JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
6 July 1995 *

In Joined Cases T-447/93, T-448/93 and T-449/93,

Associazione Italiana Tecnico Economica del Cemento, an association governed by Italian law, established in Rome, represented by Wilma Viscardini Dona, of the Padua Bar, and Éric Morgan de Rivery, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

British Cement Association, an association governed by English law, established at Wexham Springs (United Kingdom), **Blue Circle Industries plc**, a company incorporated under English law, established in London, **Castle Cement Ltd**, a company incorporated under English law, established at Peterborough (United Kingdom), and **The Rugby Group plc**, a company incorporated under English law, established at Rugby (United Kingdom), represented by Nicholas Forwood QC and Mark Clough, Barrister, of the Bar of England and Wales, instructed by Robert Tudway and Dorcas Rogers, Solicitors, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

Titan Cement Company SA, a company incorporated under Greek law, established in Athens, represented by Alastair Sutton and Daniel Bethlehem, Barristers, of the Bar of England and Wales, and by Aristotelis Kaplanidis, of the Thessaloniki Bar, instructed by Victor Melas, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

applicants,

* Languages of the case: English and French.

Commission of the European Communities, represented by Xenophon A. Yataganas, Michel Nolin, Eric White and Daniel Calleja, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Hellenic Republic, represented by Panagiotis Kamarineas, Legal Adviser in the State Legal Service, Panagiotis Milonopoulos, Legal Assistant in the European Community Department of the Ministry of Foreign Affairs, and Christina Sitara, Legal Agent in the State Legal Service, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 177 Val Sainte-Croix,

Heracles General Cement Company anonymos eteria, a company incorporated under Greek law, established at Likovrisi (Greece), represented by Kostas Loukopoulos and Sotiris Felios, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Jos Stoffel, 21 Boulevard de Verdun,

interveners,

APPLICATION for the annulment of the decision of 1 August 1991 contained in Commission communication 92/C 1/03 pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid to Heracles General Cement Company in Greece, published in the *Official Journal of the European Communities* of 4 January 1992 (OJ 1992 C 1, p. 4),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: J. L. Cruz Vilaça, President, B. Vesterdorf, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 17 January 1995,

gives the following

Judgment

Background to the dispute

1 During the course of 1983, the Greek authorities adopted a number of structural measures designed to remedy serious disturbances in the country's economy. Those

measures included the adoption, on 5 August 1983, of Law 1386/83 for the organization for the financial reconstitution of undertakings (hereinafter 'Law 1386/83' or 'the Law'). That law created an organization known as 'Organismos oikonomikis Anasygkrotiseos Epicheiriseon' (Business Reconstruction Organization, hereinafter 'BRO'). According to Article 2 of the Law, the purpose of the BRO was to 'contribute to the social and economic development of the country through the financial rejuvenation of undertakings, the import and application of foreign technology, the development of Greek-based technology and the establishment and operation of socialized or mixed economy undertakings'. For the purpose of carrying out those objectives, the BRO was empowered in particular to administer and manage undertakings, participate in the capital of undertakings and grant loans. Article 10 of the Law authorized the capitalization of the debts of the undertakings concerned by the issue of new shares.

2 By Ministerial Decree of 7 August 1986, the Greek Government applied Law 1386/83 to Heracles General Cement Company (hereinafter 'Heracles'), the balance sheet of which had shown a substantial deficit since 1983, by bringing it under public control and converting into capital its debts to Greek institutions amounting to DR 27 755 million (approximately ECU 170 million).

3 Heracles occupies a very important position in the Greek cement market, in which there are four substantial producers: Heracles, the largest, with a workforce of over 3 500, Titan Cement Company SA (hereinafter 'Titan'), one of the applicants in this case, followed by Halkis Cement Company (hereinafter 'Halkis') and Halyps Cement Company.

4 The Commission was not informed of the adoption of Law 1386/83 by the Greek authorities, but learned of it through other channels and on 29 October 1986 initiated a procedure against it under Article 93(2) of the Treaty (OJ 1986 C 332, p. 2).

Nor does the Commission appear to have received advance notification from the Greek Government that Law 1386/83 was going to be applied to Heracles in August 1986. However, following the grant of the aid, the Commission learned of it from contacts with competitors of Heracles dating from that time. It therefore ordered the Greek Government, by telex of 18 September 1986, to provide clarification on the point within seven days and to notify to it, if appropriate, the application of Law 1386/83 in that instance (Annex V to the Commission's answers to the questions put by the Court, lodged on 14 September 1994). In response to that request, the Greek Government provided detailed information by letter of 10 October 1986, pointing out in particular that in its view the conversion of Heracles' debts into shares did not constitute aid within the meaning of Articles 92 and 93 of the Treaty (Annex III to the Commission's answers).

6 The procedure initiated on 22 October 1986 against Law 1386/83 was completed on 7 October 1987 and resulted in the approval of the 'implementation of the Law' pursuant to Article 92(3)(b) of the Treaty, on the ground that it was intended to remedy a serious disturbance in the economy of a Member State (Commission Decision 88/167/EEC of 7 October 1987 concerning Law 1386/83 by which the Greek Government grants aid to Greek industry (OJ 1988 L 76, p. 18), hereinafter 'the 1987 decision').

7 The implementation of the Law was made subject, however, to a number of 'conditions', set out in Article 1 of the 1987 decision, and the Greek Government was *inter alia* required to notify individual cases exceeding certain thresholds.

8 In the preamble to that decision, the Commission found that the Law and the operations of the BRO fulfilled the conditions for the application of the second part of Article 92(3)(b), particularly in view of Protocol No 7 of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties, on the economic and industrial development of Greece (OJ 1979 L 291, p. 1, hereinafter 'Protocol No 7'). That protocol provides that 'in the application of

Articles 92 and 93 of the EEC Treaty, it will be necessary to take into account the objectives of economic expansion and the raising of the standard of living of the population'. After justifying the notification obligation by reference to the judgment of the Court of Justice in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, the Commission found that the Law fulfilled the conditions laid down by Article 92(3)(b), and reiterated that it must retain control over the application of the Law (part V of the decision).

9 The Greek Government was informed of that decision by letter from the Commission dated 17 November 1987. In response to that letter, it provided, by letter of 3 December 1987, detailed additional information concerning Heracles, while repeating its view that the intervention in question did not constitute State aid (Annex IV to the Commission's answers).

10 On 8 December 1987, Titan lodged a complaint with the Commission opposing the grant of the aid at issue to Heracles.

11 By letter to the Greek Government of 15 February 1988, the Commission initiated a second procedure under Article 93(2) of the Treaty in respect of the aid granted to Heracles. Noting that there had been an increase in Greek cement exports, particularly those of Heracles, to other Member States, the Commission found that the aid at issue could distort competition and affect trade between Member States within the meaning of Article 92(1) of the Treaty, since Heracles had been making losses since 1983 whilst engaging in intra-Community trade. It pointed out that the only derogation applicable to the aid at issue was that provided for by Article 92(3)(b) of the Treaty but that the application of that provision was subject to certain conditions which were not, in its view, met in the case of Heracles.

12 On 9 March 1988, Titan sent to the Commission further comments on the aid granted to Heracles.

13 In the course of the administrative procedure, the Commission, by Notice 88/C 124/04, published in the *Official Journal of the European Communities* on 11 May 1988 (OJ 1988 C 124, p. 4), invited parties concerned other than the Member States to submit their comments on the aid to Heracles within one month. It indicated that 'on the basis of the information in its possession the Commission takes the view that the aid distorts or threatens to distort competition and affects trade between Member States within the meaning of Article 92(1) of the EEC Treaty and does not qualify for any of the exemptions laid down in paragraphs 2 and 3 of that Article' (fifth paragraph of the notice).

14 In response to that notice, several of Heracles' competitors, including the applicants in Cases T-447/93 and T-449/93 and the British Cement Association (hereinafter 'BCA'), acting on behalf of the 'United Kingdom cement manufacturers', which is one of the applicants in Case T-448/93, contacted the Commission, asserting that serious disturbance had been caused to the Community cement market as a result of the intervention by the Greek authorities, which had very greatly strengthened Heracles' competitive position. Thereafter, several meetings and exchanges of correspondence took place between, on the one hand, the Commission and the applicants and, on the other, the Commission and the Greek Government.

15 The administrative procedure terminated with the adoption of a decision to approve the aid, contained in a letter sent to the Greek Government on 1 August 1991 and published on 4 January 1992 as a Commission communication pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid to Heracles General Cement Company in Greece (92/C 1/03, OJ 1992 C 1, p. 4).

16 It is that decision which is at issue in the present proceedings. In its decision, the Commission refers, first, to its 1987 decision, in which it had imposed 'an obligation to notify individual significant cases so that these may be considered from the point of view of their impact on intra-Community trade and competition'. Next, it regrets the failure of the Greek Government to notify 'the important application of Law 1386/83'. Finally, it examines the information provided in the interim by the Greek Government in relation to the 'conditions' contained in the 1987 decision. It concludes that 'the aid awarded to Heracles in 1986, by transforming part of its debts into capital, can now be considered to be in conformity with the Commission's decision of 7 October 1987 on Law 1386/83, referred to in the second paragraph of this letter'.

17 In parallel with the procedure relating to Heracles, the Commission initiated on 3 April 1989 another procedure pursuant to Article 93(2) of the Treaty against aid granted pursuant to Law 1386/83 to Halkis, the third largest Greek cement producer. That procedure led to Commission Decision 91/144/EEC of 2 May 1990 on aid granted by the Greek Government to a cement manufacturer (Halkis Cement Company) (OJ 1991 L 73, p. 27, hereinafter 'the Halkis decision'), in which it found that the aid to Halkis had been granted in breach of the rules set out in Article 93(3) of the Treaty and was incompatible with the common market, since it did not fulfil the criteria for exemption provided for in Article 92(2) and (3) of the Treaty. It further found that the conditions for applying the derogations set out in Article 92(3)(b) and (c) were not fulfilled, having regard in particular to the increase in Halkis' exports to Italy. It concluded that the aid was contrary to 'the common interest'.

Procedure

18 By application lodged at the Registry of the Court of Justice on 27 March 1992, the Associazione Italiana Tecnico Economica del Cemento (hereinafter 'AITEC'), an Italian cement producers' association, brought an action for the annulment of the Commission's decision of 1 August 1991, published on 4 January 1992.

19 Similarly, by applications lodged at the Registry of the Court of Justice on 30 March 1992, Titan and the BCA, together with three of its member companies, Blue Circle Industries plc (hereinafter 'Blue Circle'), Castle Cement Ltd (hereinafter 'Castle') and Rugby Group plc (hereinafter 'Rugby'), which are the principal cement manufacturers in the United Kingdom, respectively brought actions for the annulment of the same decision.

20 The three cases, which were brought before the Court of Justice and numbered C-97/92, C-105/92 and C-106/92, were joined by order of the President of the Court of Justice dated 15 October 1992 for the purposes of the written procedure, the oral procedure and the judgment.

21 By orders of the President of the Court of Justice of 12 October 1992 and 24 March 1993 respectively, the Hellenic Republic and, subsequently, Heracles were given leave to intervene in support of the form of order sought by the defendant in the three cases, pursuant to applications lodged by them at the Registry of the Court of Justice on 14 August and 10 August 1992 respectively. They lodged their statements in intervention, which were common to the three joined cases, on 7 December 1992 and 3 July 1993 respectively.

22 On 27 September 1993, the Court of Justice referred the proceedings to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

23 The written procedure followed the normal course and closed with the lodging by the Commission on 28 January 1994 of a common rejoinder in the three joined cases. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure and requested the parties, by way of measures of organization of procedure, to reply, in writing and prior to the hearing, to a number of questions.

24 At the hearing on 17 January 1995, the parties presented oral argument and replied to questions put by the Court.

Forms of order sought by the parties

25 AITEC claims that the Court should:

— declare the application admissible and well founded;

— adopt measures of inquiry;

— annul the Commission's decision of 1 August 1991 concerning the grant of aid to Heracles, published on 4 January 1992;

— order the Commission to pay the costs;

— order the interveners to pay all the costs arising from their intervention.

The Commission contends in Case T-447/93 that the Court should:

— dismiss the action as inadmissible or unfounded;

— order the applicant to pay the costs.

BCA, Blue Circle, Castle and Rugby claim that the Court should:

— request the Commission to submit its file relating to the aid to Heracles and, in particular, all draft decisions which may have been prepared by the Commission and/or submitted to the Commission itself;

— annul the Commission's decision of 1 August 1991 in the form of a letter to the Greek Government published as Commission communication pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid to Heracles General Cement Company in Greece;

— order the Commission to pay the costs;

— order the interveners to bear their own costs and to pay the costs incurred by the applicants in relation to their intervention.

The Commission contends in Case T-448/93 that the Court should:

— dismiss the action as inadmissible or, alternatively, unfounded;

— order the applicants to pay the costs.

Titan claims that the Court should:

— declare void the Commission's decision in the Article 93(2) procedure in respect of an aid by the Hellenic Republic to Heracles, referred to in communication 92/C 1/03;

— take such further action as the Court may in its wisdom deem appropriate;

— order the Commission and the interveners to pay the costs incurred by the applicant.

The Commission contends in Case T-449/93 that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

The Hellenic Republic, intervening in support of the form of order sought by the Commission, asks the Court in Cases T-447/93, T-448/93 and T-449/93 to:

— dismiss the actions in the three cases as inadmissible or, alternatively, unfounded;

— order the applicants to pay the costs.

Heracles, intervening in support of the form of order sought by the Commission, asks the Court in Cases T-447/93, T-448/93 and T-449/93 to:

— dismiss the actions as inadmissible or unfounded;

— order the applicants to pay the costs.

Admissibility

The admissibility of the action in Case T-449/93 (Titan)

Arguments of the parties

26 The Commission does not comment on the admissibility of the action and leaves it to the Court to decide whether the applicant fulfils the conditions laid down in that regard in the judgment of the Court of Justice in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, namely, first, that the applicant must have played an active part in the pre-litigation procedure and, second, that its competitive position must be significantly affected.

27 The Hellenic Republic, intervening in support of the form of order sought by the Commission, maintains that the applicant has not produced sufficient evidence to show that its position as a competitor in the market has been directly and individually affected by the aid at issue and that it has suffered damage as a result. It considers that the action is therefore inadmissible.

28 Heracles denies that any of the applicants have a legitimate interest in the matter; in its view, they are using their actions to defend a European cement producers' cartel established in contravention of the Community competition rules. Contesting the data provided by the applicants, it further states that their competitive position has not been affected by the aid at issue, as is apparent from the improvement in their financial situation since 1986, despite the grant of the aid.

29 The applicant states that it is the second largest cement producer in the Greek market and that it is entitled to bring legal proceedings for the annulment of the decision authorizing the grant of aid to Heracles, since that decision, although addressed to the Greek Government, is of direct and individual concern to it, as Heracles' main competitor, within the meaning of Article 173 of the Treaty.

30 As to the criteria laid down in the judgment in *Cofaz and Others* v *Commission*, cited above, the applicant maintains, first, that it played a significant role in the Commission's investigation procedure, in particular by lodging a complaint on 8 December 1987 and by subsequently submitting further comments (Annexes 6 and 7 to the application). It further maintains that the contested aid affected its competitive position and profitability in the cement market, in that it enabled its main competitor to strengthen its market position artificially.

31 Referring to the allegations of the Hellenic Republic, the applicant maintains in its reply that it and Heracles, as the two largest cement manufacturers in Greece, are in direct competition with each other as regards almost all of their sales, not only in the Greek market but also in export markets.

32 Lastly, the applicant submits that the contested decision is of direct concern to it, since it allows Heracles to retain the benefit of the aid, whereas it should have ordered the repayment of the aid.

Findings of the Court

33 According to Article 173 of the Treaty, any natural or legal person may institute proceedings against a decision addressed to another person if that decision is of direct and individual concern to him. Consequently, the applicants' right to bring an action depends first of all on whether they are individually concerned by the decision addressed to the Greek Government.

34 It is apparent from the case-law of the Court of Justice that provisions of the Treaty concerning the right of interested persons to bring an action must not be interpreted restrictively. Persons other than those to whom a decision is addressed may only claim to be individually concerned within the meaning of Article 173 of the Treaty if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107).

35 The Court of Justice has held in that regard that, where a regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings in order to protect their legitimate interests (see *Cofaz and Others* v *Commission*, paragraph 23).

36 It is necessary, from that point of view, to examine the part played by the undertaking in the pre-litigation procedure, since the Court of Justice has accepted as evidence that the measure in question is of concern to the undertaking, within the meaning of Article 173 of the Treaty, the fact that it was that undertaking which originally lodged the complaint leading to the opening of the investigation pro-

cedure, the fact that its views were heard during that procedure and the fact that the conduct of the procedure was largely determined by its observations (Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849).

37 The same considerations apply to undertakings which have played a comparable role in the procedure referred to in Article 93 of the Treaty provided, however, that their position on the market is significantly affected by the aid which is the subject of the contested decision. Article 93(2) recognizes in general terms that the undertakings concerned are entitled to submit their comments to the Commission but does not provide any further details (see *Cofaz and Others* v *Commission*, paragraphs 24 and 25).

38 As regards the role played by the applicant in the procedure referred to in Article 93 of the Treaty, it should be noted that the applicant on 8 December 1987 lodged with the Commission a detailed complaint against the aid to Heracles (Annex 6 to the application) and that it provided detailed information during the procedure (see the observations of 9 March and 9 June 1988, Annexes 7 and 8 to the application).

39 As to the question whether the applicant's position on the market has been significantly affected by the measure at issue, the Court notes that the applicant has placed particular emphasis on the fact that its profitability has been affected by the aid at issue, inasmuch as that aid enabled its main competitor to strengthen its competitive position on the market. The profitability of its sales on the domestic market was reduced by reason of the artificially low sale prices imposed by the Greek Government which Heracles was able to charge by virtue of the aid which it received. Following the abolition of domestic price controls in 1989, the Greek Government allegedly used its position as a majority shareholder in Heracles in order to keep prices at an artificially low level. The applicant has shown, by means of the tables annexed to its reply, that it and Heracles, as the two largest Greek

cement producers, are in direct competition with each other as regards almost all of their sales, not only on the Greek market but also on export markets, which is confirmed by a document produced by Heracles, namely Annex 3 to its statement in intervention. The existence of that competitive relationship is also apparent from Annex 4 to that statement in intervention: 'In certain circumstances, Titan would pull out of the UK unilaterally ... , (although) knowing that Heracles would probably fill the void in Tilbury'.

40 Although there is no need for the Court, when considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicant and Heracles, it is sufficient to note that, contrary to the assessments of the Greek Government and Heracles, the applicant has adduced pertinent reasons, with reference to specific circumstances, to show that the Commission's decision may adversely affect its interests by significantly jeopardizing its position on the market in question (see *Cofaz and Others* v *Commission*, paragraph 28).

41 As to whether the applicant is directly concerned, suffice it to observe that the Commission's decision finding the aid at issue compatible with the Treaty has left intact all the effects of the contested aid, whereas the applicant had sought from the Commission a decision abolishing or amending the aid in question. In those circumstances, it must be held that the contested decision is of direct concern to the applicant (see *Cofaz and Others* v *Commission*, paragraph 30).

42 It follows that the contested measure is of direct and individual concern to the applicant within the meaning of Article 173 of the Treaty.

The admissibility of the action in Case T-447/93 (AITEC)

Arguments of the parties

43 The Commission, without raising any formal objection of inadmissibility, requests the Court to examine the admissibility of the action. It questions whether the contested decision is of direct and individual concern to the applicant, as a professional association of cement producers, within the meaning of Article 173 of the Treaty, even assuming that its membership comprises all cement producers in Italy.

44 The Commission relies on the judgment in *Cofaz and Others* v *Commission* as support for its argument that the second criterion, whereby the applicant's competitive position must be significantly affected by the contested decision, is not fulfilled, because the applicant, as an association, does not have a competitive position on the market in question. In the Commission's view, that view is confirmed by the judgments of the Court of Justice in Joined Cases 67, 68 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, in which it was held that the right of a professional body or association to bring an action is subject to extremely restrictive conditions which are not fulfilled by the applicant.

45 The Commission further denies that the applicant was a privileged intermediary in relation to it and observes that the applicant has not shown how its own interests as an association have been affected by the contested decision.

46 The Hellenic Republic, as intervener, expressly maintains that the action is inadmissible, for the same reasons. In its view, the applicant has not adduced sufficient

evidence to show that the measure at issue has directly and individually affected its competitive position in the market, or that it has suffered damage as a result.

47 Heracles, as intervener, adds that its exports to the rest of the Community commenced in 1986, not as a result of the aid at issue but by reason of the fact that the Greek producers' traditional export markets, such as Egypt, had ceased to provide an outlet for their exports. That same year, Titan also started, for the same reasons, to export cement to the rest of the Community.

48 The applicant maintains that its application is admissible. It refers to its objects, which are to protect the technical and economic interests of Italian cement producers, and to the fact that 30 of the 42 Italian cement producers are members.

49 As regards the first of the conditions referred to in *Cofaz and Others* v *Commission*, it maintains that it contributed substantially to the accurate and detailed information provided to the Commission in the course of the pre-litigation procedure and was thus, *vis-à-vis* the Commission, a privileged intermediary, as the Commission expressly acknowledged. As an organization representing its members, its object, pursuant to its statutes, is to defend their interests, and it alone can collate objectively and confidentially the information needed to defend the common interests of its members.

50 The applicant maintains that the second condition laid down by the Court of Justice in *Cofaz and Others* v *Commission* is also fulfilled. It points out that there has been a progressive development in the case-law of the Court of Justice, which initially considered that an association acting as the representative of a class of traders could not be individually concerned by an act affecting the general interests of that class but has since accepted that professional organizations or associations are individually concerned where they defend their members' interests in the course of the

administrative procedure and they or the operators which they represent are in competition with the recipient or recipients of the contested aid. That development in the case-law is apparent from the judgment in *Van der Kooy and Others v Commission*, cited above, which did not lay down the objective conditions needing to be fulfilled by applicant associations but made the admissibility of actions dependent on the circumstances of each case. That more open approach originated with the order of the Court of Justice of 30 September 1992 in Case C-295/92 *Landbouwschap* v *Commission* [1992] ECR I-5003, was continued in the judgment in *CIRFS and Others* v *Commission*, and was subsequently confirmed in Cases C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and C-225/91 *Matra* v *Commission* [1993] ECR I-3203 (see also Case 323/82 *Intermills* v *Commission* [1984] ECR 3809). The last two judgments affirmed the right of any of the 'parties concerned', within the meaning of Article 93(2), and thus professional organizations in particular, to bring an action for annulment.

51 The applicant considers that in the circumstances of the present case the Court must hold its action to be admissible. It points out that it referred in its application to the observations which it submitted during the procedure under Article 93(2) of the Treaty, especially those contained in its letter to the Commission of 7 June 1988 (Annex 4 to the application), and that it relied, in its reply, on various tables and statistics in order to show that its members are in competition with Heracles. In that context, it has explained that twelve of its members (individually identified), operating in ports where Heracles' exports were unloaded, lost market share equivalent to the increase in Heracles' exports, amounting to an overall loss of approximately LIT 186 000 million (see pp. 21 and 24 and footnote 26 in the reply).

52 Lastly, the applicant states that it would be contrary to the requirements of the proper administration of justice initially to allow an association to submit arguments and defend the interests of its members during the pre-litigation procedure — to facilitate communication with the Commission — and then to require each of the members of the association to bring its own action.

Findings of the Court

53 It is necessary to examine whether, as in Case T-449/93 (*Titan*), the contested decision is of direct and individual concern to the applicant. However, since the applicant is an association which is not itself a cement producer, its interests must be assessed differently from those of Titan.

54 According to the case-law of the Court of Justice, the defence of common interests is not enough to establish the admissibility of an action for annulment brought by an association (see Joined Cases 16 and 17/62 *Producteurs de Fruits* v *Council* [1962] ECR 471, at pp. 479 and 480; the order in Case 60/79 *Producteurs de Vins de Table et Vins de Pays* v *Commission* [1979] ECR 2429, at p. 2432; and Case 282/85 *DEFI* v *Commission* [1986] ECR 2469, paragraphs 16, 17 and 18).

55 The Court notes in that regard that the applicant relies on the fact that the competitive position of some of its members has been significantly affected. The applicant maintains that it established, by means of its observations during the administrative procedure, that specific interests of some of its members had been affected.

56 The Court finds that, in its observations sent to the Commission on 7 June 1988 (see Annex 4 to the application), the applicant explained, with reference to Table 3 (on p. 3), that the aid at issue had distorted competition and that the undertakings most affected, as referred to by way of example in Table 3, were having to halt certain burning processes and to close production units. Furthermore, that table contains estimates, for the relevant unloading ports, of the potential imports from

Greece compared to the output of the production units of the Italian companies in the area concerned. It thus compares, in particular, the individual cement production in 1987 and numbers of employees of Italcementi, Cementir and Moccia with the estimates of potential imports channelled through the ports of Chioggia, Leghorn and Naples.

57 Similarly, the applicant maintains in its reply (p. 24 and footnote 26) that twelve of its members established in the areas in which Greek imports are unloaded, including Cementir, Moccia and Italcementi, have suffered losses estimated at LIT 186 000 million.

58 The Court considers that, in adducing that evidence, the applicant has duly established that the competitive position of at least three of its members on the Italian market has been affected by the imports of Greek cement benefiting from the aid at issue. Whilst it is certainly true that the applicant does not merely defend the interests of those undertakings, since it cited them as examples of the threat to the Italian cement industry as a whole, nevertheless, by putting them forward as being amongst the group of undertakings 'most concerned' (p. 3 of Annex 4 to the application), it has referred to their individual position. The application contains, therefore, an account of the competitive position of those undertakings which distinguishes them from other undertakings in that sector.

59 It should also be pointed out that if those three undertakings, which took part in the administrative procedure through the intermediary of Confindustria and AITEC (see Annex 4 to the application), had brought an action for annulment referring to the information contained in the application, as considered above, that action would have been admissible, since they would thereby have duly shown, by means of Annex 4 to the application in the present case, that the aid approved by

the Commission's decision was liable significantly to affect their position on the market, which would be enough to demonstrate that they were individually concerned within the meaning of Article 173 of the Treaty. As to the question whether they are directly concerned, reference is made to paragraph 41 of this judgment.

60 In those circumstances, it must be stated that the applicant has defended the individual interests of certain of its members whilst at the same time attempting to protect those of the sector as a whole. Unlike the applicants in the cases cited in paragraph 54, the applicant, in bringing its action, may be regarded as having substituted itself for at least three of its members who could themselves — in view of the matters set out in the application — have brought an admissible action. In the present case, therefore, the Court considers that the collective action brought by the association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decisions, whilst avoiding any risk of Article 173 of the Treaty being circumvented by means of such a collective action.

61 Moreover, in representing the interests of some of its members during the administrative procedure and before the Court, the applicant has acted in accordance with Article 3 of its statutes, which provides that its object is in particular 'to protect the technical and economic interests of the trade as regards the economic development of the sector'.

62 It follows that, since, in the context of a procedure under Article 93(2) of the Treaty, the applicant has protected the interests of some of its members in accordance with the powers conferred on it by its statutes, without any objection from those members, and since it has shown that a decision of the Commission is of direct and individual concern to those members, the applicant must be regarded as individually concerned within the meaning of Article 173 of the Treaty, and cannot be treated as an association which has not taken part in the administrative procedure or which, in that procedure, has defended only interests of a general nature.

63 As to the question whether the contested decision is of direct concern to the applicant, reference is made to paragraph 41 of this judgment. The decision has left intact all the effects of the aid at issue, whereas the applicant had sought, in the interests of its abovementioned members, a decision of the Commission abolishing or altering that aid.

The admissibility of the action in Case T-448/93 (BCA and others)

Arguments of the parties

64 This action has been brought by BCA and by three of its member companies: Blue Circle, Castle and Rugby. Those three companies are the three principal cement manufacturers, responsible for almost all cement production, in the United Kingdom. BCA is the successor of the Cement Makers Federation (CMF), which was, until 1987, the commercial association of the United Kingdom cement industry and of which the three undertakings were also members. The objects of BCA are, in particular, 'to represent, promote, advance and protect cement production and the interests of those engaged therein' and 'to act as a channel of communication between the Members of the Association and ... (any) supra-national organisation and the respective departments or agencies thereof' and, in addition, 'to promote, support or oppose by all available means legislative or other measures, whether in Great Britain or elsewhere' (see paragraph 3(b), (h) and (i) of the Memorandum of Association, annexed to the application).

65 The Commission expresses doubts as to the admissibility of the action, as in Case T-447/93 (see paragraphs 43 and 44 above).

66 First, it questions whether the three applicants played an active role in the administrative procedure and whether that role was sufficiently significant, inasmuch as it was only BCA which submitted observations which, moreover, consisted solely of a very short letter of 9 June 1988, which did not state the names of the undertakings represented by BCA.

67 Second, it maintains, with the support of the Greek Government and Heracles, that the applicants have not adequately and unambiguously shown that their position in the market was directly and individually affected by the aid to Heracles, particularly as regards BCA, whose own interests, as a professional association, could not have been affected by that aid.

68 The applicants consider that their application is admissible, since the contested decision is of direct and individual concern to them, as required by Article 173 of the Treaty and as interpreted by the Court of Justice, particularly in the *Cofaz* judgment.

69 As to their participation in the procedure, the undertakings assert that they had already expressed their views on the aid granted to Heracles — both on their own behalf and through their then association, CMF — in particular at meetings with Members of the Commission, with Lord Cockfield and Mr Sutherland on 5 September 1986, with Mr Narjes and Mr Sutherland on 29 September 1986 and with Mr Sutherland on 6 November 1986. They were thus the first to complain about that unlawful aid. They further state that what prompted the Commission to request the Greek Government to supply information about the aid at issue on 18 September 1986 was information previously provided to the Commission by the applicants. The applicants also refer to the written comments in response to the Commission's 1988 notice which they submitted on 9 June 1988 through the intermediary of BCA.

70 As to the impact on their position in the market, the applicants refer to the Commission's own finding that Heracles accounted, from 1986 onwards, for about half of all Greek cement exports, and for approximately 70% of Greek cement imports into the United Kingdom. Furthermore, the contested aid brought about an appreciable increase in the volume of Heracles' exports to the United Kingdom: imports from Heracles rose from 12 500 tonnes in 1986 to 480 000 tonnes in 1990 (Annex 2 to the reply). The applicants infer from this that the aid to Heracles has significantly affected their position, since it has seriously compromised their long-term position in the market in question. The facts disclosed in the procedure against a European cement cartel, referred to by Heracles, confirm their analysis of the effect of the aid, in that they show that, in a market such as the cement market, even a small change in import volumes has an appreciable effect on market prices.

71 BCA pointed out at the hearing that it represents all of the cement producers in the United Kingdom. The applicants stated that, by reason of the number and location of its ports, the United Kingdom has one of the most competitive cement markets in Europe.

72 The applicants further state that the Court of Justice extended, in its judgment in *Cook* v *Commission*, the criteria for the admissibility of actions laid down in its judgment in *Cofaz* by ruling that any interested party which played an effective part in a procedure initiated by the Commission pursuant to Article 93(2) of the Treaty has capacity to institute proceedings under Article 173 of the Treaty in relation to the Commission's decision to close the procedure.

73 The Commission refers, in its rejoinder, to the judgments of the Court of Justice in *Van der Kooy and Others* v *Commission* and *CIRFS and Others* v *Commission*, cited above, in support of its argument that BCA, as an association of undertakings, does not have the right to bring an action (see paragraph 44 above).

74 The Commission points out in addition that, prior to 1986, there were no exports of Greek cement to the United Kingdom; consequently, the applicants' competitive position could not have been affected at the time when the aid was granted.

Findings of the Court

75 It is necessary, first, to examine the admissibility of the action in so far as it has been brought by Blue Circle, Castle and Rugby, having regard to the criteria defined above (see paragraphs 33 to 37).

76 As regards their participation in the preparatory steps to the procedure under Article 93(2), the Court finds that the applicants have asserted, on the basis of their own documentation, and without being challenged by the Commission, that their representatives and those of CMF took part in meetings with representatives of the Commission on 5 and 29 September 1986 and on 6 November 1986. The purpose of the meeting on 5 September 1986 was, in particular, to examine the aid granted to Greek producers by reductions in their debts to the national electricity companies. At the meeting on 29 September 1986, the United Kingdom undertakings drew attention to the transformation of Heracles' debts into capital. Prior to the meeting on 6 November 1986, the directors of the undertakings and the representative of CMF prepared a memorandum for use at that meeting, containing in particular a detailed analysis of Heracles' position before and after the transformation of its debts and of all of the distortive effects brought about by the aid.

77 In the face of such specific statements on the part of the applicants, the Commission cannot merely state that it is unable to confirm or deny that such meetings took place because it has been unable to find the slightest written record of them

(see the Commission's answer of 14 December 1994), particularly since the letter of 9 June 1988 from BCA to the Commission confirms that there were contacts between the 'UK cement makers' and the Commission in 1986. In those circumstances, the Court finds that the applicants participated in the preparatory steps to the procedure under Article 93(2) of the Treaty.

78 It remains to be considered, therefore, whether the applicants also took part in the procedure provided for by Article 93(2) after it was initiated by the Commission. It is appropriate for that purpose to examine the contents of BCA's letter of 9 June 1988. In that letter, BCA refers, first of all, to the meetings in 1986 attended by the United Kingdom cement producers. Second, it states that the United Kingdom producers 'reiterate' their objections. Since the producers in question were those who participated in the 1986 meetings, including, therefore, the three applicants, the Court must find that those applicants reiterated their objections in 1988 through the intermediary of BCA and, consequently, that they also took part in the procedure provided for by Article 93(2) of the Treaty.

79 Nor may the Commission assert, as it did at the hearing, that the applicants' participation was no more than a single sentence explaining that the aid to Heracles would distort competition and affect intra-Community trade. In 'reiterating' the objections raised by them in 1986, the applicants were clearly referring to all their discussions with the Commission in 1986.

80 As to the effect on their market position, the Court finds that the three undertakings, which are the principal cement producers in the United Kingdom, have clearly shown that their competitive position is affected by the Commission's decision, inasmuch as that decision considerably strengthens the financial position of their

Greek competitor Heracles, thus enabling it to export its products to the United Kingdom at more competitive prices than before. The Court finds, for the purposes of its examination of the question of admissibility, that the evidence adduced by the applicants is sufficient to show that the Commission's decision is liable to have a significant effect on their position on the market in question and is thus of individual concern to them.

81 As regards the question whether the contested decision is of direct concern to the applicants, reference is made to paragraph 41 of this judgment.

82 Since the Court is here concerned with a single action, there is no need to examine the right of the applicant BCA to bring proceedings (see *CIRFS and Others* v *Commission*, paragraph 31).

The legal interest of the three applicants in bringing proceedings

83 Lastly, the Court finds it necessary to examine Heracles' objection that the three actions are inadmissible, based on the illegal nature of the 'interest' of the applicants, whose actions seek, according to Heracles, to protect an alleged European cement producers' cartel.

84 Heracles has not given details of any link between these actions and that alleged cartel. Since Heracles has not established that its arguments are of any relevance to the present proceedings, there can be no grounds for finding that the applicants have no legal interest in bringing proceedings. Furthermore, the Commission's decision regarding the existence of that cartel has not yet become final, since it is the subject of other proceedings before the Court.

85 Accordingly, the three actions are admissible.

Substance

86 Titan relies on a number of pleas in support of its action for annulment. In the Court's view, it is appropriate to examine two of those pleas, one concerning the inapplicability of the derogations provided for in Article 92(2) of the Treaty and of the general principles of Article 92(3), and the other relating to the inapplicability of Article 92(3)(b) of the Treaty.

87 AITEC relies on four pleas in support of its action for annulment. In the Court's view, it is appropriate to examine, along with the pleas advanced by Titan, that alleging infringement of the 1987 decision and failure to comply with the obligation to examine the impact of the aid on competition and intra-Community trade, since that plea is interrelated with Titan's pleas, and also the arguments raised by AITEC in its third plea (infringement of Article 190 of the Treaty) concerning an alleged error on the part of the Commission as regards the relationship between Heracles' exports and its total production.

88 BCA, Blue Circle, Castle and Rugby rely essentially on three pleas in support of their action for annulment. It is appropriate to examine, more specifically, the applicants' arguments relating to the lack of any analysis of the compatibility of the aid with the common market (the third limb of the first plea) and the erroneous assessment of the facts regarding, in particular, the 1987 decision, the Halkis decision and the shifting to other Member States of the burden caused by the structural over-capacity of the Greek cement industry (the fifth limb of the first plea).

Pleas and arguments of the parties in Case T-449/93 (Titan)

1. Inapplicability of the derogations provided for in Article 92(2) of the Treaty and of the general principles of Article 92(3) of the Treaty

89 The applicant states, first of all, that the conversion of Heracles' debts into capital by the Greek Government, through the intermediary of the BRO, constitutes aid within the meaning of Article 92(1) of the Treaty. It claims that that aid is discriminatory, that it distorts competition between Heracles and other producers, both in Greece and in the common market, and that it affects trade between Member States.

90 The Commission and the Greek Government concede that the measure benefiting Heracles constitutes aid which distorts or threatens to distort competition within the meaning of Article 92(1) of the Treaty.

91 However, Heracles questions whether the measure at issue constitutes aid within the meaning of Article 92(1) of the Treaty, whilst admitting that for it the point is of purely academic interest. It considers that a substantial private creditor would have acted in the same way as the BRO and would have invested the sum in question in order to safeguard its investment. Moreover, that strategy was successful, since the Greek Government succeeded in selling its holding in Heracles to the Calcestruzzi company and to the national bank.

92 After stating that the aid at issue could not be brought within any of the derogations provided for by Article 92(2) of the Treaty, the applicant maintains that the Commission misconstrued the general principles of Article 92(3) of the Treaty by failing to take account of the fact that the derogations laid down in that provision must be strictly interpreted in order to safeguard the proper functioning of the common market.

93 In the applicant's view, the Commission failed either to assess the aid in accordance with the principles of Community law and policy or to consider that aid in the context of the Community cement industry and market as a whole, as it was required to do by Article 92(1) of the Treaty. The Commission thereby consolidated the unlawful advantage in favour of Heracles, particularly since, at the same time in a parallel procedure, it refused approval for aid granted to Halkis.

94 The applicant maintains that the 1987 decision and the conditions imposed by it constitute an insufficient and inadequate framework for assessing the compatibility of the aid with Community law. In its view, the Commission, in concluding that 'the aid ... can now be considered to be in conformity' with the 1987 decision, failed to take into consideration the effect of the aid on competition and intra-Community trade, since it merely noted, by way of justification for the change in its attitude since 1987, that the Greek Government had replied to the objections raised by the Commission.

95 The applicant states in its reply that the fact that the framework law was declared compatible with the Treaty generally, when it did not itself have any tangible effect, did not relieve the Commission of its obligation to examine whether specific actions undertaken by the BRO were compatible with the 1987 decision and the Treaty. In the 1987 decision, the Commission, far from seeking to establish an exhaustive general framework, required, on the contrary, that it be given individual notification of significant cases. It is apparent from the preamble to the decision that the Commission proposed to assess such cases in accordance with the principles traditionally applied by it in matters of State aid.

96 The Commission concedes that the aid to Heracles 'distorted or threatened to distort competition within the meaning of Article 92(1) of the Treaty', but it consid-

ers that the aid in question could nevertheless be covered by the exception under Article 92(3)(b) of the Treaty, since it was intended to remedy a serious disturbance in the Greek economy and fulfilled the conditions set out in the 1987 decision. That decision authorized the general scheme established by Law 1386/83, and hence the specific measures adopted within the framework of that law, provided that they fulfilled only the conditions laid down in the framework decision (see the Opinion of Advocate General Darmon in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, at p. 6487).

97 The Commission further states that the fact that the aid at issue had already been granted prior to the adoption of the 1987 decision is immaterial in this regard, since it was aware when adopting that decision, that the Law had already been applied in the past. In its decision, it made it quite clear to the Greek Government that all significant measures implementing the Law were to be notified, whether they were taken before or after the 1987 decision.

98 The Greek Government, in supporting the Commission's contentions in this regard, points out, as does Heracles, that the 1987 decision constitutes the legal framework of the contested decision, and that, since it has at no time been disputed, it has become legally unchallengeable. The 1987 decision acknowledged that Law 1386/83 was covered by the derogation laid down by the second part of Article 92(3)(b) of the Treaty read in conjunction with Protocol No 7.

99 It further maintains that the Commission examined the respective competitive positions of Heracles and its main European competitors after the aid at issue was decided on. It found that, after 1985, the markets on which Heracles operated in non-member countries shrank significantly, and that Heracles therefore sought new

markets. However, it found that Heracles held only a limited share, namely 34%, of total Greek cement exports to Italy, the remainder being held mainly by Titan. The Greek Government infers from this that the claim that there was no investigation of the competitive position of Heracles by comparison with other producers is unfounded.

100 The Greek Government states in addition that it is apparent from the fifth paragraph in Part V of the preamble to the 1987 decision that the risk of disturbance in the Community cement market was adequately taken into consideration in the context of that decision.

101 Heracles maintains that the Commission established, in the context of a procedure against a cartel of European cement producers, that its exports constituted the principal threat to European producers and 'threatened' to create an intra-Community cement trade which had not hitherto existed. The existence of trade between Member States is a precondition for Article 92 of the Treaty to apply. Heracles concludes that, in the absence of intra-Community trade, Article 92 of the Treaty was not applicable. It adds that Greek cement exports to other Member States did not commence until 1986.

102 The Commission maintains in its rejoinder that, in authorizing the general aid scheme on the ground that it was intended to remedy a serious disturbance in the economy of a Member State, the 1987 decision significantly limited its discretion in relation to individual grants of aid. Nevertheless, it examined whether the aid was linked to a restructuring plan, whether Heracles had increased its production capacity and whether it was intending to take over one of the loss-making undertakings, thereby increasing its production capacity and distorting competition. In so doing, it adequately assessed the effects of the aid on intra-Community competition.

2. Inapplicability of Article 92(3)(b) of the Treaty

103 The applicant maintains that, contrary to what is stated in the contested decision, the derogation provided for by Article 92(3)(b) of the Treaty is not applicable to the aid at issue. It repeats its contention that the Commission could not, by referring solely to the 1987 decision, escape its obligation to examine the compatibility of the aid at issue with the Treaty itself. That decision was adopted after the aid was granted. The Commission was under a duty to examine the compatibility of the aid with the Treaty at the time when it was granted, having regard to the legal framework prevailing at that time. Consequently, the 1987 decision could not constitute the basis for the examination to be undertaken by the Commission. Lastly, the applicant states once again that in the Halkis decision the Commission reached a different conclusion from that in the contested decision.

104 The Commission maintains that the aid at issue could be covered by the derogation provided for by Article 92(3)(b) of the Treaty, since it fulfilled the conditions laid down in its 1987 decision authorizing the general scheme, particularly as regards the monitoring of the effect of the aid.

105 With regard to the Halkis decision, the Commission points out, as do the interveners, that the facts giving rise to that decision were different from those of the present case.

106 In its reply to the questions put by the Court, the Commission repeats that, when adopting the 1987 decision, it did not examine the compatibility with the common market of specific aids which had already been granted, but reserved that exami-

nation for the decisions it was to take following notifications of individual grants of aid, which were to be made subsequently in accordance with the 1987 decision. The Commission also states, with regard to the application of a scheme previously approved under Article 92(3)(b) of the Treaty, that its only obligation was to verify that the aid at issue fulfilled the conditions on which that scheme had been approved. The Commission further maintains that it was under no obligation in the present case, on closing the procedure, to assess the impact of the aid at issue on intra-Community trade and competition, since that assessment had already been made when the 1987 decision was adopted and when the procedure was opened. The very object of compliance with the conditions imposed by that decision was to enable the aid at issue to be declared compatible with the common market despite its impact on trade and competition. That is why, in its decision closing the procedure, it merely verified that the conditions laid down in its 1987 decision were fulfilled.

Pleas and arguments of the parties in Case T-447/93 (AITEC)

1. Breach of the 1987 decision, in that the Commission did not examine the impact of the aid on intra-Community competition and trade

107 The applicant maintains that the 1987 decision required the Commission to examine whether aid granted on the basis of Law 1386/83 affected intra-Community trade. It considers, therefore, that the Commission should have determined the impact of the aid at issue on Heracles' competitive position by comparison with that of other Community cement producers, instead of basing its decision solely on the interests of the Greek State, which granted the aid.

108 The applicant emphasizes the fact that the Commission proceeded, in its 1987 decision, on the basis that the application of that decision to individual grants of aid must not have the effect of strengthening the competitive position of the recipient undertakings *vis-à-vis* undertakings in other Member States. Yet the application of the 1987 decision to the aid granted to Heracles precisely strengthened Heracles' competitive position by comparison with that of the Italian undertakings.

109 The Commission argues that, since the aid to Heracles was granted pursuant to a previously approved aid scheme, its only duty was to verify whether the aid at issue fulfilled the conditions laid down in Article 1 of the 1987 decision. Its only obligation, therefore, was to ensure that Heracles was not in a stronger competitive position than would have been the case if the difficulties which prompted the 1987 decision had not existed. It considers that it fulfilled that task to the letter, as is evidenced by the contested decision.

110 The applicant considers that the Commission cannot claim to have assessed the validity of the contested decision solely in the light of the 1987 decision, since that decision did not exist when the aid was granted in 1986. In its reply, it states that the Commission's obligation to examine the impact of the aid derives exclusively from Article 92 of the Treaty. The fact that, in its application, the applicant also based that obligation on the 1987 decision merely reflects its plea in the alternative in the event that the Court holds that decision to be the sole legal framework for assessing the aid at issue. The Court finds that, in so doing, the applicant has added to its plea of omission on the part of the Commission a supplementary argument showing the Commission's duty to act.

2. The erroneous assessment by the Commission of the ratio between exports and the total production of, on the one hand, Heracles and the Greek producers and, on the other hand, other producers

111 The applicant maintains that the contested decision is based on unsupported assertions which are not such as to enable the Court to review the legality of its reasoning. Those assertions are based on factors which do not correspond to those referred to in the decision to open the procedure. The Commission acted solely on the basis of statements by the Greek Government, which were, moreover, inadequate. According to the applicant, the examination carried out by the Commission reveals a manifest error of assessment and inadequate reasoning, particularly since it failed to take into consideration the fact that the Greek producers, and Heracles especially, export some 50% of their production, as compared with only 5 % to 10 % in the case of producers in other Member States.

112 The Commission is unable to see the relevance of the applicant's arguments to the present case, and observes that Greek undertakings have always exported a considerable volume. Nor does it consider that point relevant to a decision applying a general scheme which had previously been approved.

Pleas and arguments of the parties in Case T-448/93 (BCA and others)

1. Infringement of Article 93(2) of the Treaty, in that the Commission did not examine the compatibility of the aid with the common market

113 The applicants maintain that the Commission wrongly considered that the compatibility of the aid at issue resulted automatically from its compatibility with the 1987 decision. The 1987 decision was adopted in the context of a quite exceptional economic situation. The fact that it was justified at the time is not, therefore, such as to justify all aid subsequently granted. Moreover, taking into account the improvement in the Greek economy, the Commission had itself ordered the progressive reduction, and ultimate elimination before January 1990, of other export aid (see Commission Decision 86/614/EEC of 16 December 1986 amending Commission Decision 85/594/EEC authorizing Greece to take certain safeguard measures under Article 108(3) of the EEC Treaty, OJ 1986 L 357, p. 28).

114 The applicants further state that there is a manifest contradiction between the contents of the communication relating to the opening of the procedure and those of the contested decision. In the former, the Commission proceeded on the basis that the compatibility of the aid did not fall to be assessed solely in the light of the 1987 decision but also in the Community context, at least in significant cases where notification was required.

115 The Commission refers, first, to the reasoning advanced by the applicants themselves in connection with another limb of this plea, namely that the aid should have been assessed in the light of the conditions prevailing at the time when it was granted. The Commission observes in that regard that the Greek producers' traditional export markets were located primarily in the Middle East, North Africa and the United States. It was only from 1985 onwards, when those markets slumped, that the Greek cement producers started to seek outlets on the Community market. Before that time, however, trade between Greece and the rest of the Community had been practically non-existent.

116 The Commission considers that, having regard to the fact that the aid to Heracles was granted pursuant to a previously approved scheme, its only obligation was to verify whether the aid at issue fulfilled the conditions laid down in Article 1 of the 1987 decision. Since the aid did meet those conditions, it qualified for the derogation provided for by Article 92(3)(b) of the Treaty.

2. Erroneous assessment of the facts in the light of the 1987 decision and the discriminatory nature of the contested decision by comparison with the Halkis decision, particularly as regards the shifting to other Member States of the burden caused by the structural over-capacity of the Greek cement industry

117 The applicants maintain that the Commission committed a manifest error in its assessment of the facts, by failing to ensure, as required by the 1987 decision, that the aid to Heracles did not distort competition.

118 The applicants observe that exports of Greek cement to other Member States increased considerably between 1986 and 1990. They consider that the contested decision ultimately had the effect of shifting to the other Member States the burden arising from the structural over-capacities of the Greek cement industry, whereas the 1987 decision was precisely intended to avoid such an outcome. They

further point out that the Commission found, in the Halkis decision, that aid similar to the aid at issue was incompatible with the common market.

119 The applicants further stated at the hearing that the geographical configuration of the United Kingdom is such that it is particularly exposed to imports of cement by boat.

120 The Commission, supported by the interveners, rejects those contentions. It gives details of the various particular aspects of the Greek cement market on which it based its decision, and points out that its powers in the matter are discretionary and its exercise thereof may be censured only in cases of manifest error.

121 Lastly, the Commission repeats that the increase in Greek cement exports to the Community is attributable to the slump, from 1985 onwards, in exports by Greek producers to their traditional markets, namely the Middle East, North Africa and the United States. Heracles' position in that regard was no different from that of the other producers, save perhaps that the aid at issue enabled it to re-establish its financial position and thereby to seize the opportunities offered by the market in the same way as its Greek competitors.

Findings of the Court

122 The Court notes, as a preliminary point, that Heracles, as an intervener, is not entitled to question whether the measure at issue in this case constitutes aid within the meaning of the Treaty. An intervener accepts the case as he finds it at the time of his intervention, in accordance with Article 93(4) of the Rules of Procedure of the Court of Justice, which were applicable to Heracles' intervention before the present cases were referred to the Court of First Instance. The Court must find in this instance that the contested decision is based on a finding that the measure at issue

constitutes aid within the meaning of the Treaty and that point is not challenged by the main parties. Consequently, by maintaining that the conditions of application of Article 92 do not appear to be fulfilled, Heracles is altering the framework of the dispute as defined by the application and the defence, in disregard of Article 93(4) of the Rules of Procedure of the Court of Justice. It follows that that plea must be regarded as inadmissible.

123 As to the substance of the case, the Court finds that all of the applicants maintain, in essence, that, when assessing the compatibility of the aid at issue with the Treaty, the Commission could not simply examine whether it fulfilled the conditions laid down by the 1987 decision, which declared that the aid scheme established by Law 1386/83, on the basis of which the contested aid was granted, was compatible with the Treaty. According to the applicants, the Commission should have carried out a specific examination of the compatibility of the aid at issue with the common market. It is appropriate, therefore, to determine first of all the scope of the 1987 decision and then to verify whether or not the contested decision disregards the 1987 decision and Article 92 of the Treaty.

The scope of the 1987 decision

124 The Court finds that, in the 1987 decision, the Commission approved the implementation of Law 1386/83 on the ground that it fulfilled the conditions of the second part of Article 92(3)(b) of the Treaty, read in conjunction with Protocol No 7, since it was intended to remedy a serious disturbance in the economy of the Hellenic Republic. Having set out the economic situation of that Member State, the Commission noted that the BRO had made individual interventions pursuant to that law covering 45 undertakings, of which 23 companies (including Heracles) which had not been put into liquidation accounted for approximately 20% of industrial employment in the Hellenic Republic. Consequently, the decision recognized that the operations of the BRO were capable, in general, of remedying that disturbance.

125 It should be noted, however, that although the 1987 decision approved the implementation of Law 1386/83, it did not approve all of the individual interventions by the BRO. In Article 1(2)(a) of its decision, the Commission subjected the implementation of Law 1386/83 to the following condition:

'The Greek Government shall notify the individual cases of intervention in firms made subject to the law employing 300 or more persons in the case of non-sensitive branches and 100 or more persons in the case of sensitive branches'.

126 In the preamble to the decision, the Commission justifies the imposition of that 'condition' by explaining that 'the Commission is empowered in a decision authorizing a general scheme of State aids to impose conditions resulting from its assessment of the scheme including, where relevant and necessary, an obligation to notify individual significant cases so that these may be considered from the point of view of their impact on intra-Community trade and competition. In this the Commission must have regard to considerations of Community policy. This results from the judgment of the Court in ... *Philip Morris* v *Commission* where the Court clearly indicated ... that the assessment involved in operating the exceptions provided for in a, b and c of Article 92(3) are to be made "in the Community context"' (fourth paragraph of part V of the 1987 decision).

127 In the Court's view, it is apparent from the terms of the 'condition' requiring notification, and from the justification therefor, that the Commission considered that, as regards cases exceeding the thresholds laid down by the 1987 decision, the finding concerning the serious disturbance in the Greek economy was not, on its own,

enough to legitimate the aid in question. The Commission therefore considered, without calling in question the future existence of the general aid scheme approved by reason of the serious disturbance in the Greek economy, that interventions by the BRO on a certain scale should be subjected to a specific examination, first, of whether the grant of the aid fulfilled the 'conditions' imposed by the 1987 decision and, second, of whether or not it resulted in the undertakings concerned 'being left in a stronger competitive position *vis-à-vis* industries in other Member States than would otherwise occur had those difficulties not arisen in the first place' (see part V of the decision). The fact that the Commission itself considered that it was obliged to assess the effect on intra-Community trade of the aid granted by the BRO is borne out by the reference in the decision (part V) to the judgment in *Philip Morris* v *Commission*, in which the Court of Justice approved the fact that the Commission had carried out such an examination (paragraphs 11 and 12 of the judgment). The Court concludes, moreover, that the need for such an examination, as provided for by the 1987 decision, accords with the purpose of Article 92 of the Treaty, which seeks in principle, as a rule of competition, to prevent aid granted by Member States from distorting competition or affecting intra-Community trade.

128 It follows from the foregoing that in the 1987 decision the Commission itself considered that, depending on the circumstances in which the aid scheme in question was approved, the second part of Article 92(3)(b) of the Treaty may require a specific examination of the compatibility of individual cases of aid going beyond the finding that there exists a serious disturbance in the economy of the Member State concerned. In the present case, moreover, the Commission stated that the existence of a serious disturbance in the Greek economy was not enough to justify the view that significant cases of individual aid granted pursuant to Law 1386/83 were compatible with the second part of Article 92(3)(b) of the Treaty.

129 It follows that, as regards aid exceeding the thresholds laid down by the 1987 decision, the obligation to notify such aid, even after its grant, must be interpreted

as a reservation on the approval contained in the decision itself, of the same type as that defined in the judgment of the Court of Justice in Case 47/91 *Italy* v *Commission* [1994] ECR I-4635 (paragraphs 21 and 22), whereas, as regards less significant grants of aid, that decision must be interpreted as definitive approval of aid granted on the basis of the authorized general scheme. Consequently, the Commission cannot claim that its decision constitutes blanket approval of all aid granted pursuant to Law 1386/83, as was the position in the *Irish Cement* cases, cited above. In those cases, the regional aid schemes had received the general approval of the Commission, without the Commission requiring significant cases to be notified or the inclusion of the reservation concerning the approval of such cases. Since the scheme had itself formed the subject-matter of the examination provided for by Article 93(1) of the Treaty and had been approved on that basis, the measures implementing it no longer had to be notified to, or examined by, the Commission, by contrast with the present case.

130 As to the fact that the specific intervention by the BRO in favour of Heracles had already taken place prior to the adoption of the 1987 decision, it should be recalled that the Commission was aware of that fact when it adopted its decision (see its telex of 18 September 1986). In that regard, the Commission regrets in the contested decision the fact that the Greek Government 'failed to notify the important application of Law 1386/83 in favour of Heracles'. It has rightly pointed out that it did not in 1987 examine the individual cases of aid already granted but deferred that examination until it received notification of individual grants of aid pursuant to the notification obligation referred to in the 1987 decision. That interpretation of the decision is confirmed by the wording of Article 1(2), which states that the conditions laid down by that provision are to apply to 'any interventions of the BRO', which indicates that the Commission wished to receive subsequent 'notification' of cases of aid already granted, in order that they 'may be considered from the point of view of their impact on intra-Community trade and competition' (see part V of the 1987 decision). It follows that although the aid to Heracles pre-dated the 1987 decision, it was subject to the obligation laid down by Article 1(2)(a) of that decision.

131 It should also be stated in that regard that the Commission's defence is contradictory. In its answers to the Court's questions, it explains, on the one hand, that it did not in 1987 examine the compatibility with the common market of the individual cases of aid previously granted and that it deferred its examination of them until such time as it received notification of those cases pursuant to Article 1(2)(a) of the 1987 decision. On the other hand, it maintains at the same time that, as regards cases involving the application of a scheme previously approved on the basis of Article 92(3)(b) of the Treaty, its only obligation was to verify that the aid in question had been granted in accordance with the conditions of approval of that scheme, on the ground that the question of compatibility with the common market had already been examined in the context of the 1987 decision. As regards the examination of those conditions, it adds that the only condition needing to be examined was that relating to the absence of any increases in production capacity, since, in the absence of any such increase, the common market would necessarily remain wholly unaffected.

132 Lastly, the Court observes that, contrary to the submission of the Greek Government (see paragraph 100 above), part V of the 1987 decision contains no assessment of the Community cement market.

The contested decision

133 The Court notes that the Commission pointed out in the contested decision that the obligation to notify individual significant cases had been imposed 'so that these could be considered from the point of view of their impact on intra-Community trade and competition'. However, the fact remains that, in the contested decision,

the Commission merely considered the consequences of the aid on the territory of the Hellenic Republic, basing its approach on the Greek Government's answers to the objections initially raised by the Commission.

134 It follows that the contested decision is vitiated by a contradiction in the reasoning given on that point (see, to the same effect, the judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103).

135 The Court further points out that, in the present case, the Commission merely found that the aid at issue fulfilled the conditions of the 1987 decision, particularly as regards the absence of any increase in production capacity and the viability of the undertaking. Whilst it was indeed necessary for those factors to be taken into consideration for the purposes of examining the compatibility of the aid with the common market, the fact remains that they are not enough for any conclusion to be reached in that regard, since the 1987 decision also required the Commission to examine the extent to which competition might be distorted or intra-Community trade might be affected. No such examination was undertaken in any way by the Commission, as it has, moreover, admitted.

136 As to the Greek Government's objection that the applicants' argument ignores Protocol No 7, which provides that 'in the application of Articles 92 and 93 of the EEC Treaty, it will be necessary to take into account the objectives of economic expansion and the raising of the standard of living of the population', the Court observes that that provision does not constitute an exception to Articles 92 and 93 of the Treaty but merely requires the Commission to take into consideration, when assessing the effects of aid to a Greek undertaking, the objectives set forth in that protocol. It in no way relieves the Commission of its duty to undertake the examination provided for by Articles 92 and 93 of the Treaty and, in particular, to examine the impact of the aid on competition and intra-Community trade.

137 It follows that the Commission disregarded the scope of its obligation under the 1987 decision and Article 92 of the Treaty to examine whether the aid at issue distorted competition and affected intra-Community trade. Consequently, the contested decision is vitiated by an error of law which prompted the Commission to carry out an incomplete examination of the aid at issue (see the judgment of the Court of First Instance in Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraphs 62, 83 and 95).

The impact of the aid on competition and intra-Community trade

138 The Court notes the assertion by the Commission and the interveners that in 1986 no trade in cement existed between Greece and the other Member States and that, consequently, intra-Community trade could not have been affected by the contested aid. The Court finds that that argument constitutes a plea in the alternative which needs to be examined because the error of law committed by the Commission, and the consequences it had on the examination of the impact on intra-Community trade and competition of aid which had been notified, could not lead to the annulment of the contested decision if it were found that such an examination was superfluous by reason of the factual situation in the cement sector.

139 It should be noted in that regard that the Commission's argument is based on the situation in the cement market at the time when the aid was granted. However, it was already foreseeable at that time that Greek cement exports would be directed towards certain other Member States. The Greek producers' traditional export markets had slumped, which meant that the intra-Community trade already existing was going to grow substantially. Annex 1 to Heracles' statement in intervention shows that in 1986 it had already started to export cement to the other Member States of the Community. This is confirmed by the Halkis decision (part IV).

140 In those circumstances, the Commission was required to examine the effects which the aid was likely to have on intra-Community trade and competition.

141 It is apparent from the contested decision that the Commission did not carry out any examination of the foreseeable effects of the aid, at the time when it was granted, on competition and intra-Community trade. Nor did it examine the actual effects of the aid, which it could have taken into consideration as factual evidence, since it did not decide on the compatibility of the aid with the Treaty until five years after it had been paid.

142 In the light of all of the foregoing considerations, the Court finds that the Commission committed an error of law by failing to examine the impact of the aid at issue on intra-Community trade and competition (see *La Cinq* v *Commission*, paragraphs 94, 95 and 96).

143 Consequently, the contested decision must be annulled, without there being any need to rule on the other pleas relied on or to adopt the measures of inquiry applied for by the applicants.

Costs

144 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and pay those incurred by the applicants, apart from those caused by the interventions. The interveners must bear their own costs and pay the costs incurred by the applicants in the context of the interventions.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Annuls the decision of 1 August 1991 contained in Commission communication 92/C 1/03 pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid to Heracles General Cement Company in Greece, published in the *Official Journal of the European Communities* of 4 January 1992;**

2. **Orders the Commission to bear its own costs and pay the costs of the applicants apart from those caused by the interventions;**

3. **Orders the interveners to bear their own costs and pay the costs incurred by the applicants in the context of the interventions.**

Cruz Vilaça Vesterdorf Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 6 July 1995.

H. Jung

Registrar

J. L. Cruz Vilaça

President