OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 11 February 2003 [1]

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1 — Original language: Spanish.

1. This is an appeal by Ciments français SA ('Ciments français') 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 Council 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 Ciments français and certain other undertakings which are not relevant for present purposes. [5]

— On 25 November 1991, the Commission sent the Statement of Objections to the 76 undertakings and associations of undertakings concerned. Ciments français 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]

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 and Others* 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.

7 — Paragraphs 4 to 6 of the judgment.

— By Decision 94/815/EC of 30 November 1994 ('the Decision'),[8] the Commission found that Ciments français had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC)[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. in a concerted practice involving information on current prices and a forecast of price increases, from 17 March to 31 December 1988, with a view to the restriction of their autonomy of conduct (Article 3(1)(b));

3. in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France, from 23 June 1982 to 30 September 1989 (Article 3(3)(a));

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 9 June 1986 to 26 March 1993, in an agreement on the setting-up of the joint trading company, Interciment SA, having as its purpose the carrying-out of the persuasive and dissuasive measures against those threatening the stability of the member countries' markets in cement (Article 4(2));

6. 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));

7. within the framework of the European Export Policy Committee, from 1 July 1981 to 17 February 1989, in a continuous concerted practice involving (a) the examination of the situation on Community markets, (b) the sharing of third-country markets, (c) the setting of prices for products intended for overseas export, and (d) the exchange of individualised data on export availabilities and on actual

8 — OJ 1994 L 343, p. 1.

9 — Paragraph 22 of the judgment.

exports to third countries and designed to prevent incursions by competitors on respective national markets in the Community (Article 6);

8. within the framework of the White Cement Committee, from 6 May 1982 to 26 May 1988: (a) in the concerted practice and agreement relating to non-transhipment to home markets, (b) in the continuous concerted practice relating to the channelling of production surpluses for export to third countries, and (c) in a continuous concerted practice relating to exchanges of information on the production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual undertakings (Article 7).

— The Commission ordered Ciments français 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) and imposed two fines, one of ECU 24 716 000 and the other of ECU 1 052 000, 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, 10 and 11).

3. Ciments français 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. In its application, Ciments français claimed, primarily, that the Decision should be annulled. In the alternative, it claimed that the fines imposed on it should be reduced. In any event, it requested 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;

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

2. the minutes of the oral hearing of each of the undertakings;

3. the list of all the documents in the files;

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 contested judgment, the Court of First Instance granted Ciments français's application in part and:

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

11 — See paragraphs 164 to 168 of the judgment under appeal.

12 — Ciments luxembourgeois SA.

13 — Paragraphs 169 and 170 of the judgment.

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

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

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

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

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

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

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

— dismisse[d] the remainder of the application;

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

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

9. In other words, the Court of First Instance held Ciments français responsible 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 17 February 1989;

2. in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France (Article 3(3)(a)), with the exception of the Saarland market, from 23 June 1982 to 12 August 1987;

3. in the agreement on the setting-up of the European Task Force (Article 4(1) of the Decision), between 28 May 1986 and 31 May 1987;

4. from 9 June 1986 to 7 November 1988, in an agreement on the setting-up of the joint trading company, Interciment SA, having as its purpose the carrying-out of the persuasive and dissuasive measures against those threatening the stability of the member countries' markets in cement (Article 4(2));

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.

6. within the framework of the European Export Policy Committee, from 18 November 1983 to 17 February 1989, in a continuous concerted practice involving (a) the examination of the situation on Community markets, (b) the sharing of third-country markets, (c) the setting of prices for products intended for overseas export, and (d) the exchange of individualised data on export availabilities and on actual exports to third countries and designed to prevent incursions by competitors on respective national markets in the Community (Article 6);

7. within the framework of the White Cement Committee, from 6 May 1982 to 26 May 1988: (a) in the concerted practice and agreement relating to non-transhipment to home markets, (b) in the continuous concerted practice relating to the channelling of production surpluses for export to third countries, and (c) in a continuous concerted practice relating to exchanges of information on the production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual undertakings (Article 7).

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 and the fourth of Ciments français's pleas in law as manifestly unfounded.

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. Ciments français claims that the Court of Justice should set aside the contested judgment in part and uphold the claims which it put forward at first instance, namely, primarily, that the Decision should be annulled or, in the alternative, that the amount of the fine imposed on it should be reduced, and that in any event the Commission should be ordered to pay the costs.

13. In support of that claim, Ciments français puts forward four pleas in law, although, as I have just stated, two of these — the first and the fourth — have been dismissed.

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

1 — *The appellant and the Compagnie des ciments belges (second plea in law)*

A — Arguments of the parties

15. In calculating the fines imposed on Ciments français, the Commission included the turnover figures of its subsidiaries in Spain, Greece and Belgium. The Court of First Instance excluded the turnover figures corresponding to the companies established in the first two countries but did not do so in the case of the Belgian subsidiary, since it considered that the appellant had not

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

disputed that it controlled that subsidiary when it committed the infringements. In Ciments français's submission, that finding entails a manifest error of assessment, since it follows from the documents produced at first instance that it assumed control of the Compagnie des ciments belges from October 1990, and that it constitutes an error of law, since it infringes the principle of non-discrimination, as it led the Court of First Instance to give different treatment to undertakings in the same situation.

16. The appellant therefore requests the Court of Justice to set aside the contested judgment in part and to reduce the amount of the fine imposed in respect of the infringement committed in the market in grey cement from EUR 12.52 million to EUR 9.62 million.

17. The Commission contends that the plea is inadmissible, since it raises a question of pure fact. The Court of First Instance stated that the fact that the fine was calculated on total group turnover did not mean that the subsidiaries were required to pay it or that any question of discriminatory treatment therefore arose. Furthermore, the appellant did not raise this point in its appeal and cannot rely on its pleas at first instance, which were dismissed for the reasons just stated, to challenge reasoning in the contested judgment which does not go beyond a mere finding of fact.

18. In the Commission's submission, this plea is unfounded, because at first instance the applicant referred only to its letter to the Commission of 28 February 1994, which does not mention the date on which it took over its Belgian subsidiary. The error could not be classified as manifest since the documents which reveal it were only submitted with the applicant's reply. The issue before the Court of First Instance was not the impact on the calculation of the fines of the date on which Ciments français took control of its subsidiary but whether that taking of control should be regarded for the purposes stated and, consequently, whether the subsidiary's turnover should be included in the calculation of the fine.

19. The Commission maintains that the Court of First Instance's position on this question is inconsistent. If, according to paragraph 5040 of the judgment, the fine must be calculated on the total turnover of the undertaking responsible, which is the best indicator of its economic weight on the market, it is necessary to include the turnover figures of the subsidiaries which were part of the group on the date taken for the purpose of determining those figures, without reference to the time when the infringement was committed. That approach is

consistent with the dissuasive nature characteristic of financial penalties. According to the Commission, there is no reason to preclude the undertakings which were not part of the group at the time of the infringement.

B — The dates relevant to the determination of this plea

20. During the proceedings at first instance, Ciments français disputed the turnover figure taken into consideration in calculating the amount of the fines, casting doubt on the year taken as the reference year, [15] and also the inclusion of the turnover of its subsidiaries, because this test had the consequence that they were punished more severely than the subsidiaries of other companies which were fined separately from their parent companies. For that reason, 'Ciments français considers itself to have been the victim of discriminatory treatment inasmuch as the undertakings in its group, although not referred to in the contested decision, were fined more heavily than the undertakings acknowledged to have conducted themselves unlawfully'. [16]

21. The Court of First Instance answered that submission, stating that 'where the perpetrator of an infringement heads a group which constitutes an economic unit the turnover of the group as a whole must be taken into account when calculating its fine', since that turnover is the best indicator of its economic weight on the market. [17] However, it rejected the argument alleging discriminatory treatment, since the fine was imposed on the appellant, which is the person required to pay it, and not on any of its subsidiaries. [18]

22. Having established that general principle, the Court of First Instance found that Ciments français took control of its two Spanish subsidiaries and of its Greek subsidiaries when its participation in the infringements in respect of which fines were imposed had come to an end and for that reason decided to exclude from the basis used in calculating the fines amounts relating to sales by the three subsidiaries during the reference business year. [19] However, it did not apply the same test in

15 — This question formed the subject-matter of a quarter of the fourth plea in law, which was declared manifestly unfounded by order of 5 June 2002.

16 — See paragraph 5038 of the judgment. See also paragraphs 5033 and 5034.

17 — See paragraph 3040 of the judgment under appeal.

18 — See paragraph 5049.

19 — See paragraphs 5045 to 5047 of the contested judgment.

respect of the Compagnie des ciments belges, because the applicant did not dispute that it controlled that subsidiary when it committed the relevant infringements. [20]

23. However, the administrative file and the papers before the Court of First Instance contain documents which show that Ciments français recognised on a number of occasions that until October 1990 it did not control the Compagnie des ciments belges, namely:

1. in a letter sent to the European Commissioner responsible for competition matters on 28 November 1994, the chairman of Ciments français states that the Belgian undertaking was taken over between May and October 1990. Ciments français produced this document at first instance, as an annex to its reply; [21]

2. in the Decision, [22] the Commission itself states that '[i]n 1990 [Ciments français] took control of the Belgian producer [SA Compagnie des ciments belges]';

3. in the application [23] and in the reply, [24] Ciments français refers to 1990 as the year in which it took over its subsidiaries;

4. in a document of 22 September 1998 sent by the appellant's legal representatives to the Court of First Instance in response to a question put by the Judge-Rapporteur at the hearing, the documents in the file which proved the date on which it assumed control of the Belgian subsidiary file were indicated.

C — A manifest error of fact which must be corrected

24. As I have just stated, the Court of First Instance deducted from the basis for the calculation of the fines imposed on Ciments français the volume of sales of its Spanish and Greek subsidiaries, since it did not control them when it committed the infringements in respect of which it was fined. However, the Court of First Instance did not do so in respect of the Belgian subsidiary, because Ciments français '[did] not dispute' that it controlled that subsidiary when it committed the infringements.

20 — See paragraph 5044.

21 — It also submitted this document with the application initiating the appeal (Annex 3).

22 — See recital 5, paragraph 7(g), third indent, second subparagraph.

23 — P. 102, *in fine*, and p. 103.

24 — P. 46, final paragraph.

25. The expression 'does not dispute' entails a subjective dimension which cannot be known to the Court of Justice, since none of the parties has said that the appellant expressly disputed during the judicial proceedings that it controlled the Belgian cement manufacturer when it participated in the unlawful conduct. However, it also entails an objective aspect, which is the one on which the Court of First Instance relied.

26. The solution arrived at in the case of the Spanish and Greek subsidiaries came about because it was shown that Ciments français did not yet control them when the unlawful conduct took place. It must be inferred, therefore, that the reason for the solution adopted in respect of the Compagnie des ciments belges was that the appellant did not provide the same proof.

27. However, the Decision itself states that control over the Belgian subsidiary, like control of the other three subsidiaries, was taken during 1990; and the appellant informed the Court of First Instance of this in its reply and in the written answer to the request for information put by the Judge-Rapporteur at the hearing. It is an error which, moreover, is made manifest by virtue of a document which was discussed in the proceedings from the outset, namely the Decision itself. Accordingly, the considerations which the Commission puts forward in the present appeal in respect of the time when the documents revealing the error were submitted during the proceedings at first instance are irrelevant.

28. I am aware that an appeal is a procedural instrument for the determination of the law, during which the facts established by the Court of First Instance are not amenable to review. [25] However, the Court of Justice may, exceptionally, intervene in that regard 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.

29. In the latter case, the appraisal of evidence, because it is illogical, arbitrary or implausible, would interfere with the rules of healthy criticism. That test was laid down by the Court of Justice in its judgment of 2 March 1994 in *Hilti* v *Commission*, [26] paragraph 42 of which reads: 'the appraisal by the Court of First Instance of

25 — See point 27 of my Opinion in Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281 and the judgments cited at footnote 17 of that Opinion, and also paragraph 19 of the judgment in *Ismeri Europa* 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.

26 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667.

the evidence put before it does not constitute (*save where the clear sense of that evidence has been distorted*) [27] a point of law which is subject, as such, to review by the Court of Justice'. Shortly afterwards, that test was decisively adopted in the judgment of 1 June 1994 in *Commission* v *Brazzelli Lualdi and Others*, [28] in which it was held that '[t]he Court of First Instance thus has exclusive jurisdiction to find the facts *except where the substantive inaccuracy of its findings is apparent from the documents submitted to it*'. [29] It is now found in a well-established and undisputed line of decisions. [30]

30. It may be inferred from all the foregoing that the Court of First Instance erred in assessing the evidence, since it is clear from the Decision itself that Ciments français did not control its Belgian subsidiary until 1990, the date on which, as the Court of First Instance itself recognises, the appellant had desisted from the conduct in respect of which fines were imposed. That error, which must be corrected, has a legal consequence, the same consequence as the Court of First Instance applied to Ciments français's three other subsidiaries: the figures for sales by the Compagnie des ciments belges during 1992 must be excluded from the basis for calculating the fines.

27 — Emphasis added

28 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981.

29 — Paragraph 49. Again, emphasis added.

30 — See Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 21, and *Moccia Irme and Others* v *Commission*, paragraph 78. See also the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 39.

31. The Court of Justice should therefore uphold this plea in law.

32. In order to convince the Court of Justice that this complaint is inadmissible, the Commission has indulged in sophistry, confusing the arguments relating to paragraphs 5044 and 5047 of the contested judgment and those which the appellant put forward at first instance concerning the discrimination which, it alleged, was suffered by its subsidiaries by comparison with the subsidiaries of other companies because their turnover figures were included in the calculation of the fines, which were rejected at paragraph 5049. When Ciments français speaks of discrimination, [31] it does so in a different sense, since it is referring not to the unequal and unjustified treatment of its subsidiaries by comparison with the subsidiaries of other companies, as the Commission alleges, but to that of the companies belonging to the appellant, the two Spanish companies and the Greek company, on the one hand, and the Belgian cement manufacturer, on the other hand, owing to the fact that the latter company's turnover was not excluded from the basis for the calculation of the fine.

2 — *The principle of proportionality (third plea in law)*

A — Arguments of the parties

33. Ciments français maintains that the Commission infringed the principle of pro-

31 — First paragraph of point 2.4.

portionality by imposing a very high fine on it without ascertaining the extent to which it participated in the various infringements. The Court of First Instance annulled three of the complaints against it but did not reduce the fine.

34. The Commission contends that the position adopted by the Court of First Instance is the direct consequence of its having rejected the appellants' argument that the fines had to be proportionate to the practices employed by each of them in implementing the Cembureau agreement. In the judgment, the Court of First Instance approved the analysis carried out in recital 65, paragraph 3 of the Decision, where it is stated that the penalties were being imposed not in respect of the specific measures taken to implement the agreement but of overall participation in its implementation. Accordingly, it did not reduce the fine on the basis of the annulment of certain parts of Articles 3 and 4 of the Decision. The fine, in so far as it relates to the market in grey cement, is established in Article 1.

35. The Commission further states that at paragraphs 4951 to 4963 of the judgment under appeal the Court of First Instance approved the tests used in setting the individual fines in the Decision and noted that they made it possible to alter the fine according to the seriousness of the conduct of each undertaking and the role it played in the cartel, in accordance with Article 15(2) of Regulation No 17. That assessment of elements of fact falls outside the jurisdiction of the Court of Justice.

36. Last, the Commission submits that at paragraphs 4814 and 4815 of the contested judgment the Court of First Instance reduced the fines in proportion to the reduction in the duration of the infringement and in doing so correctly applied the abovementioned provision of Regulation No 17.

B — The tests used by the Commission in imposing the fines

37. 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.

38. 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, Article 1 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.

39. The Commission imposed separate penalties for infringements relating to each market. [32]

40. As regards the market in grey cement, the only market in which anti-competitive conduct was imputed to Ciments français, 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 implementing it were connected. [33] That approach is legitimate and is based on the Commission's power to adopt a single decision covering several infringements. [34]

41. It considered, furthermore, that all the undertakings and associations to which the Decision was addressed adhered to the Cembureau agreement and it set out the evidence used to establish the participation of each of them. Thus, in regard to Ciments français, it concluded that it represented its national association as Head Delegate at the meetings held by Cembureau on 14 January 1983, 19 March and 7 November 1984, and acted in that capacity at the time when the agreement was applied. [35]

42. '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. [36]

43. In accordance with the foregoing, the Commission identified two groups of undertakings and associations: first, those involved in the Cembureau agreement and,

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

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

34 — 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.

35 — See the Decision, recital 65, paragraph 3(b) and paragraph 9(a), second indent.

36 — 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).

second, the other undertakings, which were less involved and whose responsibility was therefore lesser. [37]

44. Within the former category, the Commission distinguished three subgroups: (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 Ciments français in this group); (2) a second subgroup 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 subgroup, made up of the companies which had taken part in measures implementing the agreement and designed to protect home markets. [38]

45. 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. [39]

46. 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. [40]

47. The Court of First Instance upheld Ciments français'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 73 months. [41] 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. [42]

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

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

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

40 — 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 judgment.

41 — See paragraphs 4807 to 4814 of the judgment, in particular the fifth indent of paragraph 4814.

42 — See paragraph 4815 and the seventh indent of paragraph 12 of the operative part of the judgment under appeal.

C — Compliance with the principle of proportionality

48. 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.

49. 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), *in fine*, 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.

50. 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. [43]

51. 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. [44]

52. 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.

43 — See Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 120, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33; see also the order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

44 — 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).

53. 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.

54. 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, [45] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each. [46] 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.

55. 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 of 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.

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

57. 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.

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

46 — See *Suiker Unie and Others* v *Commission*, paragraph 623, and Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 110.

58. The reasons stated by the Commission, and approved by the Court of First Instance,[47] 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',[48] were classified as less serious.

59. Consequently, if the criteria used by the Commission are consistent with the principles governing the imposition of fines, the reduction which the Court of First Instance made by following the same rules also satisfied them.

60. In other words, the criterion consisting in punishing, as regards the market in grey cement, participation in the Cembureau agreement (Article 1 of the Decision), and disregarding the specific implementing measures applied (Articles 2 to 6 of the Decision), is lawful. So is the Court of First Instance's view that it should not reduce the fines imposed on those undertakings which, although they were not considered to have taken any of the isolated implementing measures imputed to them in the Decision, participated in the agreement to the degree found by the Commission in its Decision.[49]

61. In accordance with the foregoing, this plea should be rejected as unfounded.

V — Recapitulation and proposal

62. At point 31, I suggested that the Court of Justice should uphold the second of the pleas in law put forward by Ciments français, so that the contested judgment should be set aside in so far as it sets at EUR 12.52 million the fine corresponding to the infringements committed by that undertaking in the market in grey cement.

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

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

49 — As regards Ciments français, see recital 65, paragraph 3(b), of the Decision.

63. Having found the judgment under appeal unlawful, the Court of Justice, which has all the material necessary to give judgment, may determine the appellant's claims, [50] if only for reasons of procedural economy. [51]

64. Since the application must be granted in part, it is appropriate to reduce the fine imposed on Ciments français in Article 9 of the Decision in respect of its anti-competitive conduct in the market in grey cement to EUR 9.62 million. That is the correct calculation, made by the appellant at point 2.4 of the appeal, based on information provided at first instance and on appeal and not disputed by the Commission.

65. I see no reason to alter the order for costs made by the Court of First Instance. [52]

VI — The costs of the appeal

66. In accordance with the first paragraph of Article 122, read with the first subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice, the parties should bear their own costs in respect of the appeal.

50 — In my Opinion in Case C-310/97 P *Commission* v *Assidomän Kraft Products and Others* [1999] ECR I-5363, footnote 70, I pointed out that this is an option recognised in Article 54 of the EC Statute of the Court of Justice, which provides: 'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.' One of the cases in which the opportunity offered by that provision may be taken is that of error *in iudicando*, provided that the account of the facts is complete and sufficient to give final judgment and no evidential measures are necessary. This course appears to have been taken in the case-law of the Court of Justice, although the Court has never stated for what reason it considers that the state of the proceedings enables it to give judgment itself, confining itself to laconic statements such as 'this is the case' (Case C-345/90 P *Parliament* v *Hanning* [1992] ECR I-949, particularly at I-989, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, particularly at I-2648).

In short, it will be appropriate for the Court of Justice to give judgment on the substance where it is clear from the documents before it that the case is ready for judgment (see J. Héron, *Droit judiciaire privé*, Montchrétien, Paris, 1991, p. 517; J. Vincent and S. Guinchard, *Procédure civile*, Dalloz, Paris, 1994, p. 922), in view of the fact that the Community legislature has created it as a modern court of cassation, enjoying full freedom to give final judgment where it considers that it is necessary to do so (see J. Nieva Fenoll, *El recurso de casación ante el Tribunal de Justicia de las Comunidades Europeas*, Bosch, Barcelona, 1998, p. 430).

51 — The Decision was adopted in 1994.

52 — See paragraphs 5119 to 5123, 5131 and 5132 of the judgment under appeal.

VII — Conclusion

67. Having regard to the foregoing considerations, I propose that the Court should:

(1) uphold the second plea in law put forward by Ciments français;

(2) set aside the contested judgment in part (judgment of the Court of First Instance of the European Communities of 15 March 2000 in Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-66/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95);

(3) uphold in part the application submitted by Ciments français and, accordingly, annul Article 9 of the Decision in so far as it concerns that undertaking;

(4) reduce the fine imposed on it in respect of its anti-competitive conduct in the market in grey cement to EUR 9.62 million;

(5) order the parties to bear their own costs.