment to home markets.
- 260 Since each of those actions comes within the concept of infringement within the meaning of Article 85(1) of the Treaty, it is necessary to distinguish as manifestly irrelevant to the present case the judgment in *Dunlop Slazenger v Commission*, which dealt with legal certainty in relation to the burden of proof. In the context of an overall agreement extending over several years, a gap of several months between the manifestations of the agreement is immaterial. The fact that the various actions form part of an ‘overall plan’ owing to their identical object, on the other hand, is decisive.

- 261 Likewise, the distinction that Buzzi Unicem draws between a ‘single agreement’ and a ‘single criminal design’ is of no relevance. For the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the actual effects of an agreement once it appears that its aim is to restrict, prevent or distort competition within the common market (see Case C-277/87 *Sandoz prodotti farmaceutici v Commission* [1990] ECR I-45).
- 262 It follows that the Court of First Instance did not make an error of assessment when it confirmed the Commission’s conclusion that the Cembureau Agreement was single and continuous and that it was constituted by ‘the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts’ (recital 46, paragraph 1 of the Cement Decision).
- 263 The pleas relating to alleged errors of law, flawed reasoning and distortion of evidence as regards the single and continuous nature of the Cembureau Agreement must therefore be rejected as unfounded.

(3) Pleas alleging errors of law, flawed reasoning and infringement of the rights of the defence as regards the exchanges of price information

Arguments of the parties

- 264 Aalborg, Buzzi Unicem and Cementir raise a number of pleas criticising the Court of First Instance for having applied an incorrect legal characterisation, first, to the

specific exchanges of information on prices during the Head Delegates meetings (referred to in Article 2(1) of the Cement Decision; ‘the specific exchanges’) and, second, to the periodic exchanges of information (referred to in Article 2(2)(b) of the Cement Decision; ‘the periodic exchanges’) when it regarded them as implementing measures. The Court of First Instance is also alleged to have exaggerated the duration of the Cembureau Agreement.

— The anti-competitive object of the exchanges of price information

265 Aalborg, Buzzi Unicem and Cementir maintain that the periodic exchanges and also, in Cementir’s submission, the specific exchanges were neutral from the aspect of competition, for the following reasons:

- the selling prices of cement were easily accessible to the public and, as regards the Danish market, they were even published;
- most frequently, prices were subject to public control measures, such as approval by the Danish Monopoltilsyn;
- the gathering of data on prices charged was traditionally part of the tasks of a trade association and, owing to its limited scope, had no significance from the point of view of competition; and
- information on prices had always been sent by Cembureau to its members after the prices communicated had become applicable at the time of an annual update.

- 266 Aalborg maintains that although the Court of First Instance considered that the periodic exchanges had no impact from the point of view of competition, it incorrectly extended the scope of the Cembureau Agreement to a lawful practice which had existed between the same parties long before that agreement had been concluded.
- 267 Buzzi Unicem supports those arguments and claims that the findings of the Court of First Instance are inconsistent with the settled criteria consistently applied by the Community judicature in such matters, according to which an infringement of Article 85(1) of the Treaty presupposes that the information exchanged may be regarded as trade secrets.
- 268 Aalborg and Buzzi Unicem contend that the reasoning used by the Court of First Instance at paragraphs 1651 and 1652 of the judgment under appeal to prove that the periodic exchanges facilitated the implementation of the Cembureau Agreement is unclear and illogical. To find that those exchanges are anti-competitive in nature because they have the same anti-competitive purpose as the Cembureau Agreement constitutes circular reasoning.

— The error in the Italian version of the judgment under appeal

- 269 Buzzi Unicem criticises the Court of First Instance for having incorrectly stated, at paragraphs 1680 to 1682 of the judgment under appeal, its reasons for rejecting the plea that the exchanges of price information were lawful in any event since the market was not oligopolistic. In the Italian version of the judgment under appeal, the Court of First Instance appears to assert that Unicem maintained that the market was oligopolistic. Even if, as the Commission contends, this was merely a clerical error in the Italian version, which does not render the Court of First Instance's conclusion invalid, Buzzi Unicem claims that its rights of defence were affected, since it could not identify that error and was therefore unable to present its plea differently.

— The alleged unequal treatment

270 Buzzi Unicem criticises the Court of First Instance's reasons for rejecting its plea alleging unequal treatment and infringement of its rights of defence owing to the fact that the objections relating to the exchange of information were not disputed in respect of the Associazione Italiana Tecnico Economica del Cemento ('AITEC'), which was in a situation comparable to Buzzi Unicem's. It claims that the requirement which the Court of First Instance imposed on it, namely that it demonstrate that the failure to dispute the same objection in respect of AITEC placed it in a less favourable situation, is a kind of *probatio diabolica*. Only if AITEC had also been involved in the procedure would Unicem have been able to adduce firm and conclusive evidence of what might have happened in that hypothesis.

271 Buzzi Unicem contends that the Court of First Instance also erred in law in failing to take account of the consistent Community case-law which condemns the conduct of trade associations through which exchanges of information are implemented.

— The characterisation of the exchanges as an implementing measure

272 Aalborg, Buzzi Unicem and Cementir criticise the Court of First Instance for having made an error of law, distorted evidence and made an error of reasoning in stating that the exchanges of price information formed an integral part of an alleged single and continuous agreement lasting several years. They maintain that the necessary temporal link between those exchanges and the meetings of 14 January 1983 and 19 March and 7 November 1984 at which the Cembureau Agreement was deemed to have been concluded and confirmed was absent and that the exchanges cannot be deemed to be a measure implementing that agreement.

- 273 First, Cementir submits that it cannot be inferred from any passage in the introductory statement of the Chairman of the meeting of 14 January 1983 that the data specifically exchanged in that context could facilitate the setting-up or the functioning of a collusive arrangement. The document in question is quite general and does not constitute the slightest basis for the conclusion as to the anti-competitive scope of the data distributed.
- 274 Second, Cementir maintains that the two documents on which the Commission relies in respect of the meeting of 19 March 1984 cannot be used against it, since it was not present at that meeting. The Court of First Instance accepted that Cementir could not be held liable for the exchanges which took place on that occasion and, accordingly, the Court of First Instance's hypothesis that the data exchanged made it possible to compare the prices applied on the various national markets is unfounded.
- 275 Third, as regards the periodic exchanges, Cementir criticises the Court of First Instance for having distorted evidence and for having vitiated its reasoning as regards the legal assessment of those exchanges, for the following reasons:
- the Court of First Instance made a logical error when it concluded that the references to national prices in the introductory statement of the Chairman of the meeting of 14 January 1983 should be compared with the exchange of data which took place at that meeting. That is not sufficient reason to regard as unlawful a system of data exchange which was set up well before that meeting.

 - contrary to the Court of First Instance's assertion at paragraphs 1645 and 1646 of the judgment under appeal, the document relating to average national prices which, according to the Court of First Instance, illustrated the

exchange of price information between the members of Cembureau was distributed at the meeting of 30 May 1983, in which Cementir did not participate, nor at the meeting of 14 January 1983. That document is therefore of no relevance for the purpose of establishing an infringement by Cementir.

276 More specifically, Buzzi Unicem claims that paragraph 1698 of the judgment under appeal reveals circular reasoning in that it regards Unicem's participation in the exchange of information as proof of its involvement in the Cembureau Agreement and its participation in that agreement as proof of its participation in the information exchange.

277 According to Buzzi Unicem, the Court of First Instance's inferences of the existence of a link between respect for the Cembureau Agreement and Unicem's participation in the periodic exchanges do not, in accordance with the Community case-law, constitute 'the only plausible explanation for that conduct', but represent mere supposition and hypotheses which most certainly have no more probative value than do the perfectly plausible reasons put forward by Unicem.

— The duration of the exchanges

278 Aalborg maintains that the lawful nature of the exchanges of price information did not change after the conclusion of the Cembureau Agreement and submits that there is nothing in either the Community case-law or the exchanges themselves to justify extending the duration of the Cembureau Agreement until 31 December 1988. Accordingly, the facts in respect of which the Cement Decision imposed a fine are time-barred in Aalborg's case and the fine imposed on it must therefore be annulled or reduced.

Findings of the Court

- 279 As regards the exchanges of price information, Aalborg, Buzzi Unicem and Cementir are essentially reproducing the same arguments as they had already raised in vain before the Court of First Instance. Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (see, inter alia, Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34, and *BAT and Reynolds v Commission*, paragraph 62).
- 280 As regards the periodic exchanges, at paragraphs 1628 to 1630 of the judgment under appeal, the Court of First Instance explicitly rejected as unfounded the arguments alleging the lawful nature of the price information exchanged, on the ground that the information was not as neutral as the undertakings concerned claimed.
- 281 As the Court of First Instance stated at paragraphs 1510, 1511 and 1634 of the judgment under appeal, even though the information thus exchanged was in the public domain or related to historical and purely statistical prices, its exchange infringes Article 85(1) of the Treaty where it underpins another anti-competitive arrangement. That interpretation is based on the consideration that the circulation of price information limited to the members of an anti-competitive cartel has the effect of increasing transparency on a market where competition is already much reduced and of facilitating control of compliance with the cartel by its members.

282 In the present case, it is irrelevant that the information on prices in question was provided two weeks before the meeting of 14 January 1983, since it served as the basis for discussion during that meeting. Aalborg's argument that the circulation of such information by a trade association such as Cembureau is lawful cannot be accepted either.

283 Furthermore, at paragraphs 1648 to 1653 of the judgment under appeal, the Court of First Instance examined and rejected as irrelevant the fact that the Danish prices had been subject to supervision by the Danish competition authorities until 1989. When the Court of First Instance refused to examine whether the intrinsic characteristics of the information exchanged could or could not have rendered the exchanges unlawful, and concluded that both the specific and the periodic exchanges were intended to facilitate the implementation of the Cembureau Agreement and were therefore anti-competitive in nature, it did not err in law. The legal characterisation which the Court of First Instance ascribed to those exchanges is not open to challenge.

284 As regards the missing negative before the word corresponding to 'oligopolistic' at paragraph 1680 of the Italian version of the judgment under appeal, this is merely a clerical error which does not appear in the other language versions. As such, it is of no relevance, since in the light of the context and the other paragraphs of the judgment under appeal paragraph 1680 cannot be interpreted literally. Since paragraph 1681 of the judgment under appeal dispels any ambiguity on that point, the error is not such as to render the judgment under appeal marred by defective reasoning. As it was not capable of misleading Buzzi Unicem, the error did not in any event affect its rights of defence.

285 The argument relating to the alleged unequal treatment of Unicem and AITEC was rejected by the Court of First Instance at paragraphs 1701 to 1703 of the judgment under appeal. Relying on Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and*

Others v Commission [1993] ECR I-1307, paragraph 146, the Court of First Instance stated that the fact that AITEC was not charged with the infringement in question could not absolve Unicem from its liability. There was no breach of the rights of the defence, since Unicem was not prevented from obtaining access to documents which might have supported its defence during the course of the administrative procedure.

- 286 As regards the implementation of the Cembureau Agreement by the exchanges of price information, the Court of First Instance ascertained that the Commission had adduced evidence apt to demonstrate to the requisite legal standard, first, that the various anti-competitive practices had, owing to their identical objective, contributed to the carrying-out of the infringement in its entirety and, second, that the undertakings involved had the necessary subjective intention.
- 287 After carefully examining the evidence before it, the Court of First Instance found no error in the Commission's conclusion. It confirmed, first, that the purpose of the specific exchanges of price information at the meetings of 14 January 1983 and 19 March 1984 was to reinforce the general agreement on non-shipment to home markets concluded and then confirmed at those meetings (see paragraph 1518 of the judgment under appeal) and, second, that one of the objectives assigned to the periodic exchanges of information had been to ensure the implementation of the agreement (see paragraph 1644 of the judgment under appeal).
- 288 The Court of First Instance found that these exchanges were therefore intended to curb intra-Community imports of cement, or, in short, to facilitate the implementation of the Cembureau Agreement.
- 289 In the present case, Cementir's arguments concerning the probative force of the draft introductory statement of the Chairman of the meeting of 14 January 1983 are irrelevant. Reference should be made to the finding of the Court of First

Instance at paragraph 1521 of the judgment under appeal, in response to a similar argument put forward by Irish Cement, that one passage in the draft statement shows that the purpose of the meeting was ‘to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices’. The Court of First Instance held that, ‘[r]ead in their context..., [the relevant passages] clearly signify that the purpose of the exchanges of information on prices in Cembureau member countries during that meeting was to point up the differences between various national price levels, some of which had been sharply reduced, in order “to identify possible solutions capable of modifying market developments” before the “phenomenon” of an increase in imports and a sharp reduction in certain prices “had time to spread in extent and gravity”’. The Court of First Instance therefore found no error in the Commission’s conclusion that the exchange of information in question was intended to assist the implementation of the Cembureau Agreement concluded at that meeting. Those findings of fact cannot be overturned in an appeal.

290 As regards the criticisms formulated by Cementir and Aalborg concerning the lack of a temporal link between the periodic exchanges and the meetings of 14 January 1983 and 19 March 1984, it is necessary, in that regard, only to determine whether the exchanges form part of an ‘overall plan’ because they have the same objective, without taking their particular chronology into consideration. The Court of First Instance rightly held at paragraph 1644 of the judgment under appeal that the fact that the system of periodic exchanges had been in place well before the adoption of the Cembureau Agreement did not preclude the Commission from finding that, as from the conclusion of the Cembureau Agreement, that system had taken over and subsequently extended the anti-competitive object pursued by the discussions during the meetings of 14 January 1983 and 19 March 1984 and also by the specific exchanges of price information at those two meetings.

291 As regards the evidence of subjective intent on the part of each of the undertakings involved, it was for the Court of First Instance to ascertain that the Commission had established that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the

participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (see *Commission v Anic*, paragraph 87).

292 The fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is of no relevance for the purpose of establishing the existence of the infringement. Such a factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission v Anic*, paragraph 90).

293 As Cementir expressly recognised that it had attended the meeting of 14 January 1983 at which price information was exchanged (see paragraph 1566 of the judgment under appeal), it is irrelevant, for the purpose of proving the existence of a global infringement, that it was not present at the meeting of 19 March 1984. The Court of First Instance therefore did not err when it held that the Commission was right to rely on the notes of the meeting and the document relating to national average prices associated with that meeting in order to establish the existence of the infringement and Cementir's participation therein.

294 As regards Buzzi Unicem's allegations of illogical reasoning and distortion of the evidence of Unicem's participation in the periodic exchanges, it is common ground that as Unicem did not attend the meetings of 14 January 1983 and 19 March 1984, the Cement Decision contains no evidence capable of showing that Unicem had adhered to the Cembureau Agreement before 9 September 1986 by means of its participation in the periodic exchanges (see paragraph 4246 of the judgment under appeal). However, the Court of First Instance found at paragraph 1698 of the judgment under appeal that, from 9 September 1986 (the date on which the ETF was set up), Unicem had participated in the periodic exchanges, motivated by a desire to see the Cembureau Agreement applied. Nowhere in the judgment under appeal did the Court of First Instance state that Unicem's

participation in those exchanges testified to its adherence to the Cembureau Agreement. It was its adherence from the date of the setting-up of the ETF, 9 September 1986, that explained its participation in the exchanges of price information. The Court of First Instance's reasoning is therefore not illogical.

- 295 As regards the duration of the periodic exchanges as a measure taken to implement the Cembureau Agreement, the Court of First Instance held at paragraph 1641 of the judgment under appeal that it was not disputed that those exchanges had continued after the Head Delegates meetings in 1983 and 1984, at least until the end of 1988.
- 296 Since those exchanges underpinned the Cembureau Agreement, it is perfectly logical, in the absence of proof to the contrary, to consider that the agreement ended with the last of those exchanges. It follows that the Court of First Instance's findings or its reasoning in respect of the duration of the Cembureau Agreement cannot be called in question. By arguing generally that if the Court of First Instance had accepted Aalborg's arguments it would necessarily have reached a different conclusion, Aalborg is in reality merely challenging in general the findings of fact made by the Court of First Instance without putting forward any serious argument to support its allegation that that Court distorted the evidence or made an error of law. The arguments relating to the duration of the periodic exchanges are therefore inadmissible.
- 297 The pleas alleging errors of law, flawed reasoning and a breach of the rights of the defence in respect of the exchanges of price information must therefore be rejected as inadmissible and/or unfounded.

(4) Pleas alleging errors of law, flawed reasoning, distortion of evidence and breach of the rights of the defence as regards the activities within the framework of the ETF and the agreements and practices intended to protect the Italian market

Arguments of the parties

— Participation in the setting-up of the ETF

298 Aalborg criticises the Court of First Instance for having wrongly held it liable for the setting-up of the ETF (the infringement referred to in Article 4(1) of the Cement Decision). The Court of First Instance relied solely on the passive presence of Mr Larsen during the very brief presentation of the ETF at the end of the meeting of 9 September 1986.

299 Aalborg maintains that the Court of First Instance relied solely on the fact that it did not expressly distance itself during that presentation of the ETF. It claims that it was present at the meeting purely for lawful reasons, namely lobbying. Aalborg maintains that liability in that regard cannot be based on information provided 'in the margin' at a meeting of which it had no knowledge and on which, *a fortiori*, it could have no influence.

300 The Court of First Instance therefore erred in law by extending Aalborg's liability for 'not distancing itself' far beyond what is permissible according to the criteria of a 'continuous agreement' established in the Community case-law. The

setting-up of the ETF and its continuation until May 1987, and also the activities of the principal actors of the ETF, cannot in Aalborg's submission be regarded as actions forming part of a global plan, to whose adoption it consented and which contained the constituent elements of a cartel.

301 That is *a fortiori* so, as the Court of First Instance accepted that Aalborg had not taken part in any other meeting, had not been informed of subsequent initiatives and had not participated in the stick and carrot measures or in any other actions carried out by the ETF. It cannot therefore be held liable on the basis of its purely passive presence during the account of the ETF presented on 9 September 1986 or be established beyond that date.

— The characterisation of the setting-up of the ETF as a single agreement relating to the ETF and as a measure taken to implement the Cembureau Agreement

302 Aalborg maintains that the temporal links between, on the one hand, the meeting of 9 September 1986 and, on the other, the meetings of 14 January 1983 and 19 March and 7 November 1984, at which, according to the Commission and the Court of First Instance, the Cembureau Agreement was concluded and confirmed, is not sufficient for the setting-up of the ETF to be regarded as a measure taken to implement that agreement so far as Aalborg is concerned.

303 Buzzi Unicem contends that the Court of First Instance was wrong to base its assessment on the 'constituent elements' of the ETF and on Mr Albert's 'proposition' in order to conclude that Unicem was necessarily aware of the fact that the Cembureau Agreement and the concerted practices in which it had participated formed part of an overall strategy designed to eliminate imports.

— Duration of the infringement relating to the setting-up of the ETF

304 Aalborg disputes the fact that its liability for the setting-up of the ETF was held to extend until 31 May 1987 on the ground that the active participants held meetings until that date. It submits that the Court of First Instance none the less accepted that Aalborg had not taken part in any meeting other than that held on 9 September 1986, had not been informed of subsequent initiatives and had not participated in the stick and carrot measures or in other actions carried out by the ETF. Its liability cannot therefore be established beyond the date of that meeting, which it attended in a strictly passive capacity.

— Participation in the infringement relating to the setting-up of the ETF

305 Aalborg criticises the Court of First Instance for having wrongly held it liable, owing to its participation in the ETF, for the concerted practice designed to withdraw Calcestruzzi as a customer from the Greek cement producers, in particular Titan, in particular in so far as that infringement is imputed to it after 9 September 1986.

306 In that regard, Aalborg submits the same arguments as those already relied on in order to dispute the infringement consisting in the setting-up of the ETF, namely that the Court of First Instance relied solely on the passive presence of an Aalborg representative at the meeting of 9 September 1986 and on the fact that Aalborg did not expressly distance itself during the brief communication made on that occasion about the meetings between the Italian cement producers and Ferruzzi.

307 That practice, it submits, was applied on the Italian market, which is a long way from Aalborg's natural local market having regard to the transport costs of

cement and, it would appear, was applied essentially by Italian undertakings. Neither the Cement Decision nor the judgment under appeal contains the slightest explanation, still less a convincing explanation, of any knowledge, interest or influence which Aalborg might have had of or in that concerted practice.

308 Cementir contends that none of the evidence on which the Court of First Instance relied in order to confirm the existence of a concerted practice at European level designed to ensure that Calcestruzzi would no longer be a customer of the Greek producers supports the argument that Cementir participated in that concerted practice:

- the minutes of the meeting of 9 September 1986 are of no relevance to Cementir, since it did not participate in that meeting;

- Titan's letter of 2 September 1988 to its lawyers in London (document 33.126/19196) does not in any way show that Cementir's conduct towards Calcestruzzi was linked with a concerted practice with other European producers within the framework of the ETF, a body to which Cementir did not belong, as the Court of First Instance acknowledged;

- neither the meeting of 11 February 1987 nor the meeting of 17 March 1987 concerned Cementir, since it did not participate in any meetings of the ETF;

- the two telexes sent to Titan confirming the suspension of deliveries of cement agreed between Titan and Calcestruzzi does not show that Cementir or any other companies concluded a trade agreement with Calcestruzzi in the context of the implementation of a definitive anti-competitive plan at European level.

309 The findings of the Court of First Instance on that point are therefore not adequately reasoned. The Court of First Instance relied on a mere presumption which is not supported by either direct evidence or indirect evidence. Such a presumption also places on Cementir the burden of a *probatio diabolica*, consisting in proving the absence of a link, contrary to the principles governing the taking of evidence for the purpose of ensuring the presumption of innocence.

310 Nor has Cementir ever disputed that fact that Calcestruzzi had been a customer since 1979 and that, owing to the large quantities supplied to that customer, it regarded it as a customer not to be lost. On that basis, Cementir's conduct should have been characterised, from the aspect of competition law, as wholly autonomous and competitive conduct and certainly not as collusive conduct extending over several years and deserving of such a heavy penalty.

— The characterisation of the agreements with Calcestruzzi as a single agreement relating to the ETF and as measures taken to implement the Cembureau Agreement

311 Cementir claims that the Court of First Instance made a manifest error of characterisation in establishing a link between its adherence to the agreements with Calcestruzzi and any anti-competitive agreements which may have been concluded by other producers within the framework of the ETF. First, the judgment under appeal finds no direct evidence of such a link. Second, the Court of First Instance failed to ascertain whether or not there was indirect evidence of that link. In Cementir's submission, there was no such evidence, since Cementir participated in the agreements with Calcestruzzi solely for trade purposes unconnected with the initiatives of the ETF. It thus participated in the Luxembourg meeting with the sole aim of ensuring that its own agreement would continue to apply and not — as the judgment under appeal wrongly asserts — for the purposes of the agreement between Calcestruzzi and Titan. The Court of First Instance's analysis at paragraph 3359 of the judgment under appeal distorted its argument.

— The alleged error in the legal analysis of the unlawful nature of the agreements with Calcestruzzi

- 312 In Italcementi's submission, the Court of First Instance erred in regarding as relevant and deserving of a sanction the implementation of the supply contracts between the Italian cement manufacturers and Calcestruzzi, because, first, those contracts were not open to challenge and, second, the purpose of protecting the Italian market was not attained by the breaking of the contract between Titan and Calcestruzzi.
- 313 Italcementi is unable to see why the Court of First Instance concludes its analysis of the agreements with Calcestruzzi by finding that it, Unicem and Cementir infringed Article 85(1) of the Treaty between 3 April 1987 and 3 April 1992, since that means that the unlawful act also consisted in implementing the contracts with Calcestruzzi. In Italcementi's submission, that amounts to a profound contradiction and also to an error in legal analysis.
- 314 Italcementi maintains that it is clear that since the horizontal agreement concluded between the three Italian cement manufacturers and the pressure brought to bear on Calcestruzzi had the consequence of interrupting deliveries between Calcestruzzi and Titan, they had also exhausted their anti-competitive effects attributable to the Cembureau Agreement. However, the Court of First Instance seems to have considered, without stating any reason for doing so, that the contracts concluded with Calcestruzzi also constituted an expression of that agreement.
- 315 Italcementi claims to have shown, without being proved wrong by the Court of First Instance on that point, that imports of Greek cement into Italy had increased

exponentially from 1986. Calcestruzzi represented only 5% of Italian demand for cement and the Greek cement could therefore easily have been supplied to other purchasers. Italcementi contends that Calcestruzzi could have obtained supplies elsewhere for a significant amount (20%) of its needs. Consequently, the agreement was not intended to stem the flow of Greek imports into Italy but was meant to ensure that such imports took place within the framework of a fixed-term contract between Calcestruzzi and Titan. The conclusion of the contracts with Calcestruzzi therefore marks the end, and not the beginning, of the unlawful act referred to in Article 4(3)(b) of the Cement Decision.

— The plea relating to the principle *ne bis in idem*

316 Both Buzzi Unicem and Italcementi maintain that the imposition of a sanction in respect of their agreements with Calcestruzzi and the agreements between the three Italian cement producers is incompatible with the decision to drop the national objections and irreconcilable with the decision of the Italian competition authority. To reiterate the objections based on those agreements in Article 4(3) of the Cement Decision entailed in their regard a double imputation of liability, at Community level and at national level, for the same conduct, contrary to the principle *ne bis in idem*.

317 Buzzi Unicem maintains that the decision to drop the national objections constituted a clear indication that any national agreements between the Italian cement manufacturers were not connected with the ETF or the Cembureau Agreement. However, the Commission regarded those agreements as proof of the cement producers' involvement in the Cembureau Agreement for the purpose of preventing any imports of Greek cement by Calcestruzzi.

318 Buzzi Unicem contends that the reasons stated by the Court of First Instance at paragraph 3386 of the judgment under appeal for the double examination of the national conduct lacks conviction and appears to be complicated and fallacious. The Court of First Instance wrongly relied on a differentiation of the objects of the two procedures, national and Community, stating, first, that the examination by the Italian competition authority was designed to ascertain the lawfulness of the contracts concluded between Calcestruzzi and the Italian producers and, second, that the analysis made by the Commission and by the Court of First Instance concerned the agreement concluded between those producers which gave rise to those contracts and which had the objective of preventing Calcestruzzi from importing cement from Greece. In reality, however, it follows, in particular, from paragraphs 3356 and 3396 of the judgment under appeal that that analysis also concerned those contracts.

319 Italcementi puts forward similar arguments. It maintains that, from the point of view of their content, the contracts concluded with Calcestruzzi governed exclusively national sales relationships, the anti-competitive elements of which had already been sanctioned by a decision of the Italian competition authority in March 1996. Their implementation therefore had no connection with the ETF or with the Cembureau Agreement.

— The alleged distortion of the evidence

320 Buzzi Unicem criticises the Court of First Instance for having distorted the meaning of the minutes of the meetings of 17 June and 4 September 1987 and of having stated inadequate and contradictory reasons, at paragraph 2683 of the judgment under appeal, for its finding that Unicem had participated in the concerted practices. It maintains that the direct documentary evidence is not the irrebuttable evidence that the Court of First Instance considers it to be.

— The duration of the infringement referred to in Article 4(3)(b) of the Cement Decision

321 Italcementi and Buzzi Unicem dispute the Court of First Instance's assessment of the duration of the infringement constituted by the Cembureau Agreement. The judgment under appeal alters the duration of that infringement and has the consequence that, from 19 May 1989 to 3 April 1992, only the Italian cement manufacturers adhered to the Cembureau Agreement.

Findings of the Court

322 Aalborg's arguments concerning its participation in the ETF reiterate in part its version of the events which took place at the meeting of 9 September 1986. Those arguments, which seek to demonstrate the lawful nature of the objects of that meeting, have already been rejected at paragraphs 2600, 2656 and 2891 of the judgment under appeal. Aalborg cannot challenge those findings of fact made by the Court of First Instance.

323 It is an undisputed fact that Mr Larsen, from Aalborg, was present at the meeting of 9 September 1986, where both the objective of the ETF and the stick and carrot measures against incursions of low-priced cement into the European markets were initially described. As Aalborg had not proved that it had distanced itself from the discussions of the ETF, the Court of First Instance was entitled to confirm the Commission's conclusion that, by its unreserved presence at the meeting of 9 September 1986 at which the objective of the ETF had been put forward, Aalborg had participated in the concurrence of wills that led to the

setting-up of the ETF. The Court of First Instance did not err when it rejected as irrelevant Aalborg's passive role at that meeting and also its failure to participate in the subsequent meetings and in the implementation of the initiatives referred to (paragraph 2891 of the judgment under appeal).

324 As regards Buzzi Unicem's arguments relating to the setting-up of the ETF, the pleas alleging errors as regards Unicem's participation in the ETF have already been rejected by this Court as manifestly unfounded (see the order in *Buzzi Unicem v Commission*, cited above, paragraphs 133 to 165).

325 As regards the characterisation of the setting-up of the ETF as a single agreement, the Court of First Instance held at paragraphs 2537, 2538 and 3701 of the judgment under appeal that the ETF was set up for the purpose of examining stick and carrot measures capable of eliminating imports into Western Europe, in particular those from Greece. The ETF was therefore driven by the same anti-competitive economic aim as the other agreements and concerted practices referred to in Article 4 of the Cement Decision. The Court of First Instance considered that that identity of purpose was confirmed by the fact that those various unlawful measures had been adopted, or at least discussed, during the series of meetings of, or relating to, the ETF between 28 May 1986 and the end of May 1987 (see paragraph 3705 of the judgment under appeal).

326 As regards the implementation of the Cembureau Agreement by the ETF, the Court of First Instance held at paragraphs 2560 and 3701 of the judgment under appeal that the ETF had a wider mission than that of preventing cheap imports from Greece, namely that of preventing any imports of cheap cement likely to destabilise European markets.

327 As regards the duration of the infringements, it follows from paragraph 2795 of the judgment under appeal that the fate of the ETF was last discussed at the Luxembourg meeting at the end of May 1987. At paragraph 3309 of the judgment under appeal, the Court of First Instance clearly stated the reasons why 15 March 1987 was taken as the date of the end of the infringement relating to the defensive measures. That date referred to the meeting of 17 March 1987 at which a report was given for the last time of the negotiations between the Italian cement producers and the Ferruzzi group.

328 It is true that the Commission did not demonstrate that Aalborg had attended those meetings. However, according to the case-law of the Court of Justice, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is of no relevance to the establishment of the existence of an infringement (see, to that effect, *Commission v Anic*, paragraph 90). Where it is established that an undertaking was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk, it is also regarded as responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement (see *Commission v Anic*, paragraph 83). Aalborg has adduced no firm evidence capable of establishing that it withdrew its support from the ETF or from the defensive measures before they were last discussed.

329 As regards Aalborg's responsibility for the measures for the protection of the Italian market, the Court of First Instance explained in detail at paragraphs 3200 to 3202 of the judgment under appeal that Aalborg had attended the meeting of 9 September 1986 at which the situation of imports of Greek cement by Ferruzzi had been examined and it had been mentioned that talks between the Italian cement producers and Ferruzzi might produce results. As may be seen from paragraph 3196 of the judgment under appeal, Aalborg has never disputed those facts.

- 330 Nor, as may be seen from paragraph 3203 of the judgment under appeal, has Aalborg shown that at that meeting it had openly showed its disapproval of those unlawful practices or that it informed the other participants that it intended to take part in the meeting with different objects in mind.
- 331 The Court of First Instance did not make an error in concluding, at the same paragraph, that the Commission had therefore been entitled to consider that Aalborg, among others, had acceded to those practices or at least that it had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production to the markets of Western Europe, a decision perceived as a serious threat to the stability of all those markets.
- 332 As regards the arguments whereby Cementir challenges the findings of the Court of First Instance in relation to certain evidence, it is common ground that, as the Court of First Instance observed at paragraph 2768 of the judgment under appeal, Cementir did not take part in any of the meetings of the ETF. However, the Court of First Instance accepted that the Cement Decision contained a number of indications showing that Cementir intended to contribute by its own conduct to the common objectives pursued by all the participants in the ETF (paragraphs 3153 to 3155 and 3284 to 3287 of the judgment under appeal).
- 333 Cementir's arguments contain no firm indication that the Court of First Instance distorted that evidence. The fact that Cementir did not attend the meetings of the ETF is of minor significance when it is clear from the documents relating to those meetings that it contributed by its own conduct to the common objectives pursued by all the participants. In that regard, according to the assessment made by the Court of First Instance at paragraph 3288 of the judgment under appeal, the bundle of documents showed that Cementir was one of the Italian cement producers which had intervened with the Ferruzzi group in order to induce Calcestruzzi to suspend performance of the supply contract that it had concluded with Titan.

- 334 Furthermore, it follows from the findings of fact made by the Court of First Instance at paragraph 3155 of the judgment under appeal that the Italian cement producers, represented by Italcementi, asked ‘their European colleagues to apprise their EEC representatives so that they [would] not oppose the request’ for application of the Italian law providing for the introduction of prior notification of all cement imports. Thus, those cement producers, including Cementir, were aware of the actual conduct contemplated or implemented by other undertakings in pursuit of anti-competitive objectives.
- 335 Furthermore, the fact that commercial reasons led Cementir to participate in the anti-competitive agreement is irrelevant when the agreement had the effect of restricting competition. Since its participation in the agreement is demonstrated, there is no need to examine whether it had any interest in participating in it.
- 336 As regards the characterisation of the agreements with Calcestruzzi, since Cementir lent its support to the actions and agreements relating to Calcestruzzi when faced with imports from Greece, the Court of First Instance’s conclusion that Cementir was aware that it was participating in a general agreement on market-sharing cannot be regarded as arbitrary or incorrect.
- 337 The Court of First Instance did not err when it concluded at paragraph 3289 of the judgment under appeal that the Commission was entitled to find in Article 4(3)(a) of the Cement Decision that Cementir had participated in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

- 338 As regards observance of the principle *ne bis in idem*, the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset.
- 339 The Court of First Instance merely pointed out the difference in object between, on the one hand, the supply contracts and the cooperation agreements signed between Calcestruzzi and the three Italian cement producers and, on the other hand, the part of the agreement between those cement producers which sought to prevent imports of cement from Greece by Calcestruzzi. Participation in the Cembureau Agreement on non-transshipment to home markets constitutes the infringement sanctioned by the Cement Decision and the Court of First Instance considered that the Cement Decision had a different object from that pursued by the decision of the Italian competition authority in respect of the supply contracts and the cooperation agreements between Calcestruzzi and the Italian cement producers.
- 340 As there was no identity in the facts, there was no breach of the principle *ne bis in idem*.
- 341 As regards Buzzi Unicem's argument that the Court of First Instance distorted the meaning to be ascribed to the minutes of the meetings of 17 June and 4 September 1987, the Court of First Instance neither distorted the evidence nor stated contradictory reasons. Buzzi Unicem merely expressed its disagreement with the Court of First Instance's assessment of the relevant documents and reiterated its version of the facts, which has already been rejected by the Court of First Instance.
- 342 As regards the duration of the infringement, it was fixed on the basis of the duration of the supply contracts and cooperation agreements between the Italian

cement producers and Calcestruzzi. The fact that those cement producers complied with the Cembureau Agreement until 3 April 1992, whereas the other cement producers had ceased to apply it, means that they kept the agreement in force longer than those producers did. As regards the concerted practice aimed at withdrawing Calcestruzzi as a customer from the Greek producers, and from Titan in particular, it lasted until the final meeting held in that regard within the ETF (see paragraphs 3301 to 3310 of the judgment under appeal).

- 343 The pleas alleging errors of law, flawed reasoning, distortion of evidence and a breach of the rights of the defence as regards the activities within the framework of the ETF and also the agreements and practices designed to protect the Italian market must therefore be rejected as inadmissible and/or unfounded.

C — *The attribution of responsibility*

- 344 It transpires from the judgment under appeal that Aalborg was formed on 26 June 1990 and that it acquired, with retroactive effect to 1 January 1990, the cement plant of Aktieselskabet Aalborg Portland-Cement Fabrik. The latter company became a holding company, with it and Blue Circle each owning 50% of the shares in Aalborg.

Arguments of the parties

- 345 Aalborg claims that the Court of First Instance was wrong, in the judgment under appeal, to approve the Commission's decision to hold it accountable for the infringements committed by Aktieselskabet Aalborg Portland-Cement Fabrik.

346 Aalborg concludes that at paragraph 1336 of the judgment under appeal the Court of First Instance appears to hold Aalborg accountable on the basis that the facts referred to at paragraph 344 of this judgment constituted a reorganisation within one and the same legal entity. It maintains that it had stated during the hearings before the Court of First Instance that it was incorrect that its formation was part of a reorganisation of the group to which it belongs. In fact, a different legal entity, Blue Circle, acquired economic ownership of half of the activities formerly carried out by Aktieselskabet Aalborg Portland-Cement Fabrik.

347 Aalborg claims that the case-law of the Court of Justice on the transfer of responsibility (*Suiker Unie and Others v Commission, CRAM and Rheinzink v Commission* and *Commission v Anic*) applies only to situations in which the undertaking responsible had ceased to exist and a different undertaking had taken over its entire material and human resources. The Court of Justice stated that the ‘economic continuity’ test can apply only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed.

348 In the present case, the legal person with responsibility for the infringements found in the Cement Decision, Aktieselskabet Aalborg Portland-Cement Fabrik, has not ceased to exist, a fact which, moreover, does not appear to have been disputed by the Commission. Consequently, that responsibility cannot, in Aalborg’s submission, be imputed to Aalborg, as it was in the Cement Decision and in the judgment under appeal.

349 Aalborg further contends that the flawed reasoning as regards the legal person accountable for the infringement requires that the judgment under appeal be set aside. The fact that Aalborg did not specifically mention during the administrative procedure any ambiguity as to the legal person responsible cannot have

the consequence that the Commission is not required to designate precisely the person responsible and to state the reasons for its choice.

350 In that regard, Aalborg states that it had no particular reason to correct the Commission's indication of the addressee of the SO, because the Commission was relying on a different hypothesis, that of a cartel which allegedly still existed.

351 However, as that hypothesis was amended in the Cement Decision, the question of the identity of the addressee of the decision became of the essence. Aalborg could not be held accountable for the activities of a cartel during the period in the past to which the Cement Decision, unlike the SO, ascribes that infringement. Since Aalborg had not yet been formed when the meetings in question took place, its representatives were indisputably absent from the meetings regarded as fundamental to the cartel whose existence was established in the Cement Decision.

352 The Commission contends that an economic entity remains the same when all the means of production used in the manufacture of cement are transferred from one undertaking to another, which continues that industrial activity. It claims that a capital injection by a new undertaking does not in any way alter the fact that production remains in the hands of the same economic entity.

353 In the Commission's submission, the Court of First Instance was not guilty of procedural irregularity when it took into consideration the fact that Aalborg acknowledged at the hearings that it had not disputed in its reply to the SO the possibility that it might be held accountable for the acts of Aktieselskabet Aalborg Portland-Cement Fabrik.

Findings of the Court

- 354 In the context of Aalborg's appeal, the Court must examine whether the Court of First Instance erred in considering that the Commission was entitled to proceed against that company and to treat it as accountable for the anti-competitive conduct of Aktieselskabet Aalborg Portland-Cement Fabrik prior to Aalborg's formation.
- 355 More specifically, the Court must determine whether the fact that Aktieselskabet Aalborg Portland-Cement Fabrik still exists wholly and necessarily precludes the Commission from proceeding against Aalborg as being, from an economic and organisational point of view, the author of the infringement.
- 356 It is not disputed that the economic activities of Aktieselskabet Aalborg Portland-Cement Fabrik in the cement sector were transferred to Aalborg in 1990.
- 357 When the Court of First Instance concluded, at paragraph 1335 of the judgment under appeal, that Aalborg and Aktieselskabet Aalborg Portland-Cement Fabrik constituted the same economic entity for the purposes of applying Article 85(1) of the Treaty, that finding must be taken to mean that the undertaking run by Aalborg from 1990 is the same as that previously run by Aktieselskabet Aalborg Portland-Cement Fabrik (see, in that regard, paragraph 59 of this judgment).
- 358 The fact that Aktieselskabet Aalborg Portland-Cement Fabrik still exists as a legal entity does not invalidate that finding and did not therefore in itself constitute a ground for annulling the Cement Decision in respect of Aalborg.

359 In that regard, it is true that in *Commission v Anic* (paragraph 145) the Court held that there can be economic continuity only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. However, that case concerned two existing and functioning undertakings one of which had simply transferred part of its activities to the other and where there was no structural link between them. As is apparent from paragraph 344 of this judgment, that is not the position in this case.

360 As regards the allegedly flawed reasoning, the Court of First Instance was justified in considering at paragraph 1336 of the judgment under appeal that since Aalborg had not submitted before the Commission that it could not be held accountable for the activities of Aktieselskabet Aalborg Portland-Cement Fabrik, the Commission was not required to explain further in the Cement Decision why it held Aalborg accountable for those activities.

361 This plea must therefore be rejected as unfounded.

D — *The fines*

(1) The determination of the fines in the Cement Decision

362 The Cement Decision distinguished two categories or groups of undertakings and associations: first, those that participated in the Cembureau Agreement and, second, those whose involvement was less decisive and of less gravity. The conduct described in Articles 2 to 4 of the Cement Decision was regarded by the Commission as more serious than that described in Articles 5 and 6 of that decision, which had less direct effects on the partitioning of home markets.

- 363 The undertakings and associations in the first category, which all endeavoured to ensure non-transshipment to home markets with the same intensity and all brought direct influence to bear on the partitioning of those markets, were fined an amount corresponding to 4% of the turnover of each of them on the grey cement market in 1992. The amount of the fine imposed on those in the second category was 2.8% of their corresponding turnover.
- 364 Assessing the proportionality of fines with regard to the gravity and duration of an infringement falls within the unlimited jurisdiction conferred on the Court of First Instance by Article 17 of Regulation No 17. In exercising its power of review, the Court of First Instance allowed in part the applications of the applicants at first instance. For the purpose of setting the amounts of the fines, the Commission had considered that the undertakings had participated in the agreement for 122 months whereas it had emerged in the proceedings before the Court of First Instance that the actual duration of their participation was shorter. The Court of First Instance therefore reduced the amounts of the fines in proportion.
- 365 In the present appeals, the Court's analysis is limited to the question whether, by approving the criteria used by the Commission in setting the fines and by reviewing their application, and indeed by correcting that application, the Court of First Instance made a manifest error or failed to have regard to the principles of proportionality and equality which govern the imposition of fines.
- 366 The pleas raised in the context of these appeals are grouped for the purpose of the present judgment according to the pleas put forward by each applicant.

(2) Pleas relating to the criteria for setting the fines and also to the principles of equality and proportionality

Arguments of the parties

367 All the appellants have submitted pleas seeking annulment of or a reduction in the fines imposed on them by the Cement Decision, and then reduced by the Court of First Instance. They refer, in particular, to the criteria used by the Commission in imposing the fines and also to alleged infringements of the principles of proportionality and equality in the calculation of the fines by the imposition of very high fines without reference to the degree to which each undertaking participated in the infringement. They also criticise the fact that the fines were not further reduced to reflect the finding that a number of the alleged infringements had not occurred and that the duration of others was shorter than claimed, so that undertakings whose involvement was less decisive and of less gravity received the same fine.

368 Aalborg and Cementir submit more particularly that the principle of equality was infringed in so far as other undertakings classified with them in the subgroup of those whose responsibility was greatest had participated more intensively in the cartel. Buzzi Unicem also contends that the annulment by the Court of First Instance of certain parts of the Cement Decision on the ground that Unicem's contribution to the conduct described therein had not been demonstrated must be accompanied by a reduction in the fine.

369 The Commission contends that the Court of First Instance's position is the direct consequence of its rejection of the argument that the fines should be proportionate to the measures to implement the Cembureau Agreement adopted by each of the undertakings. The Court of First Instance thus approved the Commission's analysis, at recital 65 of the Cement Decision, that it was necessary to sanction the overall participation in the implementation of that agreement. The

decision not to reduce the amount of the fine on the ground that certain parts of Articles 3 and 4 of the Cement Decision had been annulled is consistent with that analysis, since, as regards the grey cement market, the fine is based on Article 1 of the Cement Decision. In any event, the Court of First Instance, in accordance with Article 15(2) of Regulation No 17, amended the penalty in accordance with the gravity of the conduct of each undertaking and also with its duration and the role played by each of them in the cartel.

Findings of the Court

370 In so far as the pleas relating to the criteria used in setting the fines and to the gravity of the appellants' participation relate to questions of fact or merely reproduce the arguments already put forward at first instance and which the Court of First Instance answered at paragraphs 4964 to 4969 of the judgment under appeal, they are inadmissible.

371 As regards the alleged failure to state reasons in the judgment under appeal concerning the criteria used in setting the fines, although it is not precluded that the Court of First Instance did not expressly answer one or other isolated argument in a single integrated text, the judgment under appeal contains adequate reasoning. The Court of First Instance confirmed the Commission's decision to assess the overall responsibility of the undertakings and to sanction the infringement constituted by the Cembureau Agreement rather than the various constituent elements of that infringement. It explained that the number of individual infringements committed by a given undertaking did not constitute an appropriate criterion by which to assess its degree of responsibility in that agreement. It also approved the Commission's assessment that the measures aimed at directly protecting home markets were more serious than the measures to channel production surpluses to non-member countries (paragraphs 4965, 4966 to 4968 and 4975 of the judgment under appeal).

372 Furthermore, the obligation to state reasons does not require the Court of First Instance to provide an account that follows exhaustively and one by one all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review (see, to that effect, Case C-120/99 *Italy v Council* [2001] ECR I-7997, paragraph 28).

373 As regards the criteria for setting the fine and respect for the principles of proportionality and equality, the Court of First Instance approved the criteria adopted by the Commission. It thus declared that the Commission had been right to decide to sanction the participation in the Cembureau Agreement as such, irrespective of the isolated conduct and the number of implementing measures adopted by each undertaking. The Court of First Instance likewise considered that the distinction drawn by the Commission between direct participants (first category) and indirect participants (second category) was well founded and that the Commission was therefore not required to evaluate the specific role played by each of them in the various unlawful acts found. The Court of First Instance also held that the number of individual infringements committed by a given undertaking in the framework of the Cembureau Agreement did not constitute in the particular case an appropriate criterion by which to assess its degree of responsibility.

374 The criteria used by the Court of First Instance, namely continuous adherence to the Cembureau Agreement by participation or collaboration in one or more of the measures implementing that agreement and the impact of the conduct on competition and on the partitioning of home markets, are consistent with the principles, set out at paragraphs 89 to 92 of the present judgment, that govern the imposition of fines.

375 The pleas relating to the criteria for setting the fines and also to the principles of equality and proportionality must therefore be rejected as inadmissible and/or unfounded.

(3) The part of Cementir's sixth plea concerning the calculation of turnover

Arguments of Cementir

- ³⁷⁶ Cementir claims that there is an accounting error in the calculation of the turnover made by the Commission, in that the cost of transporting the cement or the cost of the sacks in which it is delivered was included in the selling price. Since the turnover of the other undertakings to which the Cement Decision was addressed did not include those cost items, Cementir claims to be the victim of unequal treatment.

Findings of the Court

- ³⁷⁷ This part of Cementir's sixth plea is inadmissible, since Cementir is merely repeating arguments which it has already set out at first instance and which the Court of First Instance answered at paragraphs 5030 to 5032 of the judgment under appeal. As regards the part of the plea relating to the principle of equal treatment, it is sufficient to observe that Cementir has adduced no evidence on which it might be established that the judgment under appeal constitutes an infringement of that principle in regard to it.
- ³⁷⁸ The part of Cementir's sixth plea concerning the calculation of the turnover must therefore be rejected as inadmissible in part and unfounded in part.

(4) The second plea of Ciments français, concerning its Belgian subsidiary

Arguments of the parties

379 In calculating the fines which it imposed on Ciments français, the Commission included the turnover of its Spanish, Greek and Belgian subsidiaries. The Court of First Instance maintained in its own calculation the turnover of the Belgian subsidiary, on the ground that Ciments français had not disputed that it controlled that subsidiary at the time when the infringements had been committed. Ciments français contends that the judgment under appeal contains a manifest error of assessment in that regard, since it results from the file at first instance that Ciments français assumed control of the Compagnie des ciments belges SA ('CCB') from October 1990. The Court of First Instance's assessment also contains an error of law in that it infringes the principle of non-discrimination, since that assessment induced the Court of First Instance to afford different treatment to undertakings in identical situations: the subsidiaries of Ciments français were punished more severely than the subsidiaries of other companies and its Belgian subsidiary was treated more severely than its Spanish and Greek subsidiaries. Ciments français therefore requests that the judgment under appeal be set aside in part and that the amount of the fine imposed for the infringement committed on the market in grey cement be reduced from EUR 12.52 million to EUR 9.62 million.

380 The Commission claims that the plea raises a question of pure fact and is therefore inadmissible. The Court of First Instance stated that a calculation of the amount of the fine on the basis of total group turnover does not mean that it is the subsidiaries that must pay the fine. The plea is unfounded, moreover, because, at first instance, Ciments français relied solely on its own letter of 28 February 1994, in which it did not mention the date on which it had assumed control of its Belgian subsidiary. The documents proving that date were not produced before the stage of the reply and the hearing before the Court of First Instance did not relate to the impact of the date on which control of that subsidiary was assumed for the calculation of the fine, so that any error committed in that regard by the

Court of First Instance cannot be characterised as manifest. Nor, it alleges, is the Court of First Instance's position entirely consistent, since if the fine must be calculated according to the overall turnover of the undertaking responsible, it is also necessary to take into account the turnover of the subsidiaries which formed part of the group on the date taken for the purpose of determining that overall turnover. There is no reason to exclude the undertakings which were not part of the group at the time of the infringement.

Findings of the Court

- 381 The administrative file, the Cement Decision itself (recital 5, paragraph 7(g), third indent, second subparagraph) and the file at first instance, including a letter of 22 September 1998 in reply to a question put by the Judge-Rapporteur, show that Ciments français had indicated on a number of occasions that it had not assumed control of CCB before October 1990.
- 382 The Court of First Instance excluded from the calculation of the fines imposed on Ciments français the turnover of its Spanish and Greek subsidiaries because it had been established that Ciments français did not yet control them at the time when it became guilty of the conduct constituting the infringement. The Court of First Instance accepted, moreover, that in 1990 Ciments français had ceased any unlawful conduct.
- 383 It follows from the Cement Decision itself that Ciments français had assumed control of CCB during 1990, or the same year as it had acquired control of its Spanish and Greek subsidiaries. Contrary to the Commission's contention, the Court of First Instance therefore made a manifest error which could be detected upon reading a document such as the Cement Decision, which was clearly at the centre of the discussion from the outset.

384 The Court must therefore uphold Ciments français's second plea and ascribe to that error of the Court of First Instance the same legal consequence as that applied to its Spanish and Greek subsidiaries by removing CCB's turnover for 1992 from the basis for the calculation of the fines. The judgment under appeal is therefore set aside in so far as it set at EUR 12 519 000 the amount of the fine imposed in respect of the infringements committed by Ciments français on the grey cement market.

385 Since the Court has before it all the necessary evidence to give final judgment itself in the matter, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, the fine imposed on Ciments français by Article 9 of the Cement Decision is reduced to EUR 9 620 000, calculated on the basis of the figures which Ciments français submitted before the Court of First Instance and then before the Court of Justice and which the Commission has not disputed.

(5) Other pleas

386 Italcementi claims that the Court of First Instance did not distinguish the periods during which its adherence to the Cembureau had been less robust than those during which it had been more involved. Italcementi criticises the Court of First Instance for not having reduced the amount of the fine in spite of having annulled Article 2(1) and (2) of the Cement Decision and of finding that the conduct described in Article 5 of the Cement Decision was not contrary to Article 85(1) of the Treaty.

387 In that regard, the Court of First Instance made a proportional reduction of the amount of the fine according to the duration of Italcementi's participation in the Cembureau Agreement, so that the annulment of Article 2 in its case was

reflected in the amount of the fine (see paragraph 4381 of the Cement Decision). As regards the annulment of Article 5, it does not reduce either the gravity or the duration of Italcementi's conduct and is therefore not capable of being reflected in the amount of the fine. The Court of First Instance did not breach the principle of proportionality when it considered that the number of particular infringements committed by an undertaking does not determine the evaluation of its degree of responsibility in an agreement. As regards the distinction between different periods according to the degree of Italcementi's involvement, that argument relates to the facts and cannot be examined in an appeal. Accordingly, that plea must be rejected as inadmissible in part and unfounded in part.

388 Furthermore, Irish Cement claims that the Court of First Instance failed to respond to its argument that its conduct can have had no effect on the partitioning of home markets and that its participation in the facts complained of by the Commission was purely marginal.

389 That plea must be rejected in so far as the Court of First Instance answered that argument by implication at paragraphs 4966 and 4975 of the judgment under appeal and in so far as it relates to the facts without raising any question of law.

Costs

390 Under the first subparagraph of Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs and Aalborg, Irish Cement, Italcementi, Buzzi Unicem and Cementir have been unsuccessful, they must be ordered to pay the costs in Cases C-204/00 P, C-205/00 P, C-213/00 P, C-217/00 P and C-219/00 P respectively.

391 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gave final judgment in the case, the Court is to make a decision as to costs. Under the first subparagraph of Article 69(3) of the Rules of Procedure, which apply to appeal proceedings by virtue of Article 118 of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. Since Ciments français and the Commission have been unsuccessful in part in Case C-211/00 P, they must be ordered to bear their own costs in that case.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. Sets aside paragraph 12, seventh indent, of the operative part of the judgment of the Court of First Instance of the European Communities of 15 March 2000 in 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-66/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95;

2. Sets the amount of the fine imposed on Ciments français SA for the infringement found in Article 1 of Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) at EUR 9 620 000;
3. Dismisses the appeals for the remainder;
4. Orders Aalborg Portland A/S, Irish Cement Ltd, Italcementi-Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir-Cementerie del Tirreno SpA to pay the costs in Cases C-204/00 P, C-205/00 P, C-213/00 P, C-217/00 P and C-219/00 P;
5. Orders Ciments français SA and the Commission of the European Communities to bear their own costs in Case C-211/00 P.

Jann

Edward

La Pergola

Delivered in open court in Luxembourg on 7 January 2004.

R. Grass

V. Skouris

Registrar

President