JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 May 2010 *

In Case T-432/05,

EMC Development AB, established in Luleå (Sweden), represented by M. Elvinger and W.-N. Schelp, lawyers,

applicant,

v

European Commission, represented initially by É. Gippini Fournier and B. Doherty, and subsequently by É. Gippini Fournier and J. Bourke, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Decision SG-Greffe (2005) D/205249 of 28 September 2005 rejecting the complaint brought by the applicant against European Portland cement producers, the European Cement Association (Cembureau) and the European Committee for Standardisation (CEN) in relation to the European cement market,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras, President, M. Prek and V.M. Ciucă (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2009,

gives the following

Judgment

Legal context

A — *Directive 89/106/EEC*

1 Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), as amended by Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1), is designed in particular to remove barriers to the free movement of construction products. Under Article 1(2) of Directive 89/106, 'any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works' is deemed to be a 'construction product' for the purposes of the directive. Under Article 2(1) and Article 3(1) of Directive 89/106, Member States are required to take all the measures necessary to ensure that construction products may be placed on the market only if they are fit for this intended use, that is to say, they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if

properly designed and built, satisfy the essential requirements set out in Annex I to Directive 89/106 when and where such works are subject to regulations containing such requirements.

2 Directive 89/106 provides for the development of technical specifications, compliance with which, according to Article 4(2), raises a presumption of conformity with those essential requirements. According to Article 4(1) and Article 9(3) of that directive, those specifications may be the harmonised standards adopted by, inter alia, the European Committee for Standardisation (CEN) or European technical approvals issued by an approval body designated by a Member State.

3 Under Article 4(2) of Directive 89/106, the CE marking is to indicate that construction products comply, in particular, with the relevant national standards transposing the harmonised standards, references to which have been published in the *Official Journal of the European Union*, or that they comply with a European technical approval. Under Article 4(2) and Article 6(1) of Directive 89/106, Member States are to allow the placing on the market or use in their territory of products which comply with that directive and bear the CE marking.

4 According to Article 7 of Directive 89/106, harmonised standards are to be adopted by the European standards organisations under a mandate given by the Commission of the European Communities and following an opinion given by the Standing Committee on Construction referred to in Article 19 of that directive. The resulting standards are to be expressed as far as practicable in product performance terms, having regard to the interpretative documents. Once the standards have been established by the European standards organisations, the Commission is to publish the references of the standards in the Official Journal.

5 According to Article 8(2) of Directive 89/106, European technical approval may be granted, in particular, (i) to products for which there is neither a harmonised standard, nor a recognised national standard, nor a mandate for a harmonised standard,

and for which the Commission considers that a standard could not, or could not yet, be elaborated, and (ii) to products which differ significantly from harmonised or recognised national standards.

B — *The Guidelines on the applicability of Article 81 EC to horizontal cooperation agreements*

6 Chapter 6 of the Commission's Guidelines on the applicability of Article 81 [EC] to horizontal cooperation agreements (OJ 2001 C 3, p. 2) ('the Guidelines'), which concerns agreements on standards, provides:

'6. 1. Definition

159. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply. (47) Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or systems are essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.'

7 Footnote 47 to paragraph 159 of the Guidelines states:

'Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies.

Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.'

8 With regard to the application of the rules on competition, the Guidelines state, inter alia, as follows:

'6.3. Assessment under Article 81(1) [EC]

162. Agreements to set standards … may be either concluded between private undertakings or set under the aegis of public bodies or bodies entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC [of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37)] … The involvement of such bodies is subject to the obligations of Member States regarding the preservation of non-distorted competition in the Community.

6.3.1. *Nature of the agreement*

6.3.1.1. Agreements that do not fall under Article 81(1) [EC]

163. Where participation in standard setting is unrestricted and transparent, standardisation agreements as defined above, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the

recognised standards bodies which are based on non-discriminatory, open and transparent procedures.'

Background to the dispute

A — *Cement market players*

9 The applicant, EMC Development AB, is a company engaged in the ongoing testing, development and commercial exploitation of a method of producing energetically modified cement. The company is established in Luleå (Sweden).

10 The European Cement Association (Cembureau) is established in Brussels (Belgium). At the date on which the contested decision was adopted, it represented 25 national cement industry associations and cement companies in Europe, its objective being to advance its members' interests through active representation of the European cement industry at European and international levels.

11 CEN is an independent organisation whose members were, at the date on which the contested decision was adopted, the national standard-setting bodies of 28 European countries. The European Commission is not a member of CEN but acts as a counsellor, inter alia to its technical board. CEN, which promotes voluntary technical harmonisation in Europe, is a European standardisation body recognised under Directive 98/34.

B — *European Cement Standard EN 197-1*

12 The EN 197-1 Standard ('the Standard') was adopted in April 2000 by the 19 national standards bodies that were members of CEN at that time. It was developed by a CEN technical committee, CEN/TC 51 'Cement and building limes' ('CEN/TC 51'), under mandate M/114 which was granted by the Commission and the European Free Trade Association (EFTA) pursuant to Directive 89/106. That mandate defined the scope of application of the Standard, set out the list of products that had to be taken into consideration and stated that the Standard would be expressed, as far as practicable, in product-performance terms, having regard to the interpretative documents.

13 The Standard defines each of the 27 common cement products, that is to say, the common cements described by the various national standards bodies within CEN as traditional and well tried. Those products are further grouped into five main cement types (CEM I to CEM V), according to the proportions in which the main constituents are to be combined to produce those distinct products in a range of six 'strength classes'. Each main cement type is composed of a certain percentage of Portland cement clinker combined with varying levels of constituents. That definition includes requirements which the constituents have to satisfy, and mechanical, physical, chemical and durability requirements of the 27 common cement products and 'strength classes'.

14 Cements which comply with the Standard can obtain the CE marking.

C — *Products*

15 According to the applicant and Cembureau, 'real' Portland cement corresponds to products of the main cement type CEM I, as defined by the Standard. Blended cements correspond to cements of the four other main types, CEM II to CEM V.

16 The cement produced by the applicant is energetically modified cement, the technology for which was developed in Sweden in the early 1990s. This cement is produced by high intensive grinding/activation of Portland cement with different materials such as fly ash, blast furnace slag or fine quartz sand.

D — *Administrative procedure*

17 In October 2001, the applicant contacted the Commission's Directorates-General (DG) for Competition, Enterprise and the Environment in order to express its concerns about the Standard and about the European cement industry in general. The applicant also met with representatives of DG Competition.

18 On 3 January 2002, the applicant sent a letter to the Member of the Commission responsible for competition matters, insisting that the Commission take action.

19 On 12 and 19 February 2002, DG Enterprise and DG Internal Market informed the applicant that the Standard did not constitute a regulatory barrier to entry into the cement market and that it complied with Directive 89/106.

20 By letter of 14 March 2002, the applicant complained of an infringement of Articles 81 EC and 82 EC by European Portland cement producers, Cembureau and CEN.

21 On 15 March 2002, the letters of 3 January and 14 March 2002 were registered by the Commission as a formal complaint under Article 3(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87).

22 On 4 and 6 September 2002 respectively, CEN and Cembureau submitted their observations on the non-confidential version of the applicant's complaint. On 10 March 2003, the applicant sent its observations on the submissions of Cembureau and CEN to DG Competition.

23 On 29 January 2004, the Commission sent a letter to the applicant pursuant to Article 6 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] (OJ 1998 L 354, p. 18), informing the applicant of its intention to reject the complaint and inviting it to submit comments, which the applicant did by letter of 22 March 2004.

24 On 11 June 2004, the applicant sent the Commission a summary of its record of the meeting held on 8 June 2004 between the applicant and representatives of DG Competition. The applicant provided additional comments, stating that they were without prejudice to its future position on all other submissions that might be made. By a letter of 24 July 2004, DG Competition replied to the applicant that, in accordance with the procedural rules governing the treatment of complaints, it was not possible to conduct an 'unlimited exchange of questions and replies'.

25 By letter of 2 March 2005, DG Enterprise informed the applicant that it was considering amending mandate M/114 in order to add a 'sub-family' to the common cements and to allow new technical specifications to be developed. By letter of 1 June 2005,

DG Enterprise indicated to the applicant that it was abandoning that proposal, since the majority of the Member States were opposed to the amendment.

26 By letter of 1 July 2005, the applicant asked the Member of the Commission responsible for competition matters to examine carefully the requirements of Directive 89/106 in relation to the cement produced by the applicant.

27 By Decision SG-Greffe (2005) D/205249 of 28 September 2005 ('the contested decision'), the Commission formally rejected the applicant's complaint.

E — *The applicant's grounds of complaint*

28 In its complaint, the applicant claimed that European Portland cement producers had acted in a number of ways which constituted serious infringements of Articles 81 EC and 82 EC. In the first place, those producers had formed a cartel in order to create barriers to entry into the European cement market, the most significant of those barriers being the Standard, which they adopted via Cembureau and CEN. Those producers had also divided the European cement market geographically. In the second place, the applicant submitted that those actions of the European Portland cement producers, which collectively dominated the cement market, also infringed Article 82 EC. To strengthen their dominance, the producers had engaged in vertical integration by the acquisition of 30% to 70% control over concrete and aggregates producers in the European Union. The Portland cement producers had used their dominance over

concrete producers to prevent them from purchasing energetically modified cement by threatening to interrupt supplies.

The contested decision

29 The contested decision describes, inter alia, CEN and its system of adopting standards, Directive 89/106, the Standard, the various cements, including Portland cement and energetically modified cement, and, lastly, the applicant's complaints regarding an infringement of Articles 81 EC and 82 EC. The Commission goes on to explain in paragraphs 73 to 123 why it takes the view that there are insufficient grounds for upholding the complaint.

30 In the first place, with regard to the alleged infringement of Article 81 EC, the Commission begins by defining the relevant product and geographic markets (paragraphs 76 to 78). The product market is defined as that of grey cement and the geographic market as a set of markets, centred on the various factories, overlapping with each other and covering the whole of Europe. The Commission examines the Standard in the light of the Guidelines, in particular paragraphs 162 and 163 thereof, before concluding that it does not restrict competition within the meaning of Article 81(1) EC (paragraph 112). The Commission states that it is not necessary, in the context of a complaint concerning the application of Articles 81 EC and 82 EC, to determine whether the Standard is expressed in prescriptive or performance-based terms (paragraph 107). However, it adds that the competent Commission department, namely DG Enterprise, takes the view that the Standard is drafted in terms that are 'sufficient[ly] performance based' (paragraphs 108 to 111). Lastly, the Commission considers and rejects the other arguments relied on, relating to a cartel and to a geographic division of the markets, as the applicant has not set out any facts to substantiate its allegations (paragraphs 113 to 117).

31 In the second place, concerning the alleged infringement of Article 82 EC, the Commission finds that it is not possible to conclude that European Portland cement producers collectively hold a dominant position in the European cement market, and that Article 82 EC is therefore inapplicable (paragraphs 118 to 123).

32 According to part D of the contested decision, '[a]s there are, for the reasons set out above, insufficient grounds for acting on [the] complaint, the Commission rejects [it]'.

Procedure and forms of order sought

33 By application lodged at the Registry of the Court on 8 December 2005, the applicant brought the present action.

34 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was, consequently, allocated.

35 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 6 May 2009. At that hearing, the applicant requested that a document dated 1 March 2005 be placed on the file. The Commission objected, arguing that the document in question, which pre-dated the contested decision, had been available before the date on which the present action was brought. For that reason, the Court refused to place the document on the file.

36 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

A — *Admissibility*

1. *Arguments of the parties*

38 In the first place, the Commission expresses doubt as to whether the application is sufficiently clear and as to whether it is in conformity with Article 44 of the Court's

Rules of Procedure. The applicant disagrees at length with the factual findings in the contested decision before 'abruptly' concluding that the Commission breached Article 81 EC and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), without explaining the link between the allegedly erroneous nature of those findings and the alleged breach. The Commission states that its defence is based on the assumption that the applicant is alleging an error of assessment. In addition, the Commission refers to difficulties in identifying the legal arguments put forward in the reply, and indicates that it leaves it to the Court to decide whether those arguments meet the degree of clarity required by Article 44(1)(c) of the Rules of Procedure.

39 In the second place, the Commission challenges the applicant's repetition of arguments set out in its complaint merely by the reference in its application to that complaint, which is annexed thereto.

40 In addition, the Commission challenges the applicant's reference to the correspondence attached at Annex 8 to the application in support of the applicant's claim that the adoption of the Standard was influenced by close cooperation between Cembureau and the chairman of CEN/TC 51. According to the Commission, that reference is inadmissible under Article 44(1)(c) of the Rules of Procedure, since the applicant does not specify either the passages or the letter constituting such proof.

41 In the third place, according to the Commission, the applicant's complaint — submitted at the stage of the reply — that the Standard infringes Directive 98/34 is inadmissible under Article 48(2) of the Rules of Procedure.

42 The applicant did not put forward specific arguments in that regard in its reply or at the hearing.

2. *Findings of the Court*

43 As a preliminary point, it should be borne in mind that, under Article 44(1)(c) of the Rules of Procedure, an application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68). Similar requirements are called for where a submission is made in support of a plea in law (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 333).

44 In the present case, the application states with sufficient clarity that the object of the present action is the annulment of the contested decision by which the Commission rejected the applicant's complaint against Portland cement producers, Cembureau and CEN in relation to the European cement market and presumed infringements of Articles 81 EC and 82 EC. It is equally apparent from the applicant's written pleadings that it relies, to that end, on manifest errors of assessment on the part of the Commission, in its examination of the complaint, with regard to the applicability of Article 81(1) EC to the Standard. In that regard, the applicant submits that the Commission erred in concluding, first, that the procedure for adoption of the Standard was not controlled by traditional cement producers and that that procedure was non-discriminatory, open and transparent; second, that the Standard is not de facto binding; and, third, that the Standard does not have to be examined in the light of Directive 89/106, whereas in fact the Commission ought to have concluded that the Standard did not satisfy the requirements of that directive.

45 It must be held that the procedural flaws identified by the Commission (see paragraph 38 above) are not sufficient to render the action inadmissible, since the arguments developed in the application in support of the complaints concerning manifest errors of assessment by the Commission, in its examination of the complaint, with regard to the applicability of Article 81(1) EC to the Standard are sufficiently clear to enable the Court to review the legality of the decision at issue and the Commission to put forward a proper defence (see, to that effect, Case T-378/94 *Knijff* v *Court of Auditors* [1996] ECR-SC I-A-479 and II-1341, paragraphs 18 and 19).

46 By contrast, the application does not contain any other plea in law or complaint which satisfies the requirements of the Rules of Procedure.

47 First of all, even though the application contains a reference to a complaint alleging infringement of Articles 28 EC and 29 EC, no arguments are developed in support of that complaint, which must, therefore, be declared inadmissible for failure to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure (see paragraph 43 above).

48 Second, according to the case-law, although specific points in the text of the application may be supported and supplemented by references to specific passages in the documents attached, a general reference to other documents, even those annexed to the application, cannot compensate for the lack of essential elements of legal arguments which must be included in the application. Furthermore, it is not for the Court to seek and identify, in the annexes, the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 57 and the case-law cited).

49 In the present case, the applicant refers generally in its application to paragraphs 49 to 67 of the contested decision as restating objections set out in its complaint, without identifying the specific points in its application which are intended to be supplemented by that reference. It must be noted that the complaints of the applicant referred to in paragraphs 64 to 67 of the contested decision — relating to a cartel and to a division of the markets — are not reproduced in the applicant's written pleadings. According to the case-law cited in paragraph 48 above, such complaints are inadmissible in so far as the reference in the application cannot be related to complaints or arguments developed in that application.

50 Furthermore, in order to show that the procedure for adoption of the Standard was discriminatory and neither open nor transparent, the applicant refers to its letter of 22 March 2004 replying to the Commission's preliminary findings and to the documents attached thereto, which are included at Annex 8 to the application. However, that reference covers the annexed document only in general terms and does not, therefore, enable the Court to identify the complaints or arguments intended to be referred to by the applicant. In accordance with the case-law cited in paragraph 48 above, such complaints or arguments are, for that reason, inadmissible.

51 Third, as the complaint based on the non-conformity of the Standard with Directive 98/34, which was put forward for the first time in the reply, does not arise from matters of law or of fact which came to light in the course of the procedure or expand a plea of law set out in the application, it must be dismissed as inadmissible under Article 48(2) of the Rules of Procedure.

52 It follows from the foregoing that only the complaints described in paragraph 44 above — relating to the alleged manifest errors of assessment made by the Commission, in its examination of the complaint, with regard to the applicability of Article 81(1) EC to the Standard — have been properly brought before the Court.

53 Accordingly, the action must be declared admissible to that extent only.

B — *Substance*

1. *Preliminary observations on the scope of the Commission's obligations when examining a complaint of infringement of Article 81 EC*

54 As a preliminary point, the parties set out in their pleadings the obligations which are imposed on the Commission when it examines a complaint of infringement of Article 81 EC. In addition, they analyse the burden of proof and standard of proof required in that context. Finally, they discuss the extent of the Court's power of review in an action against a decision rejecting a complaint, as well as the burden of proof and the standard of proof required of the parties in that context.

55 The Court observes that, in the contested decision, the Commission concludes — following an analysis of, in particular, the applicability of Article 81(1) EC — that, in the light of the information provided by the applicant during the administrative procedure, inter alia in response to the letter of 29 January 2004 informing the applicant of the Commission's intention to reject the complaint, '[a]s there are … insufficient grounds for acting on [the] complaint, the Commission rejects [it]'. It is in that context that it is appropriate to recall the rights of a complainant and the obligations of the Commission in the event of the rejection of a complaint containing an allegation of infringement of Article 81 EC.

56 The complainant has the right to be informed of and to submit comments on the grounds on which the Commission proposes to reject the complaint before it adopts a decision to that effect. Regulations No 17 and No 2842/98 - replaced from 1 May 2004 by, respectively, Regulation No 1/2003 and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18) - confer certain procedural rights on persons who have lodged a complaint with the Commission on the basis of Article 3 of Regulation No 17 (now Article 7 of Regulation No 1/2003).

Those rights include the rights laid down in Article 6 of Regulation No 2842/98 (now Article 7 of Regulation No 773/2004), which provides that, where the Commission takes the view that, on the basis of the information in its possession, there are insufficient grounds for acting on the complaint, it is to inform the complainant of its reasons and set a date by which the latter may make known its views in writing (see, with regard to Regulation No 2842/98, Case T-204/03 *Haladjian Frères* v *Commission* [2006] ECR II-3779, paragraph 26).

57 However, neither Regulations No 17 and No 2842/98 nor Regulations No 1/2003 and No 773/2004 contain express provisions relating to the action to be taken concerning the substance of a complaint and any obligations on the part of the Commission to carry out an investigation. On that point, it must be borne in mind that the Commission is under no obligation to initiate procedures to establish possible infringements of Community law and that the rights conferred on complainants by those regulations do not include the right to obtain a final decision as to the existence or non-existence of the alleged infringement (see, with regard to Regulations No 17 and No 2842/98, *Haladjian Frères* v *Commission*, cited in paragraph 56 above, paragraph 27 and the case-law cited).

58 It is on the basis of those principles that the case-law has recognised that, if the Commission is under no obligation to rule on the existence or non-existence of an infringement, it cannot be compelled to carry out an investigation, because such an investigation could have no purpose other than to seek evidence of the existence or non-existence of an infringement which it is not required to establish (see, with regard to Regulations No 17 and No 2842/98, *Haladjian Frères* v *Commission*, cited in paragraph 56 above, paragraph 28 and the case-law cited).

59 However, although the Commission cannot be compelled to conduct an investigation, it is nevertheless obliged to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States (see, with regard to Regulation No 17, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 79 and the case-law cited,

and Case T-198/98 *Micro Leader* v *Commission* [1999] ECR II-3989, paragraph 27). Furthermore, since the Commission's only obligation is to examine the factual and legal particulars brought to its notice by the complainant, it is not, contrary to the applicant's assertions, incumbent on the Commission to prove that it has adopted measures of investigation.

60 It is in the light of all those considerations that the Court must assess whether the contested decision contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal in the context of the administrative procedure. In that regard, it must be borne in mind that the judicial review of Commission measures involving appraisal of complex economic matters, as is the case for allegations of infringements of Article 81 EC, is limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (*Automec* v *Commission*, cited in paragraph 59 above, paragraph 80, and *Micro Leader* v *Commission*, cited in paragraph 59 above, paragraph 27; see *Haladjian Frères* v *Commission*, cited in paragraph 56 above, paragraph 30 and the case-law cited).

2. *The first and second complaints, alleging, respectively, manifest errors of assessment in relation to the procedure for adoption of the Standard and in relation to its non-binding nature*

61 As stated in paragraph 30 above, in the present case, the Commission examined the complaint in application of the Guidelines, to which the applicant had, moreover, referred in its complaint. In particular, the Commission examined the Standard in the light of paragraphs 162 and 163 of the Guidelines. According to those paragraphs, and as stated in paragraphs 79 and 91 of the contested decision, standards adopted by standards bodies recognised under Directive 98/34 in accordance with

a non-discriminatory, open and transparent procedure, and compliance with which is not mandatory, do not, in principle, restrict competition and do not fall under Article 81(1) EC.

62 It must be noted that the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the Treaty (see Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, paragraph 98 and the case-law cited).

63 The applicant does not deny that the purpose of the Guidelines is to set out the principles governing the Commission's assessment, in the light of Article 81 EC, of horizontal cooperation agreements and, in particular, of agreements on standards.

64 Furthermore, the Court notes that the applicant agrees in its application that the Guidelines are applicable in the present case and does not deny that the Standard was adopted by CEN, a standards body recognised under Directive 98/34.

65 Therefore, since the applicant did not produce information that could call into question the criteria set out in paragraphs 162 and 163 of the Guidelines, the Commission was right to examine the applicant's complaints, more particularly in the light of paragraph 163, in order to assess (i) whether the procedure for adoption of the Standard had not been non-discriminatory, open and transparent, and (ii) whether the Standard was binding.

66 The contested decision must therefore be examined in the light of those considerations in order to determine whether it is vitiated by manifest errors of assessment inasmuch as the Commission concludes, in the light of the information available to it,

that the Standard satisfies the criteria laid down under paragraph 163 of the Guidelines and, accordingly, does not infringe Article 81(1) EC.

(a) The procedure for adoption of the Standard

Arguments of the parties

67 In the first place, the applicant claims that a procedure is non-discriminatory if it is representative and independent of vested interests, in accordance with the general guidelines of CEN and of the European Committee for Electrotechnical Standardisation (Cenelec). In this connection, the applicant invokes Cembureau's influence over the procedure for adoption of the Standard, and the control of that procedure by Cembureau and the chairman of CEN/TC 51.

68 First, the applicant submits that the Standard was designed, thanks to the close cooperation between Cembureau and CEN/TC 51, to favour existing major cement producers in the market. That analysis is said to be supported by the documents annexed to the applicant's letter of 22 March 2004 replying to the Commission's preliminary findings. According to the applicant, although the Commission does not deny that Cembureau influenced the procedure, which was in fact controlled by Cembureau and the chairman of CEN/TC 51, it nevertheless concluded in paragraph 102 of the contested decision that the activities of Cembureau had not exceeded the limits of normal lobbying activity. In addition, the applicant submits in the reply that what is important is to determine whether Cembureau possessed and wielded the necessary means to 'exert a manipulation of … Mandate M/114'. The applicant relies in that regard on the 'anger' allegedly expressed in Cembureau's letter of 26 March 1996 to DG Enterprise and on the unambiguous terms of that letter. Furthermore, in the

reply, the applicant quotes a passage of the letter of 24 July 1997 from a Dutch cement producer to DG Enterprise, indicating the basis on which CEN/TC 51 was acting. The applicant also relies on a document submitted to DG Enterprise by Cembureau in 1996, the purpose of which was to ensure that the future standard would mirror the 'pre-standard' ENV 197-1:1992. Moreover, in order to confirm the discriminatory nature of the procedure, the Court need only, in the applicant's view, consider CEN's internal guidelines. Finally, in the reply, the applicant takes issue with the Commission's assertion that the only evidence put forward by the applicant was the content of its correspondence between 1996 and 1998 with the Commission, CEN, Cembureau and a Dutch cement producer.

69 Second, the applicant remarks that the chairman of CEN/TC 51 held a senior executive position within a cement producer which was well established in the market. Consequently, there was a risk of a conflict of interests and the Commission failed to ensure the chairman's impartiality.

70 Third, according to the applicant, the adoption of the Standard should have been subject to a greater degree of scrutiny by the Commission, since the adoption procedure was led by committees whose members include bodies acting in the interests of their members. Furthermore, the applicant submits in the reply that the Commission's adoption of its preliminary findings in January 2004 was clearly an attempt to close the case prematurely, before the Commission sent documents to the applicant in February 2004. Further, the list of documents examined by the Commission for the purpose of delivering its preliminary findings did not include the documents sent to the applicant in November 2003, and no explanation was given to the applicant as to why DG Competition did not examine those documents.

71 Fourth, the Standard is discriminatory in so far as it excludes certain products and is based on the composition of products, not on their performance. By March 1996, Cembureau had convinced the Commission that the Standard could apply only to well-tried cements, and the Standard is thus 'a creature of Cembureau's making'.

72 In the second place, the applicant maintains that the procedure under which the Standard was adopted cannot be described as transparent.

73 First, the applicant challenges paragraph 27 of the contested decision, according to which the transparency of CEN's work is assured by means of 'mirror committees' and public consultation at the public enquiry stage, on the ground that the Commission fails to take into account 'those who are not members of [CEN] National Associations'.

74 Second, the applicant claims in the reply that there are gaps in the evidence available and that it had difficulties in obtaining disclosure from the Commission of a certain number of 'historical' documents. The applicant refers in that regard to its requests to the Commission for disclosure of documents in 2003 pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). The applicant cites, in particular, the non-disclosure of documents concerning CEN's work on the Standard, documents passing between CEN, Cembureau and the Commission, described in the appendix to the preliminary findings in January 2004, and the letter of 27 March 1996 from a Dutch cement producer. Further, with the exception of a single letter, the only documents available all pertain to that part of the procedure which relates to the preparation of information to be submitted to CEN for the preparation of CEN mandates.

75 Third, the applicant submits in the reply that the principle of transparency was also infringed since bodies were presented as experts by the chairman of CEN/TC 51 without it being clear whether they were part of the formal experts' group.

76 Fourth, the applicant is critical, in the reply, of the existence of unregulated *ad hoc* groups. Thus, an *ad hoc* group of members of CEN/TC 51 met in July 1997, and it is not known how it was constituted or why it was formed, although the group played a central role in the preparation of the document which resulted in the mandate which CEN was granted by the Commission and which formed the basis of the Standard.

77 In the third place, as regards the openness of the procedure, the applicant maintains, in the reply, that the Commission should have proved that the procedures applied by CEN, allowing interested parties to take part, had been followed. The Commission ought, in particular, to have obtained disclosure of the relevant documents concerning CEN's work programme in relation to mandate M/114 and the preparation of the technical committees' responses to mandate M/114. Moreover, the applicant was not invited to make its submissions to CEN and there was no procedure enabling it to take part in the discussions. The applicant states, in this connection, that it sent three letters concerning the draft standard to DG Enterprise in 1997. Those letters, to which no reply was received, represent incontrovertible evidence that the applicant was excluded from the proceedings at a key stage. The applicant highlights in particular a passage from its letter of 7 May 1997.

78 The Commission challenges the arguments put forward by the applicant.

Findings of the Court

— The non-discriminatory character of the procedure

79 The applicant claims that the procedure for adoption of the Standard was discriminatory in that it was neither representative nor independent of vested interests. According to the applicant, the procedure for adoption of the Standard was vitiated by reason of Cembureau's influence and of the role played by the chairman of CEN/TC 51, who controlled the procedure.

80 In the first place, according to the applicant, thanks to the close cooperation between CEN/TC 51 and Cembureau, which sought to exercise influence over CEN/TC 51 and which controlled it, the Standard was designed to favour existing major cement producers in the market. In addition to referring the Court to Annex 8 to the application, which is mentioned in paragraph 50 above and which has been addressed, the applicant also relies, more specifically, on Cembureau's letter of 26 March 1996, the terms of which — described by the applicant as unambiguous — confirm that Cembureau sought to exercise influence over CEN/TC 51.

81 In this connection, it is apparent from the contested decision that the Commission took the view, in paragraph 102, that the documents provided by the applicant, including the letter of 26 March 1996, did not demonstrate that Cembureau's action exceeded the normal lobbying activity carried out by any association that brings together the undertakings of an industry in order to protect and promote the interests of its members.

82 Whilst the applicant challenges that conclusion, it does not explain how that action of Cembureau in 1996 shows that that association controlled either the procedure for adoption of the Standard or CEN/TC 51. As the Commission stated in the contested

decision, it follows from the letter of 26 March 1996 that Cembureau sought to defend the interests of its members by contacting those bodies that could influence the drafting of the Standard, including, in this instance, the Commission department drawing up draft mandate M/114. Therefore, in relying on that letter, the applicant fails to demonstrate that the Commission committed a manifest error of assessment by not finding that Cembureau influenced the procedure to the extent of controlling it and undermining it. It must, furthermore, be noted that the applicant also wrote to the Commission in 1997 setting out its observations and concerns about the draft standard, which the applicant has admitted in the reply, in which it cites its letter of 7 May 1997 to DG Enterprise.

83 The applicant also relies on the letter of 26 March 1996 in claiming that it is necessary to determine whether Cembureau possessed and wielded the necessary means to manipulate mandate M/114. However, that complaint, which was put forward for the first time in the reply but which does not arise from matters of law or of fact which came to light in the course of the procedure and does not expand a plea of law set out in the application, is inadmissible under Article 48(2) of the Rules of Procedure. In any event, the applicant does not state that it provided the Commission with material in that regard during the examination of its complaint.

84 Furthermore, the Court must reject the argument put forward by the applicant in the reply in relation to the letter of 24 July 1997 from a Dutch cement producer which indicated the basis on which CEN/TC 51 was acting. The applicant merely quotes a passage from that letter but does not state how that extract can demonstrate that a manifest error of assessment was made by the Commission with regard to the alleged control by Cembureau of the procedure for adoption of the Standard.

85 In addition, with regard to the applicant's allegation concerning Cembureau's submission to DG Enterprise in 1996 of a document the purpose of which was to ensure that the future standard would mirror the 'pre-standard' ENV 197-1:1992, which, in the applicant's view, made the procedure for adoption of the Standard discriminatory, it must be noted that, in this respect also, the applicant does not provide any

explanation to support its argument. It does not refer to any passage in that document, establish any link between that document and the procedure for adoption of the Standard, or indicate how the document cited demonstrates that the Commission made a manifest error of assessment.

86 Finally, the Court must also reject the applicant's argument that, in order to confirm the discriminatory nature of the procedure for adoption of the Standard, the Court need only consider CEN's internal guidelines, which are annexed to the reply. Since the applicant does not indicate which paragraphs of the guidelines it is invoking, that reference to the annex to the reply does not enable the Court to identify the arguments intended to be referred to by the applicant. Consequently, in accordance with the case-law cited in paragraph 48 above, such arguments are inadmissible.

87 Therefore, while the applicant objects, in the reply, to the Commission's assertion that the only evidence put forward by the applicant was the content of its correspondence between 1996 and 1998 with the Commission, CEN, Cembureau and a Dutch cement producer, it must nevertheless be held that the applicant has not demonstrated that the Commission neglected to examine relevant evidence.

88 In the second place, the applicant merely asserts that the Commission failed to ensure the impartiality of the chairman of CEN/TC 51, without invoking any specific evidence that could call into question that finding of impartiality. Moreover, as the Commission correctly observes in paragraph 101 of the contested decision, in the light of the rules on the appointment of chairmen of technical committees, which the applicant did not challenge in any way, it is not surprising that an employee of a Portland cement manufacturer was appointed chairman of CEN/TC 51.

89 In view of the foregoing, it must be held that the applicant has not established that the contested decision is vitiated by a manifest error of assessment as regards the Commission's finding, in paragraphs 95 and 102, that the applicant had failed to

prove that Cembureau and the chairman of CEN/TC 51 acted together to ensure that the Standard would correspond to the products of Portland cement producers and would exclude competing products. Nor has the applicant demonstrated that paragraph 96 of the contested decision, rejecting its allegation that Cembureau controlled CEN/TC 51 through the chairman of CEN/TC 51, is vitiated by a manifest error of assessment.

90 That conclusion is not called into question by the applicant's argument that the procedure for adoption of the Standard should have been subject to a greater degree of scrutiny by the Commission because, in the present case, the procedure was led by committees whose members included bodies acting in the interests of their members.

91 In that regard, first of all, it must be noted that the applicant recognises that CEN is a standardisation body which is recognised under Directive 98/34 and the internal regulations of which define its operating rules, and that, moreover, in accordance with those rules, the composition of national delegations formed by each national standards organisation may include industry experts sitting on technical committees (paragraphs 26, 74, 100 and 101 of the contested decision), with safeguards in place to ensure that the final decision on a draft standard is taken in the public interest (paragraph 27 of the contested decision). Furthermore, the applicant does not put forward precise information to support its argument and to indicate in what respect the situation in the present case represented a special case with regard to CEN's operating rules. It must also be borne in mind that, according to the case-law cited in paragraph 59 above, the Commission's only obligation in dealing with the complaint was to examine carefully the factual and legal particulars put forward by the applicant. However, no evidence has been adduced by the applicant to demonstrate that the Commission failed to fulfil that obligation.

92 Second, the Court must reject the applicant's allegations that the Commission attempted to close the case prematurely by sending the applicant its preliminary findings before sending it documents in February 2004 and, moreover, that the documents

sent to the applicant in November 2003 did not appear in the list of documents considered by the Commission for the purpose of delivering its preliminary findings. Suffice it to note that the present action is directed against the contested decision, which was adopted after the applicant had been able to submit its observations on the preliminary findings in March 2004.

93 Third, it must be held that the applicant's argument concerning the discriminatory character of the Standard, in so far as it excludes certain products and is based on the composition of products instead of on their performance, relates to the allegation that the Standard does not comply with Directive 89/106, and is therefore ineffective as regards proof of the discriminatory character of the procedure for adoption of the Standard.

— The transparency of the procedure

94 The applicant's complaint that the contested decision is vitiated by a manifest error of assessment in that the Commission finds that the procedure for adoption of the Standard was transparent must be rejected.

95 First, the applicant challenges paragraph 27 of the contested decision, claiming, without providing any explanation in support of its complaint, that the Commission failed to take into account 'those who are not members of [CEN] National Associations'. It must be borne in mind, however, that the Commission takes the view, in that paragraph of the contested decision, that the transparency of CEN's work is assured through national 'mirror committees' managed by CEN national members, as well

as through public consultation at the public enquiry stage. Accordingly, the fact of not being a member of a national association that belongs to CEN does not preclude participation at the consultation stage.

96 Second, the applicant submits that the procedure for adoption of the Standard cannot be described as transparent when there are gaps in the evidence available, and given that it experienced difficulties in obtaining disclosure from the Commission of a number of documents relating to the procedure for adoption of the Standard. It must be noted that the applicant raises those complaints concerning paragraph 27 of the contested decision for the first time at the stage of the reply, and yet they do not arise from matters of law or of fact which came to light in the course of the procedure or expand a plea of law set out in the application. Consequently, those complaints are inadmissible under Article 48(2) of the Rules of Procedure.

97 In any event, the applicant's arguments are ineffective. As the Court has observed in paragraph 59 above, the Commission's only obligation was to examine the particulars put forward by the applicant in its complaint. It is therefore for the applicant to demonstrate that the Commission made a manifest error of assessment in taking the view that the particulars which had been submitted to it did not establish that the procedure for adoption of the Standard by CEN had not been transparent. First, the applicant invokes the failure to disclose documents relating to the drawing-up of the draft mandate by the Commission before the Standard was drawn up by CEN. Second, the Commission's failure to disclose documents, assuming that were established, does not imply any lack of transparency in the procedure for adoption of the Standard by CEN.

98 In addition, as regards the alleged failure by the Commission to disclose documents exchanged between the Commission, CEN and Cembureau which were mentioned in the annex to the Commission's preliminary findings in January 2004, the applicant

does not identify those documents or explain how their non-disclosure demonstrates a lack of transparency in the procedure for adoption of the Standard by CEN.

99 Third, the applicant submits, in the reply, that the principle of transparency was also infringed in so far as bodies were presented as experts by the chairman of CEN/TC 51 without it being clear whether they were part of the formal experts' group. In that regard, it must be held that that complaint is inadmissible under Article 48(2) of the Rules of Procedure, since the applicant raises it for the first time at the stage of the reply, and yet it does not arise from matters of law or of fact which came to light in the course of the procedure or expand a plea of law set out in the application. In any event, it must be rejected since the applicant does not explain how the request made by the chairman of CEN/TC 51 to the Commission for participation in a meeting organised in 1996 of persons identified as experts within CEN demonstrates a manifest error of assessment by the Commission.

100 Fourth, the applicant invokes, in the reply, the lack of transparency in the procedure for adoption of the Standard as a result of the existence of unregulated *ad hoc* groups, in particular an *ad hoc* group of members of CEN/TC 51. It submits that that group met in July 1997 and that it played a central role in the preparation of the document resulting in mandate M/114, which was granted by the Commission to CEN and which formed the basis of the Standard. That complaint is, however, inadmissible under Article 48(2) of the Rules of Procedure, since the applicant raises it for the first time at the stage of the reply, and yet it does not arise from matters of law or of fact which came to light in the course of the procedure or expand a plea of law set out in the application. In any event, it must be rejected since the applicant does not provide any explanation to support it. The applicant specifies neither the reasons why that group played a central role nor the evidence which was produced to that effect by the letter of 24 July 1997, even though it must be noted that, since mandate M/114 was dated 28 May 1997, any meeting in July 1997 could not have related to the drawing-up of that mandate. The applicant indicates that it does not know whether the chairman

of CEN/TC 51 was present at the meeting of that *ad hoc* group, but it is not possible to glean what inference the applicant draws from that query. Lastly, the applicant does not explain the link between those matters and the alleged lack of transparency liable to vitiate the procedure for adoption of the Standard by CEN.

— The openness of the procedure

101 The applicant's complaint, put forward in the reply, that the Commission must prove that procedures ensuring the openness of the procedure for adoption of the Standard were actually followed must be rejected.

102 First, as regards the argument that the Commission should, in particular, have obtained disclosure of the relevant documents concerning CEN's work programme and the preparation of the technical committees' responses to mandate M/114, it is, according to the case-law referred to in paragraph 59 above, for the applicant to demonstrate that the Commission did not carry out a careful examination of the particulars which were submitted to it. Furthermore, that argument is not substantiated, since the applicant does not indicate in what respect those — unidentified — documents prove that the procedure for adoption of the Standard was not open.

103 Second, the complaint that the applicant was not invited to make its submissions to CEN and that there was no procedure enabling it to take part in the discussions is inadmissible under Article 48(2) of the Rules of Procedure, since it was raised for the first time at the stage of the reply, and yet it does not arise from matters of law or of fact which came to light in the course of the procedure or expand a plea of law set out in the application. In any event, the applicant does not explain in what respect the Commission's failure to reply to its three letters of May and June 1997 — if established

— and the passage cited by the applicant from its letter of 7 May 1997 constitute evidence to show that the procedure was not open and demonstrate that the applicant was not able to submit its observations to CEN.

104 In view of the foregoing, it must be held that the applicant has not established that the contested decision was vitiated by a manifest error of assessment as regards the Commission's finding that the procedure for adoption of the Standard was open, non-discriminatory and transparent. Consequently, the first complaint must be rejected.

(b) The allegedly binding nature of the Standard

Arguments of the parties

105 In the first place, the applicant accepts that the Standard is not legally binding. However, it submits, that is irrelevant to determining whether the Standard unduly restricts competition or market access, notwithstanding paragraph 163 of the Guidelines. The real problem lies in the way in which the Standard is perceived by the market and in its de facto binding nature, since a standard that is relied upon to such an extent that it is largely dominant in the market would become a barrier to entry to the market, whatever other means of access were available. For the purposes of assessing the binding nature of the Standard, the Commission should have examined the relevant 'microcosm'. However, according to the applicant, the Commission did not attempt the slightest meaningful assessment of the effects of the Standard, and

consideration of the effects of the Standard in the contested decision was limited to that of its mandatory nature.

106 First, the products covered by the Standard dominate the relevant product market, the Standard dominates the market and the structural composition of the product market is such that the market relies on the Standard. Compliance with the Standard is thus a prerequisite to the sale of cement in significant quantities. Contrary to the statement in paragraph 89 of the contested decision, the fact that Portland cement is prevalent in Europe does not simply reflect consumer preferences.

107 Second, the Commission overlooked the impact of the Standard on the rules applicable to public procurement (paragraph 88 of the contested decision). A producer whose products — even those bearing the CE marking following the European technical approval procedure — do not conform to the Standard could find those products excluded from public contracts solely on the ground of their non-conformity with the Standard. The applicant also invokes the existence of national regulations and relies, in that regard, on public procurement regulations applied by the Swedish Highway Authority which reflect the Standard, and on a guide published in the United Kingdom relating to the selection of concretes flowing from common European concrete Standard EN 206-1:2000. Thus, various 'construction control regimes' would be relevant to an analysis in relation to Article 81 EC, notwithstanding Article 6(1) of Directive 89/106. In a report drawn up in 2000 for DG Enterprise, those regimes were examined in five countries with a view to identifying where and how barriers operate in practice. Those barriers were at least partially set out, probably in March 1996, by Cembureau in its submissions to the Commission. The shortcomings identified remain, if only inasmuch as national standards have been replaced by a compositional standard. Therefore, the Standard dominates the market and is de facto binding in its effects.

108 In the second place, the applicant submits that that statement is not called into question by the existence of alternative procedures for obtaining the CE marking under the provisions of Directive 89/106.

109 First, the applicant maintains that the real issue is not its legal ability to place products on the market. While there is no doubt that the European technical approval permits the award of a CE marking and all products bearing a CE marking are equally entitled to be placed on the market, those products will not necessarily all have the same status, notwithstanding Article 6 of Directive 89/106. Consequently, the fact that the Commission relies, in paragraphs 83 to 85 of the contested decision, on the European technical approval in concluding that the Standard is not binding constitutes a manifest error of assessment. The applicant also challenges the probative value of the Commission's assertion that hundreds of European technical approvals have been granted.

110 Second, the procedure for obtaining European technical approval is time-consuming, slow, costly and its outcome uncertain, as a result of which that procedure is not a viable means of obtaining access to the market. The applicant relies in this regard on a consultation document relating to the revision of Directive 89/106, annexed to the reply. Furthermore, it is commonly accepted that European technical approval is a complementary mechanism, rather than the main means of obtaining a CE marking under Article 8 of Directive 89/106. The Commission consequently erred in failing to consider the viability of ways of obtaining a CE marking other than the Standard.

111 Third, the applicant maintains, in its reply, that there is no guarantee that its products will obtain European technical approval, even if they satisfy the essential requirements of Directive 89/106. There is no guide for cement products and, therefore, European technical approval could be awarded only if all the European approval bodies concerned and the Commission agree. In addition, in order to obtain a CE marking,

the product has to be given an attestation of conformity. The attestation of conformity system has not been specified by the Commission in respect of products which are not covered by the Standard. However, the applicant states that it does not deny that its products can gain European technical approval.

112 The Commission challenges the arguments put forward by the applicant.

Findings of the Court

113 It must be noted, first of all, that it is common ground between the parties that the Standard is not legally mandatory.

— Examination of the effects of the Standard and of its de facto binding nature

114 The applicant challenges the contested decision, claiming that the Commission did not examine the effects of the Standard, which, owing to the way in which it is perceived in the market, has become de facto binding and thus constitutes a barrier to market access. While the applicant complains that the Commission did not examine the effects of the Standard, it must be observed that it essentially repeats the arguments put forward in its complaint in relation to the allegedly de facto binding nature of the Standard, and that it merely challenges the replies thereto in paragraphs 87 to 89 of the contested decision. Furthermore, it must be noted that the applicant does

not put forward any new relevant evidence to challenge the Commission's reasoning or its findings.

115 First, the applicant challenges the explanation put forward in paragraph 89 of the contested decision, according to which the fact that Portland cement is the most widely sold cement in Europe simply reflects cement buyers' preferences.

116 However, as the Commission correctly contends, the applicant does not adduce any evidence to show that the situation in the market changed as a result of the adoption of the Standard.

117 Furthermore, the applicant confines itself to repeating the argument which it put forward in the complaint concerning the fact that the majority of cements available in the market conform to the Standard in order to demonstrate that the Standard is de facto binding. It must be noted in that regard, first, that the applicant does not explain how it is possible to infer from the fact that products complying with the Standard represent a very large proportion of cement sold in Europe that the Standard dominates the market, which, in turn, relies on the Standard. Second, the applicant does not adduce any evidence to support its assertion concerning the structure of the relevant product market.

118 Consequently, it must be held that the applicant has not established that paragraph 89 of the contested decision is vitiated by a manifest error of assessment.

119 Second, the applicant criticises paragraph 88 of the contested decision, in which the Commission concludes that, although public procurement rules exclude certain cement products bearing the CE marking, those rules can be assessed in the light of Directive 89/106 rather than in the light of rules on competition.

120 However, although the applicant reiterates the argument put forward in its complaint that a product — even one bearing the CE marking following the European technical approval procedure — can be excluded from public contracts solely on the ground of its non-conformity with the Standard, the applicant does not specify in what respect the Commission's explanation is erroneous and why the alleged exclusion of a product from the market in such circumstances is outside the scope of Article 6 of Directive 89/106. In that regard, it must be observed that Article 6 of Directive 89/106, in conjunction with Article 4(2) thereof, provides that the Member States must allow the placing on the market of products which bear the CE marking, including those which have a European technical approval. Moreover, the applicant recognises that Article 6 of Directive 89/106 prevents the Member States from establishing barriers to the free movement of products which satisfy the provisions of the directive.

121 Consequently, it must be held that the applicant has not established that paragraph 88 of the contested decision is vitiated by a manifest error of assessment.

122 That conclusion is not called into question by the applicant's argument that national regulations exclude products such as the applicant's by using specifications such as those which are included in the Standard. In that regard, the evidence produced by the applicant is not sufficient to substantiate its argument. The applicant relies on provisions allegedly applied by the Swedish Highway Authority, without indicating the nature of those regulations or specifying those provisions which support its argument. It also relies on a guide to the selection of concretes published by a commercial association in the United Kingdom, and not by a public body, without explaining how the existence and content of that guide prove that the Standard is de facto binding. In any event, the applicant's argument is ineffective. Even if national regulations excluded products such as the applicant's by using specifications such as those which are included in the Standard, the Standard is not binding on account of its adoption by CEN. The fact that Member States do not apply the rules laid down

by Directive 89/106 could fall within the scope of that directive, as observed in paragraph 120 above, but that does not mean that the Standard falls within the scope of Article 81(1) EC.

123 Apart from the regulations referred to in paragraph 122 above, the applicant does not put forward any specific example of national regulations relating to the Standard. As regards the report which was drawn up for DG Enterprise in 2000, it must be noted that the applicant only produced an extract of two pages of a document, neither the title, addressee nor date of which are known, and which does not refer to the Standard. Furthermore, the applicant maintains that the 'barriers' identified in that report were at least partially submitted, probably in March 1996, in a document sent by Cembureau to the Commission. However, the applicant does not explain in what respect those documents are of any relevance to establishing the de facto binding nature of the Standard.

— The existence of other solutions for access to the market

124 The applicant challenges the Commission's finding that the Standard is not binding in nature as there are other routes of access to the market, in particular the European technical approval procedure. The applicant does not, however, establish that paragraphs 83 to 86 of the contested decision are vitiated by a manifest error of assessment on the part of the Commission.

125 It must be noted, first of all, that the applicant does not challenge paragraph 82 of the contested decision, according to which there are means of obtaining the CE marking and access to the market other than compliance with the Standard, such as the European technical approval, in accordance with Directive 89/106.

126 However, the applicant claims that, while all products bearing a CE marking are equally entitled to be placed on the Community market, those products will not necessarily all have the same status. By contrast, the applicant does not explain the nature of the differences in status of the various categories of products bearing a CE marking. Therefore, that complaint must be rejected as inadmissible in accordance with the case-law recalled in paragraph 43 above. In so far as that argument is to be understood as being linked to the allegation that the Standard dominates the market, it has already been rejected in paragraphs 117 and 118 above.

127 Next, there is no basis for the applicant's submission that the Commission failed, erroneously, to determine whether the European technical approval procedure represented a separate viable route. It must be noted that the Commission responds to that argument in paragraph 86 of the contested decision, in which it expresses the view that the European technical approval procedure works adequately and therefore constitutes a real and efficient way of obtaining access to European markets, and that the applicant has failed to provide any details or examples whatsoever as to the alleged difficulties. The applicant's argument that the procedure is not viable is not sufficiently substantiated to counter that conclusion. The applicant relies on a consultation document relating to the revision of Directive 89/106. However, that document, which, moreover, was submitted at the stage of the reply, is a general questionnaire which calls for comments by interested third parties. Consequently, it fails to establish that the European technical approval procedure is not viable, particularly in the specific area of cement.

128 Finally, the applicant submits, in the reply, that the European technical approval procedure gives rise to difficulties, particularly because of the lack of a guide or of an attestation-of-conformity system. On the assumption that the applicant intends to call into question the very existence of that procedure with regard to cement products, that complaint must be rejected as inadmissible under Article 48(2) of the Rules of Procedure in so far as it is raised for the first time at the stage of the reply, and yet does not arise from matters of law or of fact which came to light in the course of the procedure or expand a complaint set out in the application. If the applicant intends to

submit that the European technical approval procedure is onerous, its arguments are not sufficiently substantiated to prove that that other means of access to the market is not available. In any event, it must be noted that the applicant states in its reply that its products could obtain a European technical approval.

129 In the light of the foregoing, it must be held that the Commission examined the evidence put forward by the applicant to demonstrate that the Standard was de facto binding. Consequently, the applicant disregards that analysis when it complains that the Commission failed to examine the alleged effects of the Standard. In addition, it must be held that the applicant has failed to establish that paragraphs 80 to 90 of the contested decision are vitiated by a manifest error of assessment as regards the Commission's finding that the Standard is not binding.

130 Consequently, the second complaint must be rejected.

3. *The third complaint, relating to a failure to examine the Standard in the light of Directive 89/106 and the alleged non-conformity of the Standard with that directive*

(a) Arguments of the parties

131 In the first place, the applicant submits that an analysis of the Standard in the light of Article 81 EC entails, beyond the Guidelines, an examination of its conformity with Directive 89/106. If the Standard does not satisfy the requirements of that directive, that could indicate that the Standard does not comply with the 'fundamental [legal] principles' of the EC Treaty either. Standards which may fail to meet the requirements of Directive 89/106 would have an adverse effect on the market, irrespective of the other procedures for obtaining the CE marking. The need for that analysis is all the

greater when, as in the present case, the Standard benefits the main players in the relevant product market to the detriment of innovative undertakings. The Court should assess the validity of the Standard in the light of the 'fundamental [legal] principles' of the EC Treaty and of Directive 89/106 in order to determine whether the Commission's failure to make such an assessment constitutes a manifest error of assessment. The applicant's approach is not inconsistent with the Court's judgment in Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraphs 78 and 79.

132 In the second place, the Standard does not comply with Directive 89/106, a fact recognised by DG Enterprise, because it should have been a 'performance standard' in accordance with Article 7(2) of that directive. However, the Standard is both a 'compositional standard' and a 'performance standard', and it is incumbent on the Commission to prove that only a 'compositional standard' could be adopted in the present case.

133 In the third place, the applicant submits that the Commission does not deny that the applicant's products are able to satisfy the Standard's performance requirements. Therefore, if its products otherwise satisfy the essential requirements of Directive 89/106, they cannot be excluded from the Standard for reasons other than those reflecting essential requirements.

134 The Commission contends that, under the procedures laid down by Regulation No 17, now replaced by Regulation No 1/2003, it can hear complaints only in relation to infringements of Articles 81 EC and 82 EC. Since an infringement of Community law does not necessarily constitute an infringement of Article 81 EC, the Commission's powers under competition law cannot be used to examine every barrier to trade. Furthermore, in its consideration of an action for annulment, the Court would confine itself to examining the validity of the contested measure. The Court could not assess the validity of the Standard in the light of Directive 89/106, since judicial review is necessarily limited to the rules on competition. In any event, the applicant's arguments as to the non-conformity of the Standard with Directive 89/106 are irrelevant.

(b) Findings of the Court

135 The applicant submits that an analysis of the Standard in the light of Article 81 EC entails an examination of its conformity with Directive 89/106, that the Commission should have undertaken this and that the Court must assess the validity of the Standard in the light of the 'fundamental [legal] principles' of the EC Treaty and of Directive 89/106.

136 In that regard, it must be borne in mind that the present action relates to a review of the legality of the contested decision and not of the Standard. Consequently, the complaint whereby the applicant seeks, in essence, an assessment by the Court of the validity of the Standard in the light of the 'fundamental [legal] principles' of the EC Treaty and of Directive 89/106 must be rejected as being ineffective.

137 Furthermore, it must be noted that the contested decision was adopted by the Commission following a procedure which was conducted on the basis of a complaint lodged pursuant to Regulation No 17. It follows that judicial review of that decision must necessarily be limited to the competition rules as they result from Articles 81 EC and 82 EC, and consequently cannot extend to compliance with other provisions of the EC Treaty or of Directive 89/106 (see, to that effect, order of 23 February 2006 in Case C-171/05 P *Piau* v *Commission,* not published in the ECR, paragraph 58, and Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 58).

138 It follows from all of the foregoing that the third complaint must be rejected and, consequently, that the action must be dismissed in its entirety.

Costs

139 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders EMC Development AB to bear its own costs and to pay the costs incurred by the European Commission.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 12 May 2010.

[Signatures]

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