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

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

I — Facts

2. For the purposes of this appeal, the following facts, as set out in the contested judgment, are relevant:

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

— On 25 November 1991, the Commission sent the Statement of Objections to the 76 undertakings and associations of undertakings concerned; Irish Cement submitted written observations on the Statement of Objections and then oral submissions at the hearings held between 1 March and 1 April 1993. [6]

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

— By Decision 94/815/EC of 30 November 1994 ('the Decision'), [8] the Commission found that Irish

2 — Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR* v *Commission* [2000] ECR II-491.

3 — OJ, English Special Edition 1959-1962, p. 87.

4 — Cases IV/33.126 and 33.322 — Cement.

5 — Paragraphs 2 and 3 of the judgment.

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

7 — Paragraphs 4 to 6 of the judgment.

8 — OJ 1994 L 343, p. 1.

Cement had infringed Article 85(1) of the EC Treaty [9] by its anti-competitive conduct in participating:

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

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

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

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

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

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

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

9 — Paragraph 22 of the judgment.

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

— The Commission ordered Irish Cement to bring the infringements in question to an end and to refrain from any agreement or concerted practice contrary to free competition in the markets for grey cement and white cement (Article 8), imposed a fine of ECU 3 524 000 plus interest with effect from expiry of the deadline set for payment, which was three months from the date of notification of the Decision (Articles 9 and 11).

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

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

4. Irish Cement requested the Court of First Instance to annul the Decision and to annul or reduce the fine imposed on it. In any event, it asked that the Commission be ordered to pay the costs.

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

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

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

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

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

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

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

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

7. After providing them with copies of the whole file, the Court of First Instance invited the applicant undertakings and associations of undertakings to lodge a pleading specifying the documents to which they had not had access during the administrative procedure which could have affected their defence and to explain why in their view the outcome of the administrative procedure might have been different had they been given the opportunity to consult them. The pleading was to be accompanied by a copy of each document examined. All but one of the applicants [12] lodged observations. The Commission responded to all the applicants. [13]

8. In the judgment under appeal, the Court of First Instance granted Irish Cement's application in part and:

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

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

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

12 — Ciments Luxembourgeois SA.

13 — Paragraphs 169 and 170 of the judgment.

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

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

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

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

— fixe(d) the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 2 065 000;

— dismisse[d] the remainder of the application;

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

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

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

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

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

(3) between 1 January 1984 and 31 December 1988, in the periodic circulation of information on the Dan-

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

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

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

III — The procedure before the Court of Justice

10. When the appeal had been lodged and the written procedure completed, the Court of Justice, in the exercise of its powers under Article 119 of the Rules of Procedure,[14] by order of 5 June 2002 dismissed the first to third, ninth to twelfth and part of the fourteenth heads of the third plea in law and the second, third and seventh heads of the fourth plea in law.

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

IV — The appeal

12. Irish Cement claims that the Court of Justice should set aside the contested judgment in its entirety in so far as it upholds the Decision in respect of Irish Cement or, at least, that it should do so in part. Failing that, it claims, in descending order, that the Court should declare the Decision void or annul it or, finally, reduce the fine imposed on Irish Cement. It also asks that the Commission be ordered to pay the costs.

13. In support of those claims, Irish Cement puts forward four pleas in law, although some are divided into a number of heads. As I have just said, of those pleas in law, the first to third, ninth to twelfth and part of the fourteenth heads of the third plea in law and the second, third and seventh heads of the fourth plea in law have been dismissed.

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

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

1 — *Access to the file and the measures of organisation of procedure ordered by the Court of First Instance*

A — Arguments of the parties

1. First plea in law (in part)

15. Irish Cement maintains that where the Commission has adopted a decision in breach of fundamental procedural rules, the Court of First Instance is competent to annul it but not to attempt to remedy *ex post facto* the defects committed by the Commission. Anyone who is subject to disciplinary proceedings is entitled to have the procedure conducted fairly at all stages and it cannot be assumed that if it had been conducted properly the outcome would have been the same.

16. The appellant is of the view that the first test employed by the Court of First Instance is adequate: if there is no objective link between a document which is not disclosed during the administrative investigation and one of the facts imputed in the Decision, the procedure would not have had a different outcome, even if the document had been made available to the parties. However, it submits that the second test applied in the judgment under appeal is incorrect. When there is an objective link between the undisclosed document and the imputed facts, the Court of First Instance is not competent to assess whether, if the document had been disclosed, there would have been even a slight possibility that the outcome of the procedure would have been different.

17. The Commission contends that the Court of First Instance did not make good the defective procedure retrospectively. It merely ascertained whether the applicants had been deprived of a defence and to what extent their rights of defence had been infringed. It was impossible to determine in advance whether the documents which the applicants were unable to consult during the administrative procedure could have had an influence on the outcome of the procedure,[15] so that the Court of First Instance granted the undertakings and

15 — The Commission maintains that the situation in the present case is different from that in Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775 and Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, where it was held that certain undisclosed documents were by their very nature relevant, since they allowed a different interpretation of the facts. In Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, however, in which judgment was delivered on the same date, the Court of First Instance held that the documents in question were irrelevant and would not have assisted the applicant.

associations of undertakings access to the whole file, in order to enable them to specify the documents which would have been of use to them and non-disclosure of which adversely affected their rights of defence.

18. The Commission further submits that the premiss on which Irish Cement's argument is based is that the non-disclosure of certain documents is a procedural defect which must necessarily entail annulment of the final decision. That assertion is contrary to case-law and to the general principles of law.

2. Second plea in law

19. By this plea in law, Irish Cement reiterates the arguments which it puts forward in support of its first plea. The Commission contends that the appellant is merely repeating that the Court of First Instance was not competent to organise access to the file in the context in which it did so and, accordingly, refers to its comments regarding the first plea.

3. Third plea in law

(a) Fourth head

20. Irish Cement states that in the contested judgment[16] the Court of First Instance accepted the Commission's argument that it was not required to consider the claims concerning the economic background to the meetings or the documents adduced as evidence to support alternative interpretations; but it failed to address the appellant's argument that when specific evidence is open to different interpretations, the Commission should reconsider that evidence in the light of the economic background and the additional documents. In failing to do so, the Commission acted unfairly and in breach of Community law, as did the Court of First Instance when it endorsed the Commission's approach.

21. The Commission contends that the appellant's argument is reductive and abstract in the extreme and that it confuses two quite separate ideas: the legal classification of certain evidence and its evaluation. The Commission used as evidence against the applicants certain documents which the Court of First Instance classified as specific evidence, so that the economic realities which might have offered an alternative explanation for the facts were irrelevant. The Court of First Instance appraised that evidence and examined and rejected the arguments put forward by the various applicants against the way in which it had been interpreted. According to the Commission, the plea is inadmissible in so far as Irish Cement seeks to call in question the Court of First Instance's assessment of the evidence.

16 — Paragraphs 263 and 264 and paragraphs 1243 and 1251.

(b) Fifth head

22. In the appeal, the appellant claims that the test used by the Court of First Instance deprives it of the possibility of exercising its rights of defence where the Commission relies on specific documentary evidence to establish an infringement.

23. The Commission contends that the Court of First Instance did not merely accept that, in so far as the Decision relies on direct and specific documentary evidence, there was no need to examine the alternative explanations of the facts submitted by the applicant undertakings; it also examined and rejected the arguments put forward to challenge the findings made by the Commission on the basis of such evidence. In order to substantiate that assertion, it is sufficient to read paragraphs 1244 to 1251 of the judgment in so far as they concern Irish Cement. Furthermore, in that regard the appellant's contention appears to be so vague that it is difficult to answer, and it is inadmissible in so far as the Court of Justice is also requested to review the findings of fact made by the Court of First Instance.

4. Eighth head of the fourth plea in law

24. By this plea, Irish Cement criticises what it regards as the Court of First Instance's inadequate response to its reference to the judgments in *Solvay* v *Commission*[17] and *ICI* v *Commission*.[18] In its opinion, the distinction drawn in the contested judgment between those two cases and the present case is manifestly wrong, since the situation is the same in both instances.

25. The Commission contends that the appellant is not pleading a failure to state reasons but is merely disagreeing with the Court of First Instance and, more particularly, with its assessment of the facts, with the result that the plea is inadmissible. It is also manifestly unfounded.

B — The Court of First Instance's competence to order measures of organisation of procedure

26. As regards access to the administrative file, Irish Cement raises three very different issues. The first, the most abstract and the most important, to which the first two pleas in law refer, concerns the legitimacy of the measures of organisation of pro-

17 — Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775.
18 — Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847.

cedure ordered and, in particular, the competence of the Court of First Instance to adopt them and to determine the dispute in the light of their outcome.

27. The second question, which is dealt with in the fourth and fifth heads of the third plea in law, is the alleged reversal of the burden of proof resulting from the stance taken by the Court of First Instance *vis-à-vis* the direct and specific documentary evidence.

28. Last, in the eighth head of the fourth plea in law, Irish Cement complains that the Court of First Instance did not provide sufficient reasons for distinguishing the present case from *Solvay* v *Commission* and *ICI* v *Commission*.

29. In response to the claims concerning the lawfulness of the administrative procedure and in order, where necessary, to make good the damage caused by the lack of access to certain documents, the Court of First Instance requested the Commission to send the whole file and to make it available to the parties, [19] in order that, having perused the documents which they had not been able to examine during the investigation, they should identify them and explain why the outcome of the procedure could have been different had they been given the opportunity to consult them.

30. In the judgment, the Court of First Instance analysed the documents indicated by the applicants and the observations submitted by them and, in Irish Cement's case, reached the decision set out at paragraph 29 of the operative part and at point 8 of this Opinion. The Court of First Instance proceeded according to the following principle: the appellants' rights of defence would have been infringed if there had been even a small chance that the outcome of the administrative procedure might have been different if they could have relied on the documents to which access had been denied. [20]

31. Irish Cement criticises the Court of First Instance's approach and claims, essentially, that when it found that full access to the file had not been granted during the administrative procedure it should simply have annulled the Decision, since it lacked competence to appraise the way in which the documents not disclosed during the administrative procedure and brought to light during the judicial procedure could have led to a different outcome of the investigation. By not annulling the

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

20 — See paragraph 241 of the judgment. The Court of First Instance draws a distinction between those documents which have no objective link with any of the objections against the applicant, which are rejected *ab initio*, and those which have such a link, in which case it examines the way in which they provide information which might have led to a different outcome.

decision, it failed to take account of the fact that its position is not the same as the Commission's and ignored the effects of the passing of time. As may be appreciated, Irish Cement disputes *ab initio* the way in which the Court of First Instance proceeded in the contested judgment.

32. The procedure for finding infringements of Articles 81 EC and 82 EC is sanctionative by nature. As well as putting an end to anti-competitive practices, it seeks to punish the conduct which gave rise to them and confers on the Commission the power to impose financial penalties on those responsible. To that end, the Commission has wide powers of investigation and inquiry but, precisely because of that nature and because one and the same body is invested with the power to conduct investigations and the power to take decisions, the rights of defence of those subject to the procedure must be recognised without reservation and respected. [21]

33. That is the import of the provisions of Regulation No 17, in particular Article 19, and of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under [Articles 81 EC and 82 EC]; [22] and that is the scope given to them by the case-law of the Court of Justice [23] and the Court of First Instance. [24] The European Court of Human Rights has extended the scope of the guarantees laid down in Article 6 of the European Convention on Human Rights to administrative proceedings of a disciplinary nature. [25]

The Charter of Fundamental Rights of the European Union [26] takes the matter further, since, in addition to providing that an accused is entitled to defend his legal position in a fair and public judicial procedure, before an independent and impartial tribunal previously established by law, [27] it also provides that every person has the right to be heard by the institutions

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

22 — OJ 1998 L 354, p. 18. This regulation replaced Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), in force on the dates on which the administrative procedure was conducted in the present case.

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

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

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

26 — OJ 2000 C 364, p. 1.

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

of the European Union before any individual measure which could affect him or her adversely is taken and the right to have access to his or her file. [28]

34. The right to consult the file is another tool at the service of the right of defence. [29] It is not an end in itself. [30] The formal guarantees of the judicial or administrative procedure are explained according to that aim, which is simply the effective protection of the rights and legitimate interests of everyone. When there is a procedural defect, when formalities are not correctly observed, there are legal consequences if the rights of defence are undermined. In other words, the concept of being unable to mount a defence is substantive, so that no matter how many defects there may be in the procedure, they are irrelevant if, in spite of everything, the person concerned has enjoyed the appropriate rights of defence.

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

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

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

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

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

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

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

39. Thus the Court of First Instance did not assume the role of the Commission or improperly occupy its position. On the contrary, it confined itself, within the limits of its competence, to exercising judicial power to perfection, reviewing the legality of the administrative procedure before the Commission; and, adopting that approach, the Court of First Instance, which looks back to events which happened in the past, must express its views using all the material at its disposal in the present, which affords it richer resources and increases its prospects of success. [31]

40. There was nothing irregular in the way in which the procedure before the Court of First Instance was carried out. The access to the file which it provided was 'equal' in procedural terms to the access which the relevant undertakings and associations should have had during the administrative procedure. It is true that, in the meantime, time did not stand still and, consequently, events occurred, some relevant to the outcome of the procedure and to the judgment, but none adversely affecting the rights of defence of the present appellant. Furthermore, for the purpose of determining the dispute, the Court of First Instance and the parties had at their disposal evidence which was previously unavailable to them, a fact which, as I have pointed out, is conducive to a correct decision.

41. In the Opinion which I delivered today in Case C-204/00 P [32] I stated that in proceeding as it did the Court of First Instance did not fail to follow the case-law of the Court of Justice. In *Hercules Chemicals* v *Commission*, cited above, the Court of Justice held that when there has been a breach of the rights of defence, it cannot be remedied by belated access to the documents in the file which allows the undertakings concerned to derive from them pleas and arguments in support of the forms of order they are seeking since it

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

32 — [2004] ECR I-133, point 34.

does not put them back in the situation they would have been in if they had been able to rely on those documents in presenting their written and oral observations to the Commission. [33]

42. The Court of First Instance did not purport to remedy *ex post facto* a breach of the rights of defence which had already taken place, but confined itself, initially, to ascertaining whether there had been such a breach. [34] Where it considered that there had, it annulled the Decision. [35] On the other hand, where an applicant had not been deprived of its rights of defence, it held that the procedural defect committed while the administrative file was being constituted was, all in all, irrelevant.

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

44. Nor did the Court of First Instance disregard its own precedent expounded in *Solvay* v *Commission* and *ICI* v *Commission*, cited above. On the contrary, it applied it quite correctly.

45. In each of those judgments the Court of First Instance allowed the application for annulment because, taking account of the documents which were not made available to the parties during the administrative procedure, it could not rule out 'the possibility that the Commission would have found the infringement to be shorter and less serious and would, consequently, have fixed the fine at a lower amount'. [36] However, in another judgment of the same date, in another case of *ICI* v *Commission*, [37] it rejected a claim that was substantially the same, because, although the same procedural defect was present, it did not affect the exercise of the rights of defence. [38]

46. This last judgment clearly shows that, so far as the Court of First Instance is concerned, the decisive factor (and it could not be otherwise) is that the procedural defect produces adverse effects in the sphere of the rights of defence of the applicant companies. There is an obvious explanation for the fact that the Court of First Instance arrived at different solutions in *Solvay* v *Commission* and *ICI* v *Com-*

33 — Paragraphs 78 and 79.

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

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

36 — Paragraphs 98 and 108 respectively.

37 — Case T-37/91, cited in footnote 15.

38 — See paragraphs 66 and 70.

mission and in the present case. In the first two judgments the Court reviewed a Commission decision imposing penalties on the applicant undertakings for having participated in a market-sharing concerted practice, although, unlike in the present case, their conduct could only be proved by indirect evidence, essentially their passive and parallel conduct. [39] In such a situation, because the exculpatory evidence which could not be used during the administrative procedure was capable of providing an alternative explanation for the parallel conduct, it might have been capable of having an impact on the probative value of that indirect evidence. [40] Irish Cement's situation is different. Its involvement in the facts was established by the Commission from direct specific evidence, [41] the content of which, according to the unappealable finding of the Court of First Instance, was not called in question by the documents to which the appellant did not have access during the administrative stage.

C — No improper reversal of the burden of proof

47. Irish Cement rejects that approach and claims that the so-called direct or specific documentary evidence was neither direct nor specific, since it was open to alternative interpretations; furthermore, the documents disclosed during the judicial procedure lent themselves to a different interpretation from that given by the Commission.

48. Couched in those terms, this plea is inadmissible in so far as it relates to the finding of the facts of the case, which falls within the jurisdiction of the Court of First Instance, whose task it is to assess the available evidence. The Court of Justice can intervene in that regard only if, in the production of evidence, a provision or a general principle of Community law has been infringed or if, when the evidence was assessed, there was an infringement of the rules governing the burden of proof and the appraisal of evidence owing to the latter being illogical or arbitrary and therefore such as to distort the evidence. The Court of Justice can only repair an infringement of law by the Court of First Instance and never establish the facts, without prejudice to its jurisdiction to review their legal classification. [42]

39 — See paragraph 61 of *Solvay* v *Commission* and paragraph 71 of *ICI* v *commission*.

40 — See paragraphs 98 and 108, respectively, of the judgments.

41 — See paragraphs 263 and 264 of the contested judgment.

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

49. None of those circumstances applies in this case, nor has that been alleged to be the case by the appellant, which merely discusses the Court of First Instance's assessment of the direct documentary evidence and of the documents which were not made available to the parties during the administrative procedure but were provided during the judicial procedure.

50. In any event, the plea is unfounded and must therefore be rejected.

51. The Decision was not based on 'parallel conduct on the market': [43] that assertion was made in the judgment in order to show that the documents which might have provided an alternative economic explanation of the undertakings' conduct on the market were irrelevant. [44]

52. And this approach reveals the full import of the test used by the Court of First Instance, which consisted in restricting the range of evidence capable of refuting the findings of fact made by the Commission to that contained in 'documents relating directly to the infringements' imputed to the applicants in the Decision. [45] That is to say, the Court of First Instance was correct to apply the rule that there has been a breach of the applicants' rights of defence if, during the administrative procedure, they were denied access to evidence capable of contradicting the evidence used by the Commission, [46] and not only of providing additional or alternative explanations, which may be perfectly reasonable, but which do not negate the documents relied on in the Decision.

53. One example is sufficient to illustrate the point. The Commission concluded from certain documents [47] that anti-competitive agreements had been adopted at the meetings between European cement producers held on 14 January 1983 and 19 March and 7 November 1984. It seems reasonable to establish the extent to which the rights of defence were infringed by reference to the evidence which would have been capable of rebutting the content of such evidence, which is the requirement established by the Court of First Instance when it spoke of an 'objective link' with any of the objections upheld in the Decision. [48]

54. The Commission, relying on the documents in the file, concluded that Cem-

43 — Paragraph 264 of the contested judgment.

44 — See, generally, paragraphs 264 and 1116. For the particular case of Irish Cement, see paragraphs 1243 to 1251.

45 — Paragraph 262 of the judgment of the Court of First Instance.

46 — See paragraph 263 of the judgment under appeal.

47 — Those referred to at recitals 18, 19 and 45 of the Decision.

48 — See paragraph 247.

bureau and its direct members reached an agreement at the Head Delegates' meeting of 14 January 1983 on non-transhipment to home markets and on the regulation of international sales, the terms of that agreement being confirmed at the meetings of 19 March and 7 November 1984. The appellant's rights of defence could have been infringed only if it had been impossible to use in rebuttal evidence which showed that the agreement concerned had not been adopted and confirmed at those meetings; or which, when it was proved that the appellant had not attended the sessions, made clear that although it was present it dissociated itself from the agreement.

55. Once it had been proved that the agreement had been adopted and confirmed at those meetings, the fact that there was evidence capable of providing an alternative economic explanation for Irish Cement's conduct became irrelevant and, consequently, the fact that that evidence was not consulted during the administrative procedure could not breach the appellant's rights of defence. A careful reading of paragraphs 1243 to 1251 of the judgment shows that the documents which the appellant was unable to consult were documents which, as they did not claim to refute the direct evidence used in the Decision, could be classified as 'extraneous' and as unimportant to its defence.

56. In other words, the Commission inferred from certain evidence [49] that the undertakings and associations which it decided to penalise were responsible for the anti-competitive conduct defined in Articles 1 to 7 of the Decision. Irish Cement, in turn, sought to use certain documents, because they provided a different version of the facts, but the Commission prevented it from having access to them. The Court of First Instance, in the proper exercise of its jurisdiction and in the interest of the parties' rights of defence, restored the situation and made the entire file available to the applicants. After hearing their views on the matter, it held that the documents in question were not capable of providing a different interpretation of the events.

57. In doing so, the Court of First Instance did not reverse the burden of proof, which was always borne by the Commission, [50] which had to prove that Irish Cement and the other undertakings and associations were involved in the facts. However, once the Commission had fulfilled its obligation, the undertakings and associations concerned had to rebut the incriminating evidence with all the means at their disposal. Applying the judicial test set out at paragraphs 241 and 247 of the judgment, the Court of First Instance concluded that the procedural defect, the lack of access to

49 — The evidence referred to at recitals 18, 19 and 45 of the Decision.

50 — The Commission succeeded in defeating the presumption of innocence of the undertakings and associations concerned.

those documents during the administrative procedure, was irrelevant from the aspect of the rights of defence of the applicant undertakings and associations.

D — The adequacy of the reasoning concerning the judgments of the Court of First Instance in *Solvay* v *Commission* and *ICI* v *Commission*

58. Behind this complaint is a mere disagreement with the criterion which, in that regard, the Court of First Instance sets out in the contested judgment and which, as I stated at points 44 to 46 above, is correct.

59. For the reasons stated, the foregoing grounds of Irish Cement's appeal must be rejected.

2 — *A specific document, consultation of which was denied in the administrative procedure: the note of Mr Toscano (first plea in law — in part — and eighth head of the third plea in law)*

A — Arguments of the parties

60. By this complaint, Irish Cement refers to the discretion of the Court of First Instance to ascertain whether the Commission's failure to observe the correct procedure breached the rights of defence of the undertakings and associations on which penalties were imposed. In the final two paragraphs of the first plea in law it further states that, if the documents to which access was denied had been used, the Commission might have been influenced in various ways, all potentially favourable to the applicant undertakings.

61. It refers, by way of example, to Mr Toscano's note, which clarified what was discussed at the Head Delegates meeting of 14 January 1983. Furthermore, Mr Kalogeropoulos's statement would have made it possible to explain the reaction of certain cement producers to the Greek problem (the European Task Force or the Cembureau Task Force) as the manifestation of a looser but longer-standing agreement between the main European producers.

62. In the eighth head of the third plea in law, Irish Cement states that Mr Toscano's note was relevant as exculpatory evidence, from at least two aspects. First, it supports the argument that the meeting of 14 January 1983 had no secret purpose; second, it constitutes a record of what was actually discussed at that meeting, whereas the

documentary evidence on which the Commission relied refers to what were merely preparatory matters.

63. The Commission contends that the Court of Justice is not competent to adjudicate on the manner in which the Court of First Instance assessed those documents.

B — A mere disagreement as to the facts

64. No matter how much Irish Cement seeks to demonstrate the contrary, its approach does not go beyond the establishment of the underlying facts of the case. It expresses a different way of dealing with facts which in some way show an arbitrary or illogical assessment of the evidence on the part of the Court of First Instance.

65. Applying the judicial test set out at paragraph 241, the legitimacy of which I noted a few lines above, the contested judgment states that the documents disclosed were not such as to alter the version of the facts established by the Commission. The Court of First Instance held that Mr Toscano's notes confirmed that questions of importance to the cement sector were raised at the Head Delegates meeting of 14 January 1983 but they that they did not disprove or deny that anti-competitive agreements were adopted, a point which the Commission inferred from direct documentary evidence. [51] As may be seen, the discussion which Irish Cement seeks to provoke does not go beyond the assessment of the evidence or the establishment of the facts of the case.

66. The same may be said as regards the setting-up of the European Task Force at the meeting held in Baden-Baden.

3 — *The assessment of the relevance of certain documentary evidence*

A — The statement of Mr Kalogeropoulos (sixth head of the third plea in law and first head of the fourth plea in law)

1. Arguments of the parties

67. Irish Cement claims that the documentary evidence on which the Commission

51 — Those indicated in recitals 18, 19 and 45 of the Decision. In the judgment, see paragraph 1122 et seq. (in articular paragraphs 1130, 1131 and 1132).

relied in adopting the Decision does not provide a valid basis for it. That is particularly clear in the case of the statement made by Mr Kalogeropoulos, the Chairman of the Board of Directors of Heracles from 1 June 1986: Irish Cement claims that the Court of First Instance was incorrect to state when examining that statement that, '[a]s regards the starting date of the infringement referred to in Article 1 of the contested decision, the Court points out that the fact that the Commission took 14 January 1983 as the starting date of the infringement, *rather than an earlier date* in view of the 30-year period for which Mr Kalogeropoulos claims the agreement had been in existence, *does not adversely affect the applicants and does not impair the evidential value of the statement* as regards the actual existence of an agreement between European cement producers.' [52]

68. Irish Cement further states that, in the abstract, the Court of First Instance may be correct when it states, at paragraph 906 of the judgment, that the fact that in 1986 an agreement between European cement producers not to tranship to internal markets had been in force for some 30 years did not preclude the possibility that a concurrence of wills to the same end had been reaffirmed at the Head Delegates meeting of 14 January 1983. However, it maintains that that statement does not serve to support the Commission's position regarding the existence of an agreement adopted during that meeting.

69. As regards the evidence of what was discussed at the meeting of 14 January 1983, the Court of First Instance confirmed the Commission's assessment, which, contrary to what is alleged in the appeal, is not inconsistent with Mr Kalogeropoulos's statement.

70. Also according to the Commission, the appellant said nothing about the matter before the Court of First Instance; it merely stated that Mr Kalogeropoulos's statement was incompatible with the assertion that an agreement had been adopted at the Head Delegates meeting on 14 January 1983, and that argument was dealt with in paragraph 904 et seq. of the judgment.

2. Once again, a mere assessment of the evidence

71. On close examination, it will be seen that Irish Cement's argument merely challenges the Court of First Instance's assessment of Mr Kalogeropoulos's statement that 'there ha[s] existed and continue[s] to exist an agreement by all the European cement producers that no one must intervene within the national frontiers of the others'. [53] The Court of First Instance regarded that statement as unequivocal evidence of the existence, since an unspecified date, of an agreement between the

52 — Paragraph 904 (emphasis added by the appellant).

53 — See paragraph 903 of the judgment.

European cement producers which was confirmed at the meeting of 14 January 1983. So far as the Court of First Instance was concerned, that lack of specificity allowed the Commission to fix the beginning of the infringement as the date on which that meeting was held.

72. Irish Cement merely disagrees with that idea, which does not display any of the defects which, according to the case-law of the Court of Justice,[54] would, exceptionally, render the facts of the case amenable to review so that they could be corrected following a finding that there had been an error of law.

3. This plea in law is unfounded

73. Thus, the plea in law is inadmissible, but it is also unfounded. The Commission did not rely on Mr Kalogeropoulos's statement as proof that the infringement referred to in Article 1 of the Decision had actually taken place. It inferred the existence of the Cembureau agreement from the evidence referred to at recitals 18, 19 and 45 to the Decision. As the Court of First Instance pointed out, that statement constitutes further evidence to support the inference, drawn from the evidence referred to in those recitals to the Decision, that the meeting of 14 January 1983 gave approval to a market-sharing agreement which had existed for some time.

74. As the Commission states in its response, there is no inconsistency between the facts found in the Decision on the basis of the documents which revealed what was discussed at the meeting of 14 January 1983 and the statement of the Chairman of the Heracles board.

4. An adequate statement of reasons

75. Irish Cement maintains that the Court of First Instance did not answer its argument that the fact that a market-sharing agreement had existed for some time did not support the contention that an agreement was adopted at the abovementioned 1983 meeting. It is sufficient to read paragraph 903 et seq. of the judgment to realise that Irish Cement's assertion is untrue.

76. Irish Cement also complains that it did not receive an answer to its allegation concerning the political dimension of Mr

54 — See paragraph 48 above.

Kalogeropoulos's statement and the consequences which should be linked with that characterisation. I refer to paragraph 907 of the judgment, where the argument is answered in full.

77. I consider it necessary to point out that the statement of reasons demanded of the Community institutions [55] and, more particularly, of decisions adopted by its judicial organs, does not require a discourse which follows word for word all the arguments put forward by the parties; it is sufficient if the statement of reasons allows the parties concerned to ascertain the reasons for the decision and, where necessary, the competent court to have all the specific evidence to exercise its power of review. [56]

B — The Blue Circle memoranda and more on Mr Kalogeropoulos's statement (seventh head of the third plea in law and fifth head of the fourth plea in law)

1. Arguments of the parties

78. Irish Cement believes that Mr Kalogeropoulos's statement and certain Blue Circle internal memoranda cannot be used against it because it was not involved in drafting them and did not have the opportunity to cross-examine their authors. That argument, which it raised for the first time at the hearing before the Court of First Instance, was rejected at paragraph 1399 of the judgment without being declared inadmissible. In so far as it was rejected because the administrative procedure makes no provision for any form of cross-examination, the Court of First Instance, in the appellant's submission, failed to observe the latter's rights of defence.

79. The Commission contends that that plea is inadmissible, since the complaint was first raised at the hearing. Immediately afterwards, it maintains that, as to the substance, it is insignificant, since Community competition law does not provide for any general exclusionary rule such as that invoked by the appellant. It further states that Irish Cement's argument was rejected in the judgment, not only because the Rules of Procedure make no provision for cross-examination but primarily because the argument is not capable of casting doubt on the main documents used by the Commission to establish the existence of the Cembureau agreement and Irish Cement's participation therein.

80. The appellant also maintains that the Court of First Instance did not respond to the argument that the agreement referred to in the Blue Circle internal memoranda is

55 — See Article 253 EC.

56 — See, among the most recent authorities, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 65, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 1228.

not the Cembureau agreement concluded at the Head Delegates meeting of 14 January 1983 or referred to in Mr Kalogeropoulos's statement.

81. In the Commission's submission, by this plea the appellant is again seeking to suggest that certain measures may relate to some separate agreement to which it was not a party. In any event, the Court of First Instance answered those arguments and, in particular, the argument that the imports from Germany were inconsistent with the Cembureau agreement.

2. This plea is admissible...

82. It is true that the reasoning which supports the seventh head of the third plea in law was first expressed at the hearing before the Court of First Instance, but it is equally certain that, far from rejecting it on the ground that it had been put forward at an inopportune time, the Court of First Instance examined its merits, although it rejected it.

83. The Court of Justice cannot close its eyes to a line of defence which was raised at an inopportune time but which the Court of First Instance, the master of the proceedings and the moderator of the discussion, did not reject as out of time but deemed it appropriate to examine.

3. ... but unfounded

84. For the purpose of resolving this plea in law there is no need to consider whether cross-examination and the consequences of its absence are operative in the context of the Community administrative procedure in competition matters. It is an issue which must be addressed directly, thoroughly and with the necessary composure when it cannot be avoided, but not in a case such as this, in which it has been placed in the arena, almost inadvertently, at an inappropriate time and when it is not essential to address the matter in order to respond to the appellant's claim.

85. The answer may be provided from a more secondary terrain, in which reasons of a utilitarian nature are envisaged. Even if, as the appellant submits, it were almost certain that the Blue Circle internal memoranda could not be used against it, the import of the Decision would not change.

86. Paragraph 1399 of the contested judgment is perfectly clear on that point: the fact that Blue Circle internal memoranda do not operate as incriminating evidence leaves intact the remaining documents referred to in recital 19 to the Decision, from which the Commission concluded, by means of an assessment approved by the Court of First Instance, that the Cembureau agreement was concluded at the Head Delegates meeting of 14 January 1983 and then confirmed at the subsequent meetings of 19 March and 7 November 1984, at which Irish Cement was represented. [57]

87. Even if the substance of this plea were upheld, the appellant's claim could not succeed, since if the Blue Circle internal memoranda were eliminated as incriminating evidence, other incriminating evidence would remain, as the Court of First Instance, the master of the evidence in the proceedings, confirmed.

88. In such circumstances, it would not be open to the appellant to complain that the proceedings had been unfair, since it was penalised on the basis of incriminating evidence capable of rebutting the presumption of innocence: the letter convening the meeting of 14 January 1983 and the draft introductory statement by the Chairman, and the minutes of the meetings of 19 March and 7 November 1984, *inter alia*; evidence which, in the view of the Commission and the Court of First Instance, provided data which the Blue Circle memoranda merely confirmed. [58]

4. A sufficiently reasoned reply

89. In the light of the content of the contested judgment, it is impossible to understand Irish Cement's complaint relating to the lack of reasoning in relation to the evidential value of the Blue Circle internal memoranda and the factual information which they provide. Paragraphs 875 to 901 are more than sufficient.

90. In particular, the argument that the agreement to which the memoranda refer and the Cembureau agreement are not one and the same agreement is dealt with at paragraphs 876, 878 and 881, and the argument relating to imports from Federal Germany is dealt with at paragraph 897.

91. I suspect that the appellant is confusing lack of reasoning with reasoning which

57 — See paragraphs 921 to 1095, 1344, 1345, 1350 and 1352 of the judgment, which are referred to at paragraph 1399.

58 — See recital 45, paragraph 3, of the Decision.

does not conform with its claim. As regards the scope of the requirement made of every judicial decision, I refer to the considerations which I set out at point 77 above.

C — The letter convening the meeting of 14 January 1983 — Mr Braz de Oliveira — (sixth head of the fourth plea in law)

1. Arguments of the parties

92. Irish Cement submitted at first instance that Mr Braz de Oliveira's letter was not a letter convening the Head Delegates meeting of 14 January 1983, since he had acted not as an official representative of Cembureau but as a representative of Cembureau to Ireland and Denmark, with which States he shared a post on the Executive Committee. It further submits that although the Court of First Instance acknowledged that the document had been incorrectly classified, it persisted in attributing incorrect significance to it, so that its probative value must be questioned.

93. The Commission contends that Mr Braz de Oliveira's letter was correctly assessed in the judgment (paragraphs 930 to 941).

2. Another complaint which is inadmissible and unfounded

94. This plea in law may be seen from two viewpoints. From the first it is clearly inadmissible and from the second it is unfounded.

95. Irish Cement's argument is aimed at discussing the assessment made by the Court of First Instance for the purposes of proof and it is therefore inadmissible.

96. The Court of First Instance acknowledged that there were two versions of the letter convening the meeting: an 'official' version, sent to all the members of the association, and another, the one signed by Mr Braz de Oliveira, Delegate to the Cembureau Executive Committee, which was sent only to Aalborg and Irish Cement and from which the Commission inferred that the meeting of 14 January 1983 was intended to establish 'rules of the game' on the European cement market. The passage from which the Commission drew that inference was not found in the 'official' letter. The Court of First Instance took the

view that this second letter '[was] not in any way inconsistent with the tenor of the letter from Mr Gil Braz de Oliveira', [59] the value of which as proof of the objective of the meeting of 14 January 1983 is relevant, for the reasons set out in paragraphs 936 to 941 and 977 to 987 of the judgment.

97. As may be appreciated, this plea does not go beyond the evidential field, since the appellant has not demonstrated, or even alleged, the presence of any of the circumstances which would justify the intervention of the Court of Justice in that field in order to correct the Court of First Instance.

98. The plea is unfounded, if Irish Cement's complaint is that the Court of First Instance did not answer its claims relating to the matter. I refer the Court of Justice to paragraphs 930 to 941 of the contested judgment.

4. *The fine*

99. Following the order declaring the appeal inadmissible in part, there remain two complaints put forward by Irish Cement concerning the fine imposed in the Decision, which was reduced by the Court of First Instance. The first refers to the distinction which the Commission drew between direct participants and indirect participants in the Head Delegates meetings (third plea in law, 13th head, and fourth plea in law, fourth head) and the second concerns the principle of proportionality (third plea in law, 14th head, third argument).

100. I shall examine both complaints together, but I shall first set out the arguments of the parties.

A — Third plea in law, 13th head

101. Irish Cement criticises the Court of First Instance for having accepted the distinction which the Commission drew between direct and indirect participants in the Head Delegates meetings on the ground that it is an error which leads to absurd results.

102. The Commission contends that the question raised by the appellant goes to the assessment of evidence and cannot be dealt with on appeal. In any event, the distinction was justified.

59 — See paragraph 935 of the judgment.

B — Fourth plea in law, fourth head

103. In connection with the previous complaint, Irish Cement criticises the Court of First Instance for having failed to respond to its argument that the distinction between direct and indirect participants had perverse effects. It provides an example: the appellant was the only producer of cement in Ireland; Mr Quirke was the Irish representative at the meeting of 14 January 1983, from which the Commission inferred that he was Irish Cement's employee, so that the appellant's participation in that meeting was not open to discussion; if, on the other hand, any other Irish cement producer had existed at the material time, Mr Quirke's presence at the meeting, even though he was employed by Irish Cement, would not have suggested that he represented the appellant and the appellant would have been held responsible only for adopting measures to implement the Cembureau agreement.

104. The Commission contends that the Court of First Instance was not required to answer that argument, which is spurious, although it was required to determine whether it had been demonstrated that Irish Cement had taken part in the cartel.

C — Third plea in law, 14th head, third argument

105. The appellant maintains that the Court of First Instance made a manifest error of assessment at paragraph 4964 of the contested judgment when it stated that the Commission's analysis appropriately assessed the degree of responsibility borne by each of the applicants on which fines were imposed. It is incorrect to state that those who participate in a peripheral way and adopted negligible measures to implement an anti-competitive agreement must be penalised in the same way as those who promote and make a determined effort to implement them. That approach is contrary to the principle of proportionality, it fails to dissuade the participants in the cartel bearing greater responsibility and it imposes an excessive penalty on the less guilty undertakings.

106. The appellant further claims that the Court of First Instance failed to apply the standards defined by the Court of Justice in *Musique diffusion française and Others* v *Commission*. [60]

107. Last, the appellant states that the Court of First Instance failed to examine the arguments that its conduct could not have direct effects on the closing of the national markets and that it should not have been classified in the category of undertakings bearing greater responsibility. The Court of First Instance itself accepted that the appellant's participation in the infringement referred to in Article 2(2) of the Decision, described in chapters 4, 5 and

60 — Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion française* v *Commission* [1983] ECR 1825.

6 of the Decision, was virtually non-existent or in any event limited, and should therefore have concluded that the appellant's responsibility was also virtually non-existent or limited. That finding is incompatible with the refusal to annul the fine.

108. The Commission submits that this argument is inadmissible, since it refers not to an error in law but to the way in which the Court of First Instance assessed the gravity of the infringement and the amount of the fine. In any event, the amount of the fine was reduced in the judgment.

109. As regards the substance, the Commission argues that the fine was imposed for the Cembureau agreement in its entirety. Separate fines were not calculated for each of the measures taken to implement the agreement.

D — The criteria used by the Commission when imposing the fines

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

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

112. The Commission imposed separate penalties for infringements relating to each market. [61]

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

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

implementing it were connected.[62] That approach is legitimate and is based on the Commission's power to adopt a single decision covering several infringements.[63]

114. The Commission further considered that all the undertakings and associations to which the Decision was addressed acceded to the Cembureau agreement and it set out the evidence used to confirm the participation of each of them. Thus, as regards Irish Cement, it concluded that it acceded, as a member of Cembureau, to the agreement or principle of not transhipping to home markets at the time when it was agreed and approved and that it also participated in the measures and arrangements agreed to supplement it and/or assist in its application.[64]

115. 'However, within this general approach, [the Commission took] account of the role played by each undertaking in the conclusion of the... agreement', or in the measures and arrangements agreed to supplement and implement it. It also considered the duration of both.[65]

116. In accordance with the foregoing, the Commission identified two groups of undertakings and associations: first, those involved in the Cembureau agreement and second, the other undertakings, which were less involved and whose responsibility was therefore lesser.[66]

117. Within the former category, the Commission distinguished three sub-groups: (1) that consisting of the undertakings and associations which, as members of Cembureau, had participated directly in the adoption of the agreement on non-transhipment to home markets and in measures directly protecting those markets (the Commission included Irish Cement in this group); (2) a second sub-group composed of the companies which, through their most senior staff, had performed the function of Head Delegates within Cembureau either at the time when the agreement was concluded or during the period of its implementation; and (3) the final sub-group, made up of the companies which had taken part in measures implementing the agreement and designed to protect home markets.[67]

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

63 — See Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 111. On the determination of the amount of fines in complex infringements, reference should be made to E. David, 'La détermination du montant des amendes sanctionnant les infractions complexes: régime commun ou régime particulier?', *Revue trimestrielle de droit européen*, No 36(3), July-September 2000, pp. 511 to 545.

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

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

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

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

118. In the second category, the Commission also distinguished between three levels of responsibility: (1) the undertakings which had participated only in the measures implementing the Cembureau agreement that were designed to channel production surpluses to non-member countries; (2) those which, although they had taken part in the measures designed directly to protect home markets, had tried to avoid implementing the Cembureau principle; and (3) Ciments Luxembourgeois, which, although a direct member of Cembureau and although having participated in the Head Delegates meetings at which the Cembureau agreement or principle was adopted, had not put any implementing measure into effect. [68]

119. The Commission fined the undertakings and associations in the first category 4% of their 1992 turnover in the market in grey cement. Those in the second category were fined 2.8% of their 1992 turnover in the same market. [69]

120. The Court of First Instance upheld Irish Cement's application in part because, in calculating the fine which it imposed on it, the Commission considered that it had participated in the Cembureau cartel for 122 months, whereas the evidence before the Court showed that the actual duration of its participation was 71.5 months. [70] Then, taking into account that figure and applying the method of calculation used by the Commission, the Court of First Instance reduced the amount of the fine in proportion. [71]

121. It is the fact that the Court of First Instance thus confirmed the distinction between direct participants and indirect participants that in the appellant's submission constitutes an infringement of Article 15(2) of Regulation No 17 and that it brands as manifestly wrong and absurd.

122. As thus submitted, the plea in law is inadmissible, for two reasons.

123. First, it is inadmissible because the appellant merely reproduces the same arguments as those set out in the application, which were answered at paragraph 4965 et seq. of the contested judgment. Irish Cement says nothing new in this plea, nothing which was not discussed and determined before the Court of First Instance. It exploits the fact that the Court

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

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

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

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

of First Instance applied the same criterion in setting the fines as the Commission had to reproduce a discussion which in reality criticises not the contested judgment but the Decision.

124. Second, it is inadmissible because Irish Cement's complaint does not go beyond the scope of the evaluation of the evidence and the realms of mere hypothesis, [72] since the decisive factor is that, at that time, it was the only cement producer in Ireland and the person who headed the Irish delegation at the meeting of 14 January 1983 was one of its employees.

125. It is also self-evident that Irish Cement's complaint that the Court of First Instance failed to answer its arguments is manifestly unfounded. The answer which the appellant claims to be absent is there in the judgment. At paragraph 4940 the Court of First Instance refers to Irish Cement's claims on the matter and at paragraph 4965 et seq. it sets out, in response to the arguments of all the parties, its reasoning concerning the legal correctness of the criterion used by the Commission. As regards the reasoning demanded of decisions of the Court of First Instance, I refer to what I said at point 77 above, without its being necessary to give an individual answer to each and every one of the allegations put forward by the parties. The reasons implicit in the judgment are also lawful in so far as they satisfy the aims pursued by that guarantee of the reasonable exercise of power.

126. This appeal, like the other five appeals lodged against the judgment, repeats the complaints based on an alleged failure to state reasons. I shall not resist pointing out that such complaints are inappropriate, especially because of the insistence with which they are made. A judgment which takes up some 1 200 pages in the European Court Reports, which contains 5 134 paragraphs, and in which the Court, making a great effort to summarise them, sets out the arguments put forward by 41 applicants, reduces them to their essential elements and arranges them systematically, in order to provide an answer to all of them, may be open to some criticism, but not for failing to state reasons.

127. On the assumption that the express answer to any individual argument may have been omitted, but, specifically, because it constitutes a single, integrated document, the solution in many cases, such as that put forward by Irish Cement, is implicit in the reasoning. When the Court of First Instance states that the Commission 'properly' decided to penalise participation in the Cembureau agreement as such, irrespective of the individual practices and

72 — See point 103 above.

the number of implementing measures adopted by each undertaking,[73] when it says that the distinction drawn by the Commission between direct and indirect participants was well founded,[74] when it says that, consequently, '[the Commission] was not required to evaluate the specific role played by each of them in the various unlawful acts'[75] and when it states that '[t]he number of individual infringements committed by a given undertaking in the framework of the Cembureau agreement does not constitute, in the present case, an appropriate criterion by which to assess its degree of responsibility',[76] it is telling Irish Cement that there is nothing wrong with the criterion used by the Commission.

E — Observance of the principle of proportionality

128. The complaint alleging infringement of the principle of proportionality is also unfounded.

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

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

131. The Court of Justice has held that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and has further stated that no binding or exhaustive list of criteria has been drawn up.[77]

73 — Paragraphs 4965 and 4966.
74 — Paragraph 4968.
75 — Paragraph 4965.
76 — Paragraph 4966.

77 — See *Musique diffusion française and Others* v *Commission*, cited above, paragraph 120, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; see also order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

132. To my mind, there are three criteria central to this assessment: the nature of the infringement, the impact on competition and the geographical scope of the market concerned, and each of these must be considered from an objective aspect, that of the infringement itself, and from a subjective aspect, that of the undertaking responsible. [78]

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

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

135. The requirement that the penalty be proportionate to the gravity of the infringement has the consequence that when an infringement has been committed by a number of persons, [79] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each. [80] That is a requirement of the principle of equal treatment, which demands that the fine be the same for all undertakings in the same situation and prevents those in a different situation from being punished with a similar penalty.

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

137. All the practices, which of necessity were not the same in each case, pursued the

78 — In the work cited above, E. David states that 'la gravité s'apprécie selon trois critères: la nature de l'infraction, son impact sur le marché lorsqu'il est mesurable et le marché géographique et à deux niveaux: ceux de l'infraction et de l'entreprise' (p. 522).

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

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

same anti-competitive objective, and for that reason, for the purpose of imposing penalties, they could be grouped as regards gravity in one or more categories according to the impact on the market and the effect on free competition.

138. There is nothing unlawful in that approach, since, as I have already said, the gravity of an infringement may be assessed regard being had to the harm which the conduct has caused to the economy. As the Court of First Instance stated at paragraph 4966 of the contested judgment, each of the undertakings which participated in the Cembureau agreement 'sought to ensure non-transhipment to home markets by means of the number of measures deemed necessary in the light, in particular, of its commercial interests and the geographical situation of its natural market. The fact of having taken part, in the light of those factors, in fewer unlawful measures does not consequently reflect a lesser degree of adhesion to the Cembureau agreement and, therefore, a lesser responsibility in the infringement'. The position was the same as regards the damage to competition.

139. The reasons stated by the Commission, and approved by the Court of First Instance, [81] for distinguishing the two categories of undertakings satisfy an objective and reasonable criterion, as does the effect of the conduct on competition and, in particular, on the partitioning of home markets. Thus, the practices referred to in Articles 2, 3 and 4 of the Decision, in so far as they were aimed at the direct protection of those markets, were deemed most serious, while those described in Articles 5 and 6, which 'had less direct effects', [82] were classified as less serious.

140. For the remainder, Irish Cement's complaint is inadmissible when it claims that the Court of First Instance failed to answer the argument that its conduct was incapable of affecting the closing of domestic markets. I refer the Court of Justice to paragraphs 4966 and 4975 of the judgment and to my reasoning at points 125 to 127 above.

141. The plea is also inadmissible in so far as Irish Cement seeks to persuade the Court of Justice that its involvement in the facts was irrelevant and that only insignificant responsibility for applying them can be

81 — See recital 85, paragraph 9, of the Decision and paragraph 4968 of the judgment.

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

attributed to it. That is a question of fact which cannot be examined on appeal.

142. Having regard to the foregoing considerations, the pleas relating to the fine must also be declared inadmissible and unfounded.

143. Since all the pleas which were declared admissible must be rejected, the appeal must be dismissed in its entirety.

V — Costs

144. In accordance with the Commission's application, the costs of this appeal must be awarded against Irish Cement, pursuant to the first paragraph of Article 122 read with the first subparagraph of Article 69(2) of the Rules of Procedure of the Court of Justice.

VI — Conclusion

145. In accordance with the foregoing considerations, I propose that the Court should:

(1) Dismiss all the pleas in law put forward by Irish Cement Limited which were not rejected in the order of 5 June 2002;

(2) Uphold the contested judgment in so far as it concerns Irish Cement;

(3) Order the appellant to pay the costs of the appeal.