JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
22 May 1996 *

In Case T-277/94,

Associazione Italiana Tecnico Economica del Cemento (AITEC), an association established under Italian law, the registered office of which is in Rome, represented by Mario Siragusa, of the Rome Bar, Giuseppe Scassellati-Sforzolini, of the Bologna Bar, and Cesare Rizza, of the Syracuse Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Nicola Annecchino and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of decision D/05268 of the Commission of 9 June 1994, inasmuch as it expresses the Commission's refusal to bring an action before the Court of Justice under the second subparagraph of Article 93(2) of the Treaty on account of the Greek Government's failure to comply with Commission

* Language of the case: Italian.

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) and, in addition, annulment of the confirmation of that refusal, expressed in decision D/07743 of 26 July 1994, together, in the alternative, with a declaration that the Commission has failed to act,

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

composed of: H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 12 December 1995,

gives the following

Judgment

Background to the dispute

1 In 1988, as is well known, the Hellenic Republic granted aid to Greek cement producers, in particular Halkis Cement Company ('Halkis'). In view of that company's substantial losses, the Greek Government decided to convert part of its debts into capital and to allow a number of public enterprises and agencies to waive

repayment of loans granted to Halkis and to maintain a line of credit for its use (for a description of the general situation in the Greek cement industry, see the judgment of the Court of First Instance in Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971).

2 Having become aware of these facts, the Commission, on 3 April 1989, initiated a procedure under Article 93(2) of the EC Treaty and, in a notice regarding aid granted by the Greek Government to Halkis (OJ 1989 C 156 of 24 June 1989, p. 3), invited parties concerned other than the Member States to submit their comments. The applicant AITEC, which represents most of the Italian cement producers, intervened in the procedure as an interested party by sending written observations to the Commission on 17 July 1989. The Greek Government maintained that it had applied Law 1386/83 of 5 August 1983 (*Official Journal of the Hellenic Republic* No 107/A of 8 August 1983, p. 14) establishing the Organismos Anasygkrotiseos Epicheiriseon (Business Reconstruction Organization, hereinafter 'the BRO'), a company limited by shares, the entire capital of which was subscribed by the State and the object of which was to contribute to the social and economic development of the country. To that end, the BRO was empowered in particular to take over the administration and day-to-day management of undertakings undergoing restructuring or nationalized undertakings. According to the Greek Government, Halkis had been subject to the provisions of Law 1386/83 relating to liquidation, which in its case was due to take place towards the end of 1989.

3 On 2 May 1990 the Commission adopted Decision 91/144/EEC on aid granted by the Greek Government to a cement manufacturer (Halkis Cement Company) (OJ 1991 L 73, p. 27, hereinafter 'the 1990 decision'), the operative part of which reads as follows:

'*Article 1*

The aids awarded by the Greek Government to Halkis Cement Company, by allowing its public enterprises and agencies not to collect their claims on this company and by allowing these claims to increase even further, are illegal, given that

they have been awarded in breach of the rules set out in Article 93(3) of the EEC Treaty. They are furthermore incompatible with the common market, as they do not fulfil the criteria for exemption provided for in Article 92(2) or (3) and must therefore be abolished.

The Greek Government shall on the other hand refrain from implementing its proposal to grant aid by transforming debts of this company into capital.

Article 2

The Greek Government shall, by recovery, abolish the aid referred to in the first sentence of Article 1.

Article 3

The Greek Government shall inform the Commission within three months of the date of notification of this Decision of the measures it has taken to comply herewith.

Article 4

This Decision is addressed to the Hellenic Republic.'

4 A few days after notification of the 1990 decision, the Greek Government informed the Commission that the provisions of Law 1386/83 relating to liquidation had not yet been applied to Halkis and, moreover, that it was engaged in negotiations with foreign investors. Various items of information concerning the debts, accounts and exports of Halkis were also communicated at that time.

5 In October 1990 the Greek Government, having again pointed out its new policy and economic plans in respect of the privatization and restructuring of overindebted companies, requested the Commission's cooperation in working out the best way of implementing the 1990 decision.

6 Several meetings took place in Athens in October and November 1990, and a meeting was also held in Brussels on 11 January 1991. The Greek authorities informed the Commission at those meetings of the position in the negotiations concerning Halkis' future.

7 On 13 March 1991, following the submission of bids, the Italian company Calcestruzzi SA offered to take over Halkis for DR 33 billion in cash, plus approximately DR 8 billion payable over ten years. The creditors, who would have suffered greater losses if the company were to be compulsorily liquidated, regarded that offer as advantageous. The Commission was informed of those facts, first, by a communication of 21 March 1991 and, second, at the meeting held in Athens from 17 to 20 May 1991.

8 On 12 July 1991, at a time when the sale had not yet been finalized, the National Bank of Greece, Halkis' principal creditor, petitioned the Athens Court of Appeal for the company to be wound up. The court, considering that Halkis was still capable of meeting its current liabilities and that the takeover, which needed a certain amount of time to be implemented, provided the best solution for all the parties concerned, rejected that petition by judgment of 20 November 1991.

9 On 4 September 1991 the Commission sought additional information from the Greek authorities concerning the sale of Halkis. That issue was also raised at a meeting on 18 November 1991 by the Member of the Commission responsible at that time for State aid matters.

10 On 17 June 1992 the four main creditors of Halkis signed an agreement with its shareholders providing for an increase in its capital. Under that agreement, Calcestruzzi Holding SA ('Calcestruzzi') was to acquire 95% of the new shares in return for the payment of DR 41 250 000 050. By judgment of 13 October 1992 the Athens Court of Appeal approved that agreement.

11 Following a complaint lodged by AITEC on 19 November 1992, the Commission, by letter of 3 December 1992, again requested the Greek authorities to let it know whether the agreement with the creditors had been finally completed. The Greek Government replied by letter of 28 December 1992, indicating that the agreement had in fact been approved by the competent bodies but that Halkis had not yet been taken over by Calcestruzzi, inasmuch as that company had not made the first payment on the due date, 30 November 1992.

12 By letter of 5 February 1993 the Commission wrote again to the Greek Government, informing it of its concern that the 1990 decision had not been complied with and requesting it to find alternative solutions in case the sale to Calcestruzzi did not proceed. On 19 May 1993 it responded to AITEC's complaint of 19 November 1992, referring to the abovementioned request made by it to the Greek Government on 5 February 1993 and to the opening of insolvency proceedings in respect of Halkis.

13 On 2 June 1993 the Commission requested information from the Greek Government concerning the decisions adopted by the judicial authorities, whilst Halkis

sent the Commission information relating in particular to the action taken to secure completion of the takeover of the company by Calcestruzzi.

14 On 13 June 1993 Halkis brought proceedings before the Court of Arbitration of the International Chamber of Commerce for non-performance of the obligations entered into by Calcestruzzi, claiming payment from that company of DR 104 billion. On 7 July 1993 Halkis also brought proceedings against Calcestruzzi before the Athens Court of First Instance for damages amounting to DR 104 billion.

15 On 3 May 1994 AITEC submitted a fresh complaint to the Commission, requesting it, first, to bring proceedings before the Court of Justice under the second subparagraph of Article 93(2) of the Treaty for a declaration that the Greek Government had failed to comply with the 1990 decision and, second, to declare, by means of a proceeding under the first subparagraph of Article 93(2) of the Treaty, that the new aid granted to Halkis by the Greek Government was illegal. Since the Greek Government had persisted with its unlawful conduct, despite AITEC's repeated objections, AITEC considered that it had no alternative but to insist that the Commission end the situation, which it regarded as unlawful in itself. AITEC further stated that it could bring proceedings before the Court of Justice for failure to act if the Commission did not act on its request within a period of two months.

16 By letter of 7 June 1994 the Commission requested the Greek Government to confirm the information it had obtained concerning the steps taken to comply with the 1990 decision and to provide it with information about any other aid granted to Halkis. The Hellenic Republic replied to that request by letter of 20 July 1994. The Commission then proceeded to examine the voluminous documents annexed to the Greek Government's reply.

17 By letter of 9 June 1994 from Mr Petersen, Head of Unit within the Commission's Directorate-General IV responsible for competition matters (Annex 1 to the application in the present case), the Commission informed AITEC of the developments which had taken place since its letter of 19 May 1993. The letter of 9 June 1994 went on to state:

'The Commission considers that the public (and private) creditors of Halkis are acting sensibly in allowing that company to pursue its claim against Calcestruzzi. If the Court of Arbitration of the ICC upholds Halkis' claim, its creditors will be able to recover at least part of the sums owed to them by the company under the arrangement they accepted in 1991 — and certainly more than they would recover in any insolvency or liquidation proceedings. The Athens Court of Appeal confirmed this assessment in its decision No 10428/1992 of 20 November 1991, in which it stated that the sale at auction of Halkis' plant would not in any event raise more than the sum of DR 41 250 million offered by Calcestruzzi. The Commission therefore considers that no purpose will be usefully served by referring to the Court of Justice, under Article 92(3) (*sic*) of the EC Treaty, the question whether Decision 91/144/EEC has or has not been complied with pending a decision by the Court of Arbitration on the dispute between the two companies.

I would add that Article 93(2) provides as follows: "If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State *may* (...) refer the matter to the Court of Justice direct". The Commission is not bound to do so.

...

Unless any contrary indication emerges from the information which has been requested, it would seem that no additional aid has been granted to Halkis following the adoption of Decision 91/144/EEC. The initiation of the procedure provided for by Article 93(2) of the EC Treaty does not seem, therefore, to be justified.

I believe that the information set out above shows that the Commission is continuing to monitor the action taken by Halkis' public creditors in order to ensure that Decision 91/144/EEC is complied with and that no additional aid has been granted.'

18 On 13 June 1994 the applicant received a copy of that letter by fax. The letter was subsequently formally communicated to it on 4 July 1994.

19 On 18 July 1994 the applicant sent a further letter to the Commission. In that letter, it took issue with the position as set out in the letter of 9 June 1994 and repeated the views expressed by it on 3 May 1994. It further stated that the formal notice addressed to the Commission on 3 May 1994 remained effective for the purposes of proceedings for a declaration of failure to act (Annex 4 to the application).

20 On 26 July 1994 the Commission replied to the applicant by a letter in which Mr Petersen stated: 'As regards the question of compliance by the Greek Government with Decision 91/144/EEC, I believe that the Commission's position has been set out sufficiently clearly in my letter No 5268 of 9 June 1994'.

Procedure and forms of order sought by the parties

21 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 16 August 1994, AITEC brought the present action, in which it is applying, primarily, for annulment of the Commission's refusal, communicated by its letter of 9 June 1994, to bring proceedings before the Court of Justice pursuant to the second subparagraph of Article 93(2) of the Treaty and, secondarily, for annulment of the confirmation of that refusal contained in the letter of 26 July 1994. In the alternative, in case the Court of First Instance finds that the

two contested decisions do not constitute actionable measures under Article 173 of the EC Treaty, AITEC is applying for a declaration that the Commission has failed to act, pursuant to the third paragraph of Article 175 of the EC Treaty.

22 In its application the applicant claims that the Court should:

— annul the Commission's decision, No D/05268, communicated to AITEC by letter of 9 June 1994 and, in the alternative, decision No D/07743 sent to AITEC by letter of 26 July 1994, inasmuch as they expressly state the Commission's refusal, contrary to the second subparagraph of Article 93(2) of the Treaty, to take action against the Greek Government for non-compliance with the 1990 decision;

— order the Commission to proceed, pursuant to Article 176 of the EC Treaty, to take the necessary measures to secure full compliance with the judgment of the Court of First Instance;

— order the Commission to pay all the costs.

Alternatively, in the event that the Court considers that the contested measures cannot be regarded as acts within the meaning of Article 173 of the Treaty, the applicant claims that the Court should:

— declare that, by failing, within the period of two months stipulated in the formal notice given by AITEC in accordance with the second paragraph of Article 175 of the Treaty, to give a definitive decision on AITEC's application or to

bring proceedings against the Greek Government before the Court of Justice under the second subparagraph of Article 93(2) of the Treaty, the Commission has failed to fulfil its obligations under the Treaty;

— order the Commission to proceed, pursuant to Article 176 of the Treaty, to take the necessary measures to secure full compliance with the judgment of the Court of First Instance;

— order the Commission to pay all the costs.

23 The Commission contends that the Court should:

— declare the action inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to send it certain documents and put to the parties various additional questions with a request that they reply to them at the hearing. The parties presented their arguments and replied to the oral questions put by the Court at the hearing on 12 December 1995.

Admissibility of the action

Summary of the parties' arguments

25 Without raising any formal objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, the Commission regards AITEC's action as inadmissible on two grounds: (a) under the second subparagraph of Article 93(2) of the Treaty, the Commission enjoys a discretion precluding any right for individuals to require it to adopt a specific position; (b) in addition, and independently of that discretion, the adoption of a position by the Commission is not of direct and individual concern to the applicant.

26 The Commission refers, first, to the judgment of the Court of Justice in Case 301/87 *France* v *Commission* (*'Boussac'*) [1990] ECR I-307 in support of its contention that the procedure provided for by the second subparagraph of Article 93(2) of the Treaty constitutes a special form of the more general power of action provided for by Article 169 of the EC Treaty. In paragraph 23 of that judgment, the Court of Justice held that 'this means of redress is in fact no more than a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market'.

27 The Commission states that it is apparent from the wording of the rules and the general scheme of the Treaty that those provisions confer a power on it but do not place it under any obligation.

28 As the Court of Justice has repeatedly held in relation to Article 169 of the Treaty, the Commission is not bound to commence the proceedings provided for in that provision but has in that regard a discretion which excludes the right for individuals to require that institution to adopt a specific position and to bring an action

against its refusal to act (see, for example, the judgment in Case 247/87 *Star Fruit Company* v *Commission* [1989] ECR 291).

29 The Commission contends that the Court of Justice has clearly acknowledged that it is entitled, but not obliged, to act within the scope of the second subparagraph of Article 93(2) of the Treaty, since the nature of the general remedy of Article 169 is the same as the specific remedy provided for by Article 93(2).

30 Second, the Commission states that, as an association, AITEC does not have standing to bring legal proceedings against the Commission. An association, as the representative of a category of traders, cannot be individually concerned by a measure affecting the general interests of that category (see the judgment of the Court of Justice in Joined Cases 16/62 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes and Others* v *Council* [1962] ECR 471). Nor can the applicant rely on the judgments of the Court of Justice in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391 and Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 to show that its action is admissible. It has provided no evidence for its contention that the interests which it pursues are different and distinct from those of all other economic operators in the sector concerned.

31 The applicant considers that its action is admissible. AITEC claims to have shown, in its letter of 3 May 1994, that the Greek Government was still not complying with the 1990 decision, that it was, on the contrary, clearly employing delaying tactics in order to make the Commission believe that it genuinely intended to implement it, and that it was continuing to finance Halkis by means of the maintenance of lines of credit agreed to by the banks and other public bodies.

32 According to AITEC, the document which it was sent by the Commission on 9 June 1994, alternatively the document sent on 26 July 1994, constitutes a decision

within the meaning of Article 173 of the Treaty. The applicant states, with reference to the judgments of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639 and of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, that it is settled case-law that any measure producing binding legal effects capable of affecting the interests of the applicant by bringing about a significant change in his legal position constitutes an act or decision against which an action for annulment may be brought under Article 173 of the Treaty. The act communicated by the Commission's letter of 9 June 1994 expressly rejected AITEC's request for the initiation of the procedure provided for by the second subparagraph of Article 93(2) of the Treaty and defined the position of the Community institution on that point. Relying on the judgment of the Court of Justice in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, the applicant maintains that the definitive nature of the decision of 9 June 1994 is not called in question by the fact that the Commission did not rule out the possibility of instituting proceedings before the Court of Justice in the event that the outcome of the arbitration between Halkis and Calcestruzzi was unfavourable to Halkis.

33 In its reply, AITEC rejects the argument that a Commission decision refusing a request cannot constitute an act capable of being challenged. According to the previous case-law of the Court of Justice, an action against a decision refusing a request is in principle admissible only if the positive act, which is the object of the refusal, is itself capable of being challenged. As it is, the decision at issue relates to the initiation of proceedings. The applicant considers that, since it excludes the adoption of other measures by the Commission, the refusal to initiate proceedings is in itself such as to produce definitive legal effects.

34 The applicant further states that it has a direct individual interest in contesting the decision. It observes, first of all, that the decision was expressly addressed to it. The applicant maintains *ad abundantiam* that, as an association made up of 29 Italian cement undertakings (out of a total of 38 Italian undertakings in that sector), representing 92% of national production, it has a legal interest in the elimination, for the benefit of the Italian cement producers, of a distortion of competition on the Italian cement market. It contends that it is necessary to fill the legislative vacuum arising from the absence of rules for the application of Articles 92 and 93 of the Treaty by drawing an analogy between the procedural rules applying to undertakings in matters concerning the protection of trade and those applying to them in the field of State aid. In that context, the applicant's involvement in the administrative procedures preceding and subsequent to the 1990 decision is a relevant

factor, since a substantial proportion of the sales of its 29 members are effected in competition with a substantial proportion of the sales of the undertaking in receipt of the aid. The express refusal on the part of the Commission has permitted the survival of a competitor which is in a position, solely by virtue of the aid received by it, to export cement to Italy at abnormally low prices.

35 As regards the claim for a declaration of failure to act, the applicant considers itself legitimately entitled to require the Commission to bring proceedings before the Court of Justice under Article 93(2) of the Treaty, and that it is therefore entitled to bring an action for failure to act before the Court of First Instance, seeking a declaration that, by failing to bring proceedings before the Court of Justice, the Commission has failed to comply with one of its obligations and, consequently, that it has committed a breach of Community law. In its 18th Report on Competition Policy (1988), the Commission expressly acknowledged the importance of the judgment given by the Court of Justice in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, by drawing attention to the Court's ruling in that case that an interested party may require the Commission to define its position, pursuant to the second paragraph of Article 175 of the Treaty, on aid granted by a Member State to a competitor undertaking (see point 323 of the report).

36 In the event that the Court of First Instance considers that the Commission has only the power, but not an obligation, to bring proceedings before the Court of Justice under Article 93(2) of the Treaty, AITEC considers that it is legitimately entitled, as an applicant directly and immediately concerned, to avail itself of the right to require the Commission to adopt a definitive position as to its intentions, which it could then challenge pursuant to Article 173 of the Treaty. If it were open to the Commission to defer its intervention at will by sending provisional letters, that would affect the interest of individuals in protecting the rights which they derive from the Community legal order.

37 In its reply, AITEC denies that it is open to the Commission to extend the case-law of the Court of Justice on Article 169 of the Treaty to the procedure laid down by the second subparagraph of Article 93(2) thereof. The factual situation addressed by the *Boussac* judgment, cited above, was totally different from that giving rise to the present case. In actual fact, there is no precedent regarding the

admissibility of an action such as that brought by the applicant. State aid is subject to a special system of review which is unique under the Treaty.

38 The applicant states that, in State aid procedures, the Commission has less discretion, since it is obliged, in the context of Article 93(3) of the Treaty, to initiate without delay the examination procedure referred to in Article 93(2), and is also bound, following notification of the measure, to define its position within a period of two months. A decision not to initiate the pre-litigation procedure constitutes an actionable measure in just the same way as a decision to initiate it.

39 The applicant observes, as a fundamental point, that only the Commission and the Member State concerned are entitled to participate in the pre-litigation procedure provided for by Article 169 of the Treaty, whereas the first subparagraph of Article 93(2) 'requires that the parties concerned be given notice to submit their observations, thereby guaranteeing the other Member States and the sectors concerned an opportunity to make their views known and allowing the Commission to be fully informed of all the facts of the case before making its decision' (see the judgment of the Court of Justice in Case 290/83 *Commission* v *France* [1985] ECR 439, paragraphs 16 and 17).

40 The applicant states that the Commission's interpretation of its functions and powers is such as to deprive competitors in the present case of all means of safeguarding their legitimate interests, since any initiative is wholly reserved — in the event of inaction on the Commission's part — to the Member States, which relatively seldom avail themselves of their right to apply for annulment of a decision approving a grant of aid by another Member State. As regards economic effects, a decision by the Commission refusing to require compliance with a previous decision prohibiting an aid measure may be treated as a decision authorizing the aid in question, since both decisions result in the same barrier to trade between Member States and the same distortion of competition.

41 With regard to the question whether it is directly and individually concerned, the applicant argues that there can be no doubt as to the immediate (and definitive) effects produced by the decision at issue on its legal situation and on the situation of the undertakings which it represents in this case. AITEC's interest is inherent in the final result sought in this case, namely the elimination, for the benefit of the Italian cement producers, of a long-term distortion of competition on the Italian cement market.

42 AITEC considers that its capacity to bring the present proceedings also derives from the fact that it intervened, in the interests of the industry, as an association composed of almost all the Italian cement producers, in the various procedures initiated before the Commission and, in particular, in the procedure which resulted in the adoption of the 1990 decision, in which it was involved as an interested party (see the judgment in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125).

43 AITEC maintains, with reference to the Opinion of the Advocate General in *CIRFS and Others* (at [1993] ECR I-1148), that the initiation before the Court of Justice by third-party undertakings of an action challenging the application of competition rules which they regard as inadequate or insufficiently stringent constitutes a means of protecting their legitimate interest in preventing other undertakings from securing, to the detriment of the applicants, unjustified competitive advantages. As an association, AITEC currently represents 29 of the 38 undertakings in the Italian cement sector and 92% of national production. Its members have suffered substantial harm both as a result of the failure by the Greek Government to comply with the 1990 decision and by reason of the Commission's refusal to bring a direct action against the latter before the Court of Justice. This has resulted not only in a steady decrease in the market shares of the Italian producers, to the benefit of Halkis and other Greek producers, but also in the conversion or closure of establishments operated by traders in coastal regions, who are even more affected by the arrival of cement shipped by sea from the Hellenic Republic. AITEC observes that the damage which it might suffer if it were unable to bring proceedings is that to which the Advocate General was referring when he stated, in his Opinion in *Van der Kooy and Others* v *Commission*, cited above (at [1988] ECR 240), that 'justice requires that an association should be allowed to bring proceed-

ings'. Since none of the undertakings represented by AITEC has brought a separate action, considering it more expedient to defend their interests jointly through the intermediary of their association, the applicant would find it impossible to protect its members' interests if it were unable to bring proceedings in its own name.

44 AITEC further states that a decrease in the market shares and turnover of its members will also result indirectly in its suffering a loss of revenue, since the membership fees which it charges are precisely calculated according to the quantity of cement produced by its members in a given year.

45 The Commission relies, as regards the claim for a declaration of failure to act, on the same pleas and arguments as those advanced in relation to the claim for annulment.

46 The Court requested the parties, by way of measure of organization of procedure, to reply at the hearing to various questions, one of which concerned the issue of the provisional nature of the Commission's letters of 9 June and 26 July 1994.

47 The applicant argued that those letters constitute an act capable of being challenged under Article 173 of the Treaty, since the refusal to bring proceedings before the Court of Justice has produced legal effects by leaving intact the effects of the illegal Greek aid. In so acting, the Commission considered this to be 'an adequate solution, such as to eliminate the illegality of the aid. That is why the Commission refuses to bring proceedings before the Court of Justice, and it is a definitive refusal'. The applicant considers that this amounts to a final decision and not merely a communication of a provisional nature.

48 The Commission states that, by contrast with the situation in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, the letters in question merely

communicated its intention to await the decision of the Court of Arbitration of the International Chamber of Commerce. The present case did not involve a choice between one type of procedure and another, nor any 'procedural right vested in any person which merits defending'. The letters were merely communications formulated in provisional terms sent to an association as a matter of courtesy.

Findings of the Court

49 As regards the admissibility of the claim for annulment, it must be stated at the outset that the applicant is seeking to contest, pursuant to Article 173 of the Treaty, a 'decision' of the Commission of 9 June 1994, on the ground that the Commission expressly refused therein to bring an action against the Greek Government before the Court of Justice, under the second subparagraph of Article 93(2) of the Treaty, for non-implementation by that government of the 1990 decision, and is also contesting, in the alternative, the confirmation of that refusal expressed in the 'decision' of 26 July 1994. It follows that the present proceedings are not directed against the alleged additional grants of aid to Halkis, the legality of which was also contested by the applicant in its complaint of 3 May 1994. Moreover, the letter of 26 July 1994 amounts in any event to no more than confirmation of the letter of 9 June 1994, and does not therefore constitute an actionable measure.

50 In those circumstances, it should be noted that the mere fact that a letter is sent by a Community institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision within the meaning of Article 173 of the Treaty, thereby entitling its recipient to bring an action for its annulment (see the order of the Court of Justice in Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473).

51 Furthermore, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional

measure intended to pave the way for that final decision (see, for example, the judgments of the Court of Justice in Case C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraph 29 et seq., and of the Court of First Instance in Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 27).

52 It is necessary, therefore, to examine whether the letter of 9 June 1994 conveyed to the applicant a definitive position on the Commission's part. The Court notes in that regard that the procedure concerning implementation of the 1990 decision had not been concluded at that time. The Commission considered that 'no purpose (would) be usefully served' by referring to the Court of Justice, pending a decision by the Court of Arbitration on the dispute between the two companies, the question whether that decision had or had not been implemented, and pointed out that it was itself monitoring its implementation. It must be stated, therefore, that in 1994 the Commission had not yet defined its position in relation to the applicant's complaint, but anticipated doing so at a later date. The indication to that effect in the letter shows that the Commission was merely communicating information relating to the examination in progress.

53 The applicant relies on the judgment in *SFEI and Others* v *Commission*, cited above, relating to the sphere of competition, in which the Court of Justice held that 'an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated upon a complaint by such a person'. In so stating, the Court of Justice defined as the culmination of the procedure an act which is not followed by any other actionable measure. In the present case, the Commission stated that it would continue to monitor implementation of its decision and that it reserved the right to take action in the future. By contrast with the case of *SFEI and Others* v *Commission*, the Commission did not, therefore, close the file on the applicant's complaint in the present case, which is a bar to admission of the claim for annulment.

54 Nor is the judgment in *Rendo and Others* v *Commission*, cited above, on which the applicant relies in support of its argument that the Commission adopted a

decision in its regard, of any relevance to the present case. The position adopted by the Commission — namely, to await the decision of the Court of Arbitration and, at the same time, to monitor implementation of its 1990 decision — did not have the effect of suspending, for a lengthy period, a procedure which had been initiated. As is apparent from the letter of 9 June 1994, the Commission has not ceased to follow developments in Greece nor to monitor compliance with its decision. It must be stated, therefore, that, in acting as it did, the Commission did not infringe any of the applicant's or its members' procedural rights, which they do not have in any case where the monitoring of compliance with a decision under the second subparagraph of Article 93(2) is concerned (see paragraph 71, below).

55 In any event, the only way in which the Commission could have reacted favourably to the applicant's request would have been to commence proceedings against the Hellenic Republic for failure to fulfil its obligations. It is settled case-law that private individuals are not entitled to bring proceedings against a refusal by the Commission to institute proceedings against a Member State for failure to fulfil its obligations (see, most recently, the orders of the Court of Justice in Case C-29/92 *Asia Motor France* v *Commission* [1992] ECR I-3935, paragraphs 20 and 21, and of the Court of First Instance in Case T-128/95 *Aéroports de Paris* v *Commission,* not published in the European Court Reports, paragraph 32 et seq.).

56 It follows from the foregoing that, since the letter of 9 June 1994 cannot constitute a decision, the applicant cannot challenge it by means of an action for annulment. Consequently, this claim must be rejected as inadmissible.

57 As regards the claim for a declaration of failure to act, the Court finds that, according to the applicant's submissions, it is in two parts: it concerns, first, the alleged failure by the Commission to adopt a definitive decision on AITEC's 'action' and, second, its declining to bring the matter before the Court of Justice (see paragraph 22 above). Accordingly, by the first part of its claim, the applicant is asking the Commission to adopt a decision addressed to it which refers to the steps which the Commission intends to take in response to its complaint, whilst the second part

relates to a decision by the Commission to bring proceedings before the Court of Justice. In this instance, it is appropriate first of all to examine the alleged failure to bring proceedings before the Court of Justice.

58 According to the third paragraph of Article 175 of the Treaty, any natural or legal person may, under the conditions laid down in that article, apply to the Community judicature where it considers that an institution has 'failed to address to that person any act other than a recommendation or an opinion'. It is apparent from the very wording of that provision that, in order for an action for failure to act brought by a natural or legal person to be admissible, that person must establish that he is the potential addressee of a measure which the Commission is obliged to take in relation to him (see, for example, the judgment of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 29).

59 It is necessary, therefore, to examine first of all the nature of the act sought by the applicant. The object of the second part of the claim is to require the Commission to apply the second subparagraph of Article 93(2) of the Treaty by bringing proceedings before the Court of Justice. A decision to bring proceedings before the Court of Justice is an internal preparatory measure adopted jointly by the Members of the Commission, normally on a proposal from the Member in charge of the case. Such an act of the Commission is not addressed to any person. It is followed by the institution of proceedings before the Court of Justice against the Member State concerned. As such, the institution of proceedings is not a measure addressed to any person either, but merely renders the case judicially pending.

60 It follows from the foregoing that neither AITEC as an association nor its members individually are the addressees of any Commission decision to bring proceedings before the Court of Justice. In those circumstances, neither the applicant nor its members are among the natural or legal persons who are in the legal situation of being potential addressees of a measure which the Commission is obliged to take in relation to them (see, for example, the order of the Court of First Instance in Case T-3/90 *Prodifarma* v *Commission* [1991] ECR II-1, paragraphs 37 and 38).

61 Second, and as a subsidiary consideration, it is necessary to examine the argument that a decision to institute proceedings before the Court of Justice would be of direct and individual concern to the applicant or its members, and that they can therefore bring an action for failure to act, despite the wording of Article 175 of the Treaty.

62 Assuming that such a parallel relationship between an action for annulment under Article 173 of the Treaty and an action for failure to act under Article 175 could be recognized, and, further, that the judicial protection of individuals requires a wide interpretation of the third paragraph of Article 175 of the Treaty, such as to enable a natural or legal person to contest the failure of an institution to adopt an act which is not addressed to that person but which, if adopted, would be of direct concern to that person (see the judgment in *Star Fruit Company* v *Commission*, cited above, and the Opinion of the Advocate General in that case ([1989] ECR 294, point 13)), it would then be necessary to examine whether AITEC or its members is, or are, in such a position.

63 As the Court has already observed, the act sought is merely an internal preparatory measure which does not have any external effects and does not concern any individual (see paragraph 59 above). The establishment of a procedural relationship between the Commission and Greece would not affect the legal situation of the applicant or its members, particularly since the 1990 decision is final. At the hearing, the applicant itself admitted that it would not be allowed to participate in such proceedings as an intervener. Only delivery of a judgment by the Court of Justice could have any effect on its legal situation or that of its members. Furthermore, the applicant also acknowledged that during the proceedings before the Court of Justice it would have to be established '... whether or not there has been a failure to fulfil obligations, and in what circumstances'. As the applicant itself acknowledges, it is therefore possible that the Court of Justice might find that the Member State concerned had not failed to fulfil its obligations. Delivery of such a judgment would not be of direct concern to the applicant either. Consequently, in no case would the act sought be of direct concern to the applicant (see, to that effect, the judgment of the Court of First Instance in Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, paragraph 41).

64 It follows that, even assuming the existence of a parallel relationship between an action for annulment and an action for failure to act, the applicant would not be directly concerned in the present case.

65 Third, an action brought under Article 175 of the Treaty for failure to act depends on the existence of an obligation to act resting on the institution concerned, so that the alleged non-fulfilment entails a breach of the Treaty. It is necessary, therefore, to determine the Commission's obligations under the second subparagraph of Article 93(2) of the Treaty. It is clear from the scheme of that article that it confers on the Commission (and on the other Member States) the task of ensuring compliance by the Member States with decisions adopted by the Commission pursuant to the first subparagraph of Article 93(2) of the Treaty and that it empowers it to bring the matter directly before the Court of Justice without any *inter partes* pre-litigation procedure (see the *Boussac* judgment, cited above, paragraph 23).

66 It is apparent from the second subparagraph of Article 93(2) of the Treaty and, more generally, from all the provisions of that article, that the Commission's monitoring powers over Member States which do not comply with its decisions within the prescribed period imply a wide margin of discretion for the Commission. The Commission is not therefore bound to commence the proceedings provided for in that provision. On the contrary, it has a wide discretion which excludes the right of any individual to require it to adopt a specific position (see, for example, the judgment in *Star Fruit Company* v *Commission*, paragraph 11, and the order in *Aéroports de Paris* v *Commission*, paragraph 43).

67 It should also be recalled that, as the Court of Justice has held, the means of redress provided under the second subparagraph of Article 93(2) of the Treaty is no more than a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market (see the *Boussac* judgment, paragraph 23). It is settled case-law that the Commission has a discretion in deciding whether to bring proceedings before the Court of Justice for failure to fulfil Treaty obligations. That discretion is not in any way conditional on the submission by an individual of a request that the Commission should take specific action, whether under Article 169

or under the second subparagraph of Article 93(2) of the Treaty (see, for example, the order of the Court of First Instance in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 14, and the judgment of the Court of First Instance in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 71).

68 Consequently, the exercise by the Commission of its discretion to bring proceedings before the Court of Justice does not entail any obligation which may be invoked by the applicant for the purposes of establishing a failure to act on the part of the defendant. It follows from the foregoing that the second part of the claim for a declaration of failure to act must be dismissed as inadmissible.

69 As regards the other part of that claim, regarding the alleged failure by the Commission to adopt a decision in response to AITEC's request, it should be borne in mind that an action for failure to act is conditional on the existence of an obligation to act resting on the institution concerned. Consequently, it is necessary to examine whether the applicant has shown that the Commission was obliged to take such a decision in relation to it.

70 In that regard, it must be recalled first of all that the implementing regulations provided for by Article 94 of the EC Treaty have not been adopted. Consequently, it must be held that Community law does not provide for the adoption of a decision such as that sought by the applicant pursuant to its claim for a declaration of failure to act.

71 It is, however, necessary to consider whether the judgment of the Court of First Instance in *Asia Motor France and Others* v *Commission*, in particular paragraph 29 thereof, which concerns Articles 85 and 86 of the Treaty and Council Regulation No 17 of 6 February 1962 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), is applicable by analogy to the present case. In this context, an essential difference between the present case and the case of *Asia Motor France and Others* v *Commission*, which concerned a finding by the Commission of an infringement by an individual, should be noted. In that case, the Court of First Instance held that another individual, the complainant, had a right to receive a decision from the Commission on the complaint. In

the present case, the contested failure to act lies within the context of the second subparagraph of Article 93(2) of the Treaty. Whilst the first subparagraph of Article 93(2) provides for involvement of interested parties in the procedure, the second subparagraph makes no further mention of it. Following the adoption of a decision finding that aid has been illegally granted, the Commission necessarily has a wide discretion as to the way in which that decision is to be complied with, which may raise complex issues concerning the recovery of the illegal aid (see also the judgment of the Court of Justice in Case C-349/93 *Commission* v *Italy* [1995] ECR I-343, paragraph 13). Consequently, the judgment in *Asia Motor France and Others* v *Commission* is not applicable by analogy to the present case.

72 It follows from the foregoing that the applicant has not shown that the Commission failed to adopt a decision in breach of an obligation incumbent on it.

73 That conclusion does not preclude the possibility that, in certain cases, the Commission may be bound, in the interests of sound administration and transparency, to inform a complainant of the steps taken in consequence of its decision. It must be stated, however, that in the present case the Commission undertook an adequate exchange of information with the applicant.

74 In those circumstances, the first part of the claim for a declaration of failure to act is also inadmissible. Consequently, the claim for a declaration of failure to act must be dismissed in its entirety.

Costs

75 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 applicant has been unsuccessful, it should be ordered to bear its own costs and to pay those of the Commission.

On those grounds,

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

hereby:

1. Dismisses the action as inadmissible;

2. Orders the applicant to bear its own costs and to pay the costs of the Commission.

Kirschner Vesterdorf Bellamy

Kalogeropoulos Potocki

Delivered in open court in Luxembourg on 22 May 1996.

H. Jung H. Kirschner

Registrar President