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

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I — Facts

1. This is an appeal by Italcementi SpA ('Italcementi') 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]

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

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.

into European cement producers and trade associations in the sector pursuant to Article 14(2) and (3) of Regulation No 17, First Regulation implementing Articles 85 and 86 of the EC Treaty (now 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 Italcementi and other undertakings in the sector. [5]

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

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

— By Decision 94/815/EC of 30 November 1994 ('the Decision'), [8] the Commission found that Italcementi had infringed Article 85(1) of the EC Treaty [9] by its anti-competitive conduct in participating:

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

3 — OJ, English Special Edition 1959-62, p. 87.
4 — Cases IV/33.126 and 33.322 — Cement.
5 — Paragraphs 2 and 3 of the judgment under appeal.
6 — Paragraphs 3, 9 and 12 of the judgment.
7 — Paragraphs 4 to 6 of the judgment.
8 — OJ 1994 L 343, p. 1.
9 — Paragraph 22 of the judgment.

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

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

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

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

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

(5) from 9 June 1986 to 26 March 1993, in an agreement on the setting-up of the Joint Trading Company, Interciment S.A., having as its purpose the carrying-out of the persuasive and dissuasive measures against those threatening the stability of the member countries' markets (Article 4(2));

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

(7) from 3 April 1987 to 3 April 1992, in an agreement relating to the contracts and agreements signed on 3 and 15 April 1987 having as their aim the prevention of imports of Greek cement by Calcestruzzi (Article 4(3)(b));

(8) within the framework of the European Cement Export Committee, from 14 March 1984 to 22 September 1989,

in concerted practices relating to the exchange of information on the supply and demand situation in the importing third countries, the export prices chargeable, the import situation in the member countries and the supply and demand situation on the home markets and designed to prevent incursions by competitors on respective national markets in the Community (Article 5).

(9) 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 production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual prices for white and grey cement and also export prices (Article 7);

— The Commission ordered Italcementi to bring the infringements in question to an end and to refrain from any agreement or concerted practice contrary to free competition in the markets for grey cement and white cement (Article 8), imposed two fines, one of ECU 34 492 000 and the other of ECU 1 088 000, 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. Italcementi 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. Italcementi claimed, primarily, that the Decision should be declared void, in whole or in part, in so far as it concerned Italcementi. In the alternative, it claimed that the Court of First Instance should annul or reduce the fines imposed on it. It also sought annulment of the Commission Decision of 23 September 1993 in so far as it terminated the proceedings initiated against 12 German and six Spanish undertakings in respect of the objections relating to the international part of the statement of objections. In any event, it requested that the Commission be ordered to pay the costs of the proceedings.

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 each of the undertakings concerned, now the applicants;

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

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

(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]

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

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

12 — Ciments Luxembourgeois S.A.

13 — Paragraphs 169 and 170 of the judgment.

8. In the judgment under appeal, the Court of First Instance granted Italcementi'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 before 19 March 1984 and after 3 April 1992;

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

— [annulled] Article 2(2) of Decision 94/815 as regards the applicant in so far as it [found] that the periodic circulation of information between Cembureau — The European Cement Association and its members [had] related, so far as concern[ed] the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concern[ed] Luxembourg, the prices, inclusive of rebates, of that country's producer, and in so far as it [found] that the applicant [had] participated in the infringement before 19 March 1984;

— [annulled] 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;

— [annulled] 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;

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

— fixe[d] the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 25 701 000;

— dismisse[d] the remainder of the application;

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

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

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

(1) in the Cembureau agreement on non-transhipment to home markets of grey cement (Article 1 of the Decision) between 19 March 1984 and 3 April 1992;

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

(3) in the circulation of information on the Danish and Irish producers' individual price-lists, on the trade price-lists in force in Greece, Italy and Portugal, and on the average prices charged in Germany, France, Spain and the United Kingdom (Article 2(2)(b) of the Decision) between 19 March 1984 and 31 December 1988;

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

(5) in the agreement on the setting-up of the Joint Trading Company, Interciment S.A. (Article 4(2) of the Decision) between 9 June 1986 and 7 November 1988;

(6) in the concerted practices intended to withdraw Calcestruzzi as a customer from the Greek producers (Article 4(3)(a)) between 9 September 1986 and 15 March 1987;

(7) in the agreement relating to the contracts and agreements signed on 3 and 15 April 1987 (Article 4(3)(b)) between 3 April 1987 and 3 April 1992;

(8) in the concerted practices in the market in white cement (Article 7) between 6 May 1982 and 26 May 1988.

III — The procedure before the Court of Justice

10. Once 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 fourth, fifth and sixth pleas in law.

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

IV — The appeal

12. Italcementi claims that the Court of Justice should set aside the judgment under appeal in its entirety or at least in part and annul the Decision and the fine imposed on it. In the alternative, it requests that the case be referred back to the Court of First Instance for a fresh decision. In any event, it asks that the Commission be ordered to pay the costs of both sets of proceedings.

13. The Commission contends that the appeal should be dismissed in its entirety and the contested judgment upheld and that Italcementi should be ordered to pay the costs of the appeal.

14. In support of its claims, the appellant puts forward nine pleas in law, some of which have different bases. Of those pleas, as I have just stated, three have been dismissed.

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

1 — *Pleas seeking to have the judgment set aside and the Decision annulled*

A — Procedural grounds

(1) The right of access to all the documents during the administrative procedure (first plea in law)

16. Italcementi breaks this plea down into two main arguments. The first, more

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

abstract, argument concerns the characterisation of the right of access to the file in an administrative procedure in which sanctions are available and the consequence which must be linked with its breach. [15] In the second argument, which is submitted in the alternative, the appellant classifies as incorrect, arbitrary and unfounded the actual analysis carried out by the Court of First Instance in order to determine whether its right of defence was infringed. [16]

(a) The right of access and the consequences of a breach thereof (first argument of the first plea in law)

(i) Arguments of the parties

17. Italcementi begins by taking into consideration a fact which is not in issue, namely that the parties were not given proper access to the file during the administrative procedure.

18. Proceeding from that indisputable fact, Italcementi argues that the guarantee of being made aware of everything that has been submitted is a manifestation of the fundamental right of defence, which must be satisfied in the administrative procedure itself and not afterwards. Furthermore, the undertakings facing the charges should at any time have knowledge of the proceedings equal to that enjoyed by the Commission and that imbalance cannot be made good later during the judicial procedure. Having found that procedural irregularity, which was incapable of being repaired, the Court of First Instance was required to annul the Decision. By not doing so and appraising the way in which the documents to which access was not given during the administrative stage were relevant to the Decision, the Court of First Instance acted unlawfully and arbitrarily, replacing the Commission's assessment by its own, which, moreover, is not amenable to review by the Court of Justice. That conduct leaves the decision to give access to the file to the discretion of the Commission and upsets the balance of powers.

19. The appellant concludes by saying that the Court of First Instance's approach entails de facto a reversal of the burden of proof; it changes the roles and imposes on the undertakings subject to the procedure an obligation to demonstrate that the documents of whose content they were thus far unaware were capable of destroying the Commission's assessments.

15 — Paragraphs 29 to 56 and 99 to 106 of the application.

16 — Paragraphs 57 to 98 of the application.

20. The Commission contends that the Court of First Instance merely considered whether Italcementi's right of defence was infringed during the administrative procedure. It did not organise fresh access to the file, but it carried out the same assessment as in *Solvay* v *Commission* [17] and *ICI* v *Commission*, [18] i.e. it considered whether, in the light of the documents which were not made available, there was any breach of the appellant's defence. Accordingly, there was no reversal of the burden of proof, since the applicants were only asked to show that the documents which the Commission did not allow them to see could have been of some use for their defence.

21. Italcementi states in reply that a breach of a fundamental right gives rise to a sanction irrespective of the damage caused. The Court of First Instance's approach is tantamount to denying the impugned undertakings the right to full access to the file. The Court cannot evaluate *ex post facto* the relevance of the documents which they were not allowed to consult during the administrative stage. The time which elapsed between the point at which it was appropriate to grant access to the file and the point at which the Court of First Instance carried out its assessment rendered the judicial examination meaningless. The distinction drawn between those documents according to their relevance to the defence is not justified. Before the Commission adopts the decision imposing sanctions, all the documents are equally relevant. The impugned undertakings must examine them, select them and submit argument in the light of their content; those operations form part of the investigation. It was for the Commission to admit them or to reject them under supervision of the Court, which cannot be exercised artificially at a point in time prior to that at which the administration adopted its decision.

22. The Commission states in reply that the Court of First Instance's objective was to protect the right of defence of the applicant undertakings and it was prepared to annul the Decision, in whole or in part, in so far as access to a document in the file which remained inaccessible proved to be useful to the defence; in fact it examined all the documents cited by Italcementi before deciding that none of them was of the slightest use for its interests. The appellant's formalistic approach ignores the nature and function of the right of defence. If there is no actual restriction on the means of defence, there is no infringement of the right of defence.

(ii) The legitimacy of the measures of organisation of procedure ordered by the Court of First Instance

23. In response to the claims concerning the lawfulness of the administrative pro-

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

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

24. In its judgment, the Court of First Instance analysed the documents indicated by the applicants and the observations submitted by them and, in Italcementi's case, reached the decision set out at paragraph 34 of the operative part and at point 8 of this Opinion. The Court of First Instance proceeded according to the following principle: the applicants' rights of defence would have been infringed if there had been even a small chance that the outcome of the administrative procedure might have had been different if they could have relied on the documents to which access had been denied.[20]

25. Italcementi questions that procedure and contends that the 'measures of organisation of procedure' ordered by the Court of First Instance were unlawful.

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

27. That is the import of the provisions of Regulation No 17, in particular Article 19, and of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under [Articles 81 EC and 82 EC];[22] and that is the scope given to them by the case-law of the Court of Justice[23] and the Court of First Instance.[24] The European

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

20 — See paragraphs 241 and 247 of the judgment.

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

22 — OJ 1998 L 354, p. 18. This regulation replaced Regulation No 99/63 EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), in force on the dates on which the administrative procedure was conducted in the present case.

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

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

Court of Human Rights has extended the scope of the guarantees laid down in Article 6 of the European Convention on Human Rights to administrative proceedings of a disciplinary nature. [25]

The Charter of Fundamental Rights of the European Union [26] takes the matter further, since, in addition to providing that an accused is entitled to defend his legal position in a fair and public judicial procedure, before an independent and impartial tribunal previously established by law, [27] it also provides that every person has the right to be heard by the institutions of the European Union before any individual measure which could affect him or her adversely is taken and the right to have access to his or her file. [28]

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

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

30. In short, defects in the procedure do not have a life of their own in isolation from the substance of the case. If a decision taken in the wake of a defective procedure

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

26 — OJ 2000 C 364, p. 1.

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

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

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

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

is annulled because, owing to the defects in the procedure leading to its adoption, it is wrong in substance, the decision is annulled because it is incorrect in substance, not because of the procedural defect. The defect in form assumes an independent existence only when, because it occurred, it is impossible to form an opinion about the decision which was adopted.

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

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

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

34. In proceeding as it did, the Court of First Instance did not fail to follow the case-law of the Court of Justice. In *Hercules Chemicals* v *Commission*, cited above, the Court of Justice held that when there has been a breach of the rights of defence, it cannot be remedied by belated access to the documents in the file which allows the undertakings concerned to derive from them pleas and arguments in support of the forms of order they are seeking since it does not put them back in the situation they would have been in if they had been able to rely on those documents in presenting their written and oral observations to the Commission. [32]

35. The Court of First Instance did not purport to remedy *ex post facto* a breach of

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

32 — Paragraphs 78 and 79.

the rights of defence which had already taken place, but confined itself, initially, to ascertaining whether there had been such a breach. [33] Where it considered that there had, it annulled the Decision. [34] On the other hand, where an applicant had not been deprived of its rights of defence, it held that the procedural defect committed while the administrative file was being constituted was, all in all, irrelevant.

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

37. Nor does that approach entail a reversal of the burden of proof. That principle, which is of a procedural nature, is at the service of the fundamental right to the presumption of innocence, which is of a substantive nature, but the two must not be confused.

38. The presumption of innocence means that there can be no punishment if guilt is not shown. Consequently, whoever makes an accusation must show that the person accused has carried out the acts constituting the offence and also that the additional elements of fact and of law which make it possible to find him responsible are present. It is at that point that the presumption of innocence and the burden of proof meet. The Commission imputed certain anti-competitive practices to the applicant undertakings and used various pieces of evidence to support the charges. In principle, therefore, it satisfied the procedural rule which is the burden of proof. A separate issue, which it is not appropriate to address now, is whether the documents used are capable of rebutting that presumption.

39. Following its adoption, the Decision was the subject of proceedings brought by, *inter alios*, Italcementi, which sought its annulment on the ground that it had been the victim of a breach of the rights of defence in so far as it had not had access to all the documents in the file and, in particular, to those which could have exonerated it. Under the principle of the burden of proof, it was for Italcementi to show the presumptions of fact of that claim: first, that it had not been given access to all the

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

34 — As was the case with Cedest S.A. (Case T-38/95): see paragraphs 2211 and 2286 of the judgment.

documents used by the Commission in the proceedings and, second, that that fault had breached its rights of defence.

40. I shall rephrase that premiss: once the Commission fulfilled the obligation placed on it, it was for the undertakings and associations concerned to invalidate the incriminating evidence, using all the means available to them. Applying the procedural test laid down in paragraphs 241 and 247 of the judgment, the Court of First Instance held that the procedural defect, the lack of access to those documents during the administrative procedure, was irrelevant from the aspect of the right of defence.

41. There was therefore a strict application of the principle of the burden of proof, so that Italcementi's abstract and formalistic approach, namely that any procedural error, no matter how slight, entails the annulment of the Decision, without any consideration of the impact which the defect had on the substantive correctness of the decision adopted, is inadmissible. This approach would lead, without any additional guarantee for the rights of the persons concerned, to administrative paralysis, to the detriment to the principle of efficiency.

(b) The alleged incorrect, arbitrary and unfounded nature of the analysis carried out by the Court of First Instance (second argument in the first plea in law)

(i) Arguments of the parties

42. In Italcementi's submission, the Court of First Instance's approach is arbitrary and unfounded, for three reasons: first, because there is no justification for limiting the analysis of the possible usefulness of the documents not disclosed during the administrative procedure to those objectively connected to the charges; second, because the so-called 'direct documentary evidence' is actually weak and the Court of First Instance misapplied the presumptions; and, last, because, in carrying out the actual examination of the documents relied on, the Court of First Instance itself departed from the test laid down at paragraph 247 of the judgment.

43. The Commission has merely asserted that this part of the plea is inadmissible, in so far as it concerns the assessment of the evidence which is the responsibility of the Court of First Instance, and also that it is unfounded, since Italcementi ascribes to the judgment findings not made therein.

44. In the interest of coherence, I propose to answer the second reason put forward by the appellant first.

(ii) The so-called 'direct (inculpatory) evidence' and its appraisal

45. This complaint has a manifestly inadmissible aspect, which Italcementi states it is not addressing, but which in reality is a presupposition of its line of argument and is to be found in various passages of the application on appeal, especially when it speaks of the 'weakness' of the evidence used against it. No matter whether that evidence is weak, direct, inferred from references or based on presumptions, the Court of Justice cannot in an appeal review the assessment of the evidence by the Court of First Instance or express value-judgments on the factual consequences drawn therefrom.

46. The Court of Justice can intervene in that regard only if, in the production of evidence, a provision or a general principle of Community law has been infringed or if, when the evidence was assessed, there was an infringement of the rules governing the burden of proof and the appraisal of evidence owing to the latter being illogical or arbitrary and therefore such as to distort the evidence. The Court of Justice can only repair an infringement of law by the Court of First Instance and never establish the facts, without prejudice to its jurisdiction to review their legal classification. [35] None of the above occurred in this case.

47. So far as Italcementi was concerned, the Court of First Instance adopted the following approach: on the basis of certain established facts (that the various meetings were held; that Italcementi was present at some of them; that anti-competitive agreements were adopted and approved during those meetings; that Italcementi failed to indicate expressly that it dissented from or distanced itself from what was decided; that it participated in the exchanges of price information; that it participated in the setting-up of the European Test Force and of Interciment; that it took part in the Calcestruzzi actions; and that it entered into an agreement with Cementir and Uicem), it found that Italcementi formed part of the cartel. Not only does that logical process fail to display any of the defects which would justify a review by the Court of Justice, but, furthermore, it is reasonable, it is consistent with the rules of human discretion and it appears to be adequately explained in the judgment. [36]

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

36 — See paragraphs 1350, 1351 and 1353, for the Cembureau agreement; paragraphs 1497 to 1500, for the exchanges of price information; paragraphs 2745 to 2753, for the setting-up of the European Task Force, and for the setting-up of Interciment, paragraph 2997 et seq.; finally, paragraphs 3264 to 3270, for the Calcestruzzi actions, and paragraph 3345 et seq. for the agreement on the contracts with Calcestruzzi.

48. If a company participates with its competitors in the market in one or more meetings from which an anti-competitive agreement emerges, the technique of presumptions makes it possible to infer, in the absence of a manifest expression to the contrary, that that company forms part of the cartel, especially if it subsequently takes part in measures to implement the anti-competitive agreement.

49. Proof by presumptions is based on the logic of reason and also on common understanding and experience. For that purpose, it is necessary to proceed from certain proven events which, by a mental process consistent with the rules of human discretion, make it possible to consider that certain facts are proven.

50. The Court of Justice has accepted that, on the basis of this type of evidence, an undertaking can be held to have participated in an anti-competitive agreement, without prejudice to the fact that that presumption, like all those which are relative, may be rebutted by other evidence. [37] I would add that, when it is employed in a sector such as protection of competition in the internal market, in which it is necessary to face up to complicated conduct, manifested in nimble behaviour by complex organisational structures, proof by presumptions is a virtually indispensable instrument for determining the truth.

(iii) The reasonableness of the criterion used by the Court of First Instance in assessing the exculpatory evidence

51. The decisive factor in Italcementi's pleadings, the foundation of its claim, is the assertion, which it ascribes to the Court of First Instance, that the finding of infringement was made 'solely on specific documentary evidence'. That assertion [38] cannot be removed from its context. That assertion is found in the contested judgment, but it is accompanied by a negation, to the effect that the Decision is not based on 'parallel conduct on the market', [39] which is included in the text in order to invalidate the documents capable of providing an alternative explanation for the conduct of the undertakings concerned. [40]

37 — In Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 96, the Court of Justice held that the Court of First Instance could lawfully conclude, without unduly reversing the burden of proof, that since it was established that Anic had participated in the meetings at which price initiatives had been decided on, planned and monitored, it was for Anic to adduce evidence that it had not subscribed to those initiatives. It made findings to the same effect in Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181.

38 — See, for example, paragraphs 260 and 263 of the judgment.

39 — Paragraph 264.

40 — See, generally, paragraphs 264 and 116. In Italcementi's particular case, reference should be made to paragraphs 1257, 1260, 1262 and 1264.

52. That context reveals the full import of the test used by the Court of First Instance, which consisted in restricting the range of evidence capable of refuting the findings of fact made by the Commission to that contained in 'documents relating directly to the infringements' imputed to the applicants in the Decision. [41] That is to say, the Court of First Instance was correct to apply the rule that there has been a breach of the applicants' rights of defence if, during the administrative procedure, they were denied access to evidence capable of contradicting the evidence used by the Commission, [42] and not only of providing additional or alternative explanations, which may be perfectly reasonable, but which do not negate the documents relied on in the Decision.

53. One example is sufficient to illustrate the point. The Commission concluded that anti-competitive agreements had been adopted at the meetings between European cement producers held on 14 January 1983 and 19 March and 7 November 1984 (Italcementi only participated in the second of those meetings); and the Commission did so on the basis of direct documentary evidence. [43] It seems reasonable to establish the extent to which the rights of defence were infringed by reference to the evidence which would have been capable of rebutting the content of such evidence, which is the requirement established by the Court of First Instance when it spoke of an 'objective link' with any of the objections upheld in the Decision. [44]

54. The appellant itself appears to agree with that approach. In the document containing the appeal, it states that the decision to reject 'documents wholly unrelated to the case' [45] is correct and, having regard to the way in which the administrative procedure was conducted, such documents are those which have no connection with the direct evidence. On the basis of the documents in the file, the Commission concluded that at the Head Delegates meeting of 14 January 1983, which Italcementi did not attend, Cembureau and its members reached an agreement on non-transhipment to home markets and the regulation of international sales, the terms of which were confirmed at other meetings, including that held on 19 March 1984, which Italcementi did attend. Consequently, the appellant's rights of defence could have been infringed only if it had been impossible to use in rebuttal evidence which showed that the agreement concerned had not been adopted and confirmed at those meetings; which proved that the appellant had not attended the meetings; or which made clear that although the appellant was present it dissociated itself from what was agreed.

41 — Paragraph 262 of the judgment under appeal.

42 — See paragraph 263 of the judgment.

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

44 — See paragraph 247 of the judgment under appeal.

45 — Point 70.

55. Once it had been proved that the agreement had been adopted and confirmed at those meetings, the fact that there was evidence capable of providing an alternative economic explanation for Italcementi's conduct became irrelevant and, consequently, the fact that that evidence was not consulted during the administrative procedure was not capable of breaching the appellant's rights of defence. A careful reading of paragraphs 1256 to 1267 of the judgment shows that the documents which the appellant was unable to consult were documents which, as they did not claim to refute the direct evidence used in the Decision, could be classified as 'extraneous' and as unimportant to its defence.

(iv) Compliance by the Court of First Instance with its own criteria of assessment: The inculpatory evidence which remained inaccessible

56. Italcementi complains that in the judgment which it is challenging there is a discrepancy between the theoretical approach of the criterion of assessment adopted at paragraph 247 and its practical application. By way of demonstration, it cites and examines Cases T-38/95 *Cedest, S.A.*, T-52/95 *Compañía Valenciana de Cementos Portland, S.A.* and T-56/95 *Castle Cement Ltd*, in which, although the applicant undertakings' rights of defence had been infringed because they were not granted access to exculpatory documents, the Court of First Instance did not annul the Decision but merely amended it.

57. That allegation is incorrect. In order to secure recognition of its own rights of defence, Italcementi claims that there has been breach of the rights of defence of others, which it is not entitled to do.

58. It further claims that its situation is the same, since in the judgment the Court of First Instance identifies a number of documents which were not disclosed, so that it did not use them in its defence during the administrative procedure. In its submission, when it made that finding of fact, the Court of First Instance should have declared that there had been a procedural error and annulled the Decision, without there being any need to examine those documents or to ascertain whether, in any event, the infringements in respect of which a penalty was imposed appeared to be adequately demonstrated.

59. By this circular route, the appellant reproduces an argument which has already received an answer: the argument as to whether the procedural defect should, irrespective of its importance, automatically lead to annulment of the decision adopted at the close of the procedure. I refer, therefore, to the considerations which I set out throughout Part IV(1)(A)(1)(a) above and, in particular, to the points at which I explained that the Court of First Instance did not take the place of the Commission but that it exercised its judicial power carefully by examining whether the procedural defect which the Commis-

sion undoubtedly made caused Italcementi to suffer the breach of its rights of defence which it alleges. Making use of its judicial power, examining the elements of fact and the legal arguments put forward by the applicant, the Court of First Instance provided an adequate and legally-founded solution.

60. Furthermore, Italcementi's reasoning displays a certain confusion. All its claims concerning the right of defence are connected with the fact that it was unable during the administrative procedure to consult and make use of documents which it would have been able to use as exculpatory evidence; however, those to which it now makes reference constitute incriminating evidence used by the Commission, which it did not have the opportunity to examine or to challenge before the Decision was adopted. [46] Clearly, the procedural rule must be different in each of those cases. In order to demonstrate the incoherence of the test defined at paragraph 247 of the judgment under appeal concerning the lack of access to the exculpatory evidence, there is no need to turn to the arguments set out in the actual judgment in order to answer the allegation that it was impossible to consult the incriminating evidence.

46 — See paragraphs 366, 376, 1111, 1112 and 2807 of the judgment.

61. The rule used by the Court of First Instance is also coherent: the incriminating evidence which the undertakings were unable to refute in the administrative procedure should not be used against them; when that evidence had been rejected, if there is no evidence that the infringement was committed, the Decision must be annulled, but if the infringement is sufficiently established, the procedural defect is unimportant. In order to explain the correctness of that approach, I refer to what I have already stated about the instrumental nature of the right of access to the administrative file and about the material dimension of the legal concept of being denied the right of defence.

62. For all the reasons stated above, this plea — the first — should be rejected as inadmissible and unfounded.

(2) The right of defence and the Commission's rejection of the 'national objections' (second plea in law)

63. Italcementi divides this plea into two. First, it complains that the fact that it was not given the opportunity to challenge the decision to drop the national objections

before the Decision was adopted breached its right of defence; [47] and, second, it claims that there is a contradiction between that decision to drop the national charges and the Decision, since the latter punishes the conduct referred to in the national objections. [48]

(a) The fact that the appellant was unable to challenge the decision to drop the national objections during the administrative procedure

64. From one aspect, this complaint is inadmissible. It is sufficient to read the application to realise that a good proportion of arguments which the appellant puts forward merely reproduce the reasoning put forward at first instance, without criticising the answer provided at paragraph 438 et seq. of the contested judgment.

65. It is also unfounded. The Court of First Instance stated that a decision which, like the decision to drop a charge, is the objective of the addressees of the statement of objections and which, by definition, is to their advantage, never constitutes a breach of the rights of defence. [49]

66. By way of exception, the Commission is required to give those concerned the opportunity to comment on the decision to drop the charge if, in spite of appearances, it does not drop the objections but amends them in such a way that they become more serious.

67. Italcementi submits that if it had had the opportunity to formulate allegations after it was informed that the national objections had been dropped, it would have been able to convince the Commission not to condemn the agreement in respect of Calcestruzzi as implementing the Cembureau agreement (Article 4(3)(b)).

68. However, the key is not found in the fact that Italcementi might have been able to persuade the Commission but in the time when it would have been able to do so. The fact that the charges in respect of national markets were dropped did not add anything to or take anything from the matter. [50] The imputation relating to the agreement between the appellant, Unicem and Cementir for Calcestruzzi to cease importing Greek cement was found, from

47 — It deals with this issue at points 113 to 120 of the application.

48 — Points 121 to 129 of the application.

49 — See paragraph 439 of the judgment, where the Court of First Instance cites the judgment in Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 14, where the Court of Justice recognised the Commission's power to drop the objections which it imputes to the undertakings concerned.

50 — See paragraph 443 of the judgment.

the outset, in the international part of the statement of objections [51] and are reflected in the part corresponding to the Italian market, in which there is a reference to the contacts of supply entered into with Calcestruzzi, so that the appellant could always allege and argue according to the mutual interdependence of the two objections and the need for them to follow the same fate.

69. When the Commission abandoned the national parts of the statement of objections, Italcementi had already had the opportunity to emphasise the alleged identity of conduct imputed in both parts of the decision. That context reveals the full import of the Court of First Instance's assertion that 'the comments which the applicant might have been able to make on the dropping of the national objections would clearly not have led the Commission to drop the international objection relating to the agreement between the Italian cement producers'. [52]

(b) the Decision

70. In order to examine this complaint, I must spend some time examining the so-called measures to protect the Italian market.

71. The Decision describes the infringements relating to those measures, which were taken within the context of the European Task Force or Cembureau Task Force.

72. The first, and more general, measure, which is referred to at Article 4(3)(a), consists in the concerted practices designed to withdraw Calcestruzzi, then the major Italian supplier of ready-mixed concrete, as a customer from the Greek producers, and from Titan in particular. That infringement was imputed to Italcementi, to Unicem and to Cementir, and also to the other participants in the cartel. [53]

73. The second, more specific, measure consisted in the agreement adopted by the three Italian manufacturers to prevent Calcestruzzi from importing cement from Greece. Its aim was to face up to a threat that 1.5 million tonnes of Greek cement would be imported by Calcestruzzi. That infringement, which is referred to at Article 4(3)(b), was imputed only to the three Italian producers. [54]

51 — See the considerations on the matter which I set out below.

52 — Paragraph 447 of the judgment.

53 — On the existence of that infringement, see paragraph 3138 et seq. of the judgment.

54 — The reasoning of the Court of First Instance concerning the existence of this infringement is set out at paragraph 3345 et seq. of the judgment.

74. In the international part of the statement of objections there is a reference to two infringements connected with the measures to protect the Italian market adopted within the European Task Force or Cembureau Task Force. Point 61(h)(iv) [55] states: 'The pressure exerted on Calcestruzzi and the non-performance by Calcestruzzi of the contract for the purchase of Titan cement form part of the dissuasive measures taken by the Task Force *and are the result of concerted practices between the Italian producers Italcementi, Unicem and Cementir and between them and the other participants in the Cembureau Task Force*', [56] whose aim was to deprive the Greek market of a customer who was important to their penetration of the Italian market.

75. The national objection corresponding to Italy related to the contracts and agreements for the supply of cement signed by Unicem, Italcementi, Cementir and Calcestruzzi on 3 and 15 April 1987. Within the framework of those contracts, they set up a joint subsidiary called Società Italiana per le Promozioni ed applicazioni del Calcestruzzo SpA (SIPAC). [57] By those agreements, the three producers undertook to meet all the cement requirements of the Calcestruzzi Group and to apply the price reductions specified. For its part, Calcestruzzi undertook to channel half of the price reductions to the joint subsidiary, which was to invest the sums in ready-mixed concrete companies or related activities, and to obtain at least 80% of its cement requirements from Italcementi, Unicem and Cementir or from companies designated by them. If Calcestruzzi's cement purchases were less than 95% of its requirements, the manufacturers reserved the right to terminate the agreements. [58]

76. So, the Commission considered that those contacts, in respect of which it decided to take not action, were concluded within the framework of the agreement between the three Italian cement manufacturers described at Article 4(3)(b) of the Decision.

77. Italcementi contends that there is a contradiction between the decision to drop the national objections and the decision to maintain the objections relating to the conduct described at Article 4(3)(b) of the Decision, because, as the Court of First Instance states, it is not certain that the international part of the statement of objections referred to the agreement between the three Italian cement producers.

78. It is sufficient to read the sentences which I underlined above to confirm that Italcementi's approach is flawed. The inter-

55 — Which, as Italcementi acknowledges, is reproduced verbatim at recital 55(a)(1) of the Decision.

56 — Emphasis added.

57 — See paragraphs 444 and 445 of the judgment under appeal.

58 — See recital 27, paragraph 6, of the Decision and paragraph 3345 of the judgment.

national part of the statement of objections refers to the agreement between the three cement producers and also to the agreement reached with the other producers in the Cembureau Task Force. It is true that this reference is made in connection with the conduct subsequently described at Article 4(3)(a) of the Decision, but it is equally true that in the considerations concerning the conduct referred to at subparagraph (b) there is a reference to an agreement between Italcementi, Unicem and Cementir, which cannot be other than the agreement referred to at point 61(h)(iv) of the statement of objections.

79. In any event, in the second part of this plea in law there is a certain contradiction with the approach taken to justify the complaint put forward in the first part. There the appellant emphasises the close connections between both parts of the Statement of Objections; now it seeks to show that those links are not so close and that there is no reference in the international part to any agreement between the three Italian producers. If the parties should, in Italcementi's opinion, have been given the opportunity to challenge the decision to drop the national objections, which related to the contracts concluded with Calcestruzzi, in order to convince the Commission that dropping them meant that it had to abandon the charge subsequently described at Article 4(3)(b), I am unable to understand why Italcementi is now insisting that the international part did not refer to any agreement between the three cement producers of which those contracts were the consequence.

80. It follows from the foregoing considerations that the second plea in the appeal brought by Italcementi must be rejected.

B. Substantive pleas. The agreement 'relating to the contracts and agreements signed' with Calcestruzzi (third plea in law). The *ne bis in idem* principle

81. With the aim of having the judgment under appeal set aside and the Decision annulled, Italcementi puts forward as single substantive plea, in which it challenges the Court of First Instance's appraisal of the agreement relating to the contracts which it signed with Calcestruzzi in 1987 and, more particularly, the conclusion that they constituted a measure implementing the Cembureau agreement.

82. Italcementi maintains that, so far as the Court of First Instance was concerned, the aim of the imputation in Article 4(3)(b) of the Decision was the agreement concluded by the three Italian producers to prevent Calcestruzzi from importing Greek cement, and that aim, owing to the activities carried out by the European Task Force, connects the appellant with the Cembureau agreement.

83. In its submission, the penalty for the conduct described at Article 4(3)(b) of the Decision contradicts those premisses, for the following three reasons:

1. the signing and implementation of the contracts with Calcestruzzi were unconnected with the 'everyone stays at home' principle, which was satisfied when the relations between that undertaking and the Greek undertaking Titan broke down; furthermore, those contracts mark the end of the unlawful act referred to in Article 4(3)(b) of the Decision;

2. in reality, contrary to what is stated in the Decision and in the judgment, the Commission and the Court of First Instance did not condemn the agreement between the three Italian cement producers but the contracts with Calcestruzzi, and that finding is incompatible with the dropping of the national objections and cannot be reconciled with any decision of the Autorità Garante della concorrenza e del Mercato; and

3. to regard the contracts with Calcestruzzi as implementing the Cembureau agreement leads to an incorrect result: between 1989 and 1992 the only participants in that agreement were the three Italian undertakings; can it then be called an 'ultra-national' agreement?

84. As may be appreciated, the contradiction complained of, which was formal in the previous plea, now assumes a substantive dimension.

85. The answer to this complaint must be provided from the facts of the case, as set out at paragraph 3345 et seq. of the judgment under appeal.

86. Those facts only allow of two interpretations in law, depending on whether the agreement referred to at Article 4(3)(b) of the Decision and the contracts signed by Italcementi, Unicem, Cementir and Calcestruzzi in April 1987 are regarded as separate conduct or as constituting the same practice. The indistinct use of both assessments depending on the context or the argument to be answered would have to be rejected.

87. If the second possibility is taken, the principle *ne bis in idem* applies, since the same conduct would have been subject to penalties on two occasions; one imposed by the Commission and the other by the Autorità Garante della Concorrenza e del Mercato. [59]

59 — Decision of 6 March 1996. Case I.123, *Bollettino* 10/1996, p. 7.

88. That principle, [60] in order to protect the same legal rights, prevents a person from being punished repeatedly for the same unlawful conduct, since that duplication of penalties entails an unacceptable repetition in the exercise of the right to punish. [61]

89. There are three identities, therefore, which must be present in order for the principle to apply: the same facts, the same offender and a single legal right to be protected. [62]

90. The presence of subjective identity is not open to dispute.

91. The unity of the legal right to be protected is beyond doubt. In the arrangement designed to ensure free competition, it is not possible to speak, within the European Union, of separate spheres, the Community sphere and the national spheres, as though there were watertight compartments. Both sectors seek to protect free and open competition in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same. On this point, the national legislation must properly transpose the provisions set out in Articles 81 EC and 82 EC by the secondary legislation which implements those provisions.

92. A reading of Articles 2 [63] and 3 of Italian Law 287/1990 of 10 October 1990 on the protection of competition and the market [64] shows that Articles 81 EC and 82 EC are transcribed almost literally, the only difference being the reference to the 'national market' instead of the 'Community market', but that difference, as I shall explain below, is adjectival and has no substantive character.

93. The Community authorities and the national authorities are involved in a simi-

60 — On the *ne bis in idem* principle, see my Opinion of 19 September 2001 in Case C-187/01 *Gözütok* and Case C-385/01 *Brügge*, in which judgment has not yet been delivered.

61 — The possibility that the national competition authorities and the Commission should both take action was considered by the Court of Justice in Case 14/68 *Wilhelm*[1969] ECR 1, where it was held that the parallel application of the national system must not prejudice the uniform application throughout the common market of the Community rules on agreements or the full effect of the measures taken to implement those rules (paragraph 1 of the operative part). Nowadays the existence of shared competence is taken for granted (see the Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ 1993 C 139, p. 6), as is the fact that, when both the national authorities and the Commission take action in respect of the same anti-competitive practice or agreement, the Community decision must prevail (see Case C-234/89 *Delimitis* [1991] ECR I-935 and Case C-344/98 *Masterfoods* [2000] ECR I-11369).

62 — In Case 137/85 *Maizena* [1987] ECR 4587, the Court of Justice held that there was no infringement of the principle *ne bis in idem* because the two securities required from the same person in respect of the same facts did not have the same purpose (paragraphs 22 and 23).

63 — In the Decision of the Autorità Garante della Concorrenza e del Mercato, cited above, Italcementi was sanctioned as the author of infringements of that provision.

64 — *Gazzetta Ufficiale della Repubblica Italiana*, No 240, 13 October 1990.

lar task and when they penalise anti-competitive conduct they do so in order to protect a single legal right, dividing the task according to the criteria identified by the Court of Justice in the judgments which I cited in footnote 60 of this Opinion.

94. In *Wilhelm*, cited above, the Court of Justice held that '[w]hereas Article 85 regards [collusive practices] in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it'. [65] In doing so, the Court was referring to this double perspective, one global and the other territorially limited, to which I referred a few lines above. In the latter case, when the collusive activity does not extend beyond the borders of a Member State, it does not for that reason cease to affect 'competition within the common market'. [66] The test of the territorial extent of the unlawful conduct is not substantive, but adjectival, since it does not affect the nature of the infringement, but only its intensity.

95. If those three identities are present, when conduct contrary to Article 81 EC has been investigated and penalised by the Commission, it cannot then be purchased by the competent national competition authority, and vice versa. [67]

96. The solution whereby the second authority to become involved reduces the penalty owing to the amount of the fine imposed by the first authority, which was adopted by the Court of Justice in *Wilhelm*, does not satisfy the requirements of the principle *ne bis in idem*. That principle is not a procedural rule which operates as a palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens. [68]

97. In reality, *Wilhelm* did not constitute an application of that principle, [69] since it involved 'two parallel proceedings pursuing different ends', [70] in other words, in which

65 — Paragraph 3.

66 — Article 85 of the EC Treaty (now Article 81 EC).

67 — On punishment in respect of the same facts by two separate legal orders, see my arguments at point 52 et seq. of my Opinion in *Gözütok* and *Brügge*, cited above.

68 — See Article 4 of Protocol No. 7 to the European Convention on Human Rights and Article 50 of the Charter of Fundamental Rights of the European Union.

69 — See Pralus, M.: 'Étude en droit pénal international et en droit communautaire d'un aspect du principe *non bis in idem: non bis*', in *Revue de science criminelle*, July-September 1996, pp. 553 to 574, in particular p. 558.

70 — Paragraph 11.

different assets or legal values were being protected. [71] The identity of protected objective required for the application of the *ne bis in idem* rule is missing. That judgment shows that, so far as the Community case-law is concerned, even where that principle does not apply and the double punishment is lawful, 'a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed'. [72]

98. However, the third of the requisite identities, the objective, is absent. [73]

99. Paragraph 3386 of the contested judgment states that the decision of the Autorità Garante della Concorrenza e del Mercato related to the supply contracts and the cooperation agreements between the three Italian producers (Unicem, Cementir and Italcementi) and Calcestruzzi, whereas the intervention of the Community authorities concerned the agreement concluded between those cement producers in order to prevent Calcestruzzi importing cement from Greece.

100. Italcementi disputes that finding of fact by the Court of First Instance, but it does not adopt the correct approach by doing so in an appeal, where the findings of fact made at first instance cannot be challenged.

101. In short, there was an agreement between the three Italian cement producers, the aim of which was to prevent Calcestruzzi from continuing to import Greek cement, notably under the contract which it had concluded with Titan in 1986. That agreement, which was covered by the common purpose of the European Task Force of eliminating cement imports into western Europe, required a further development, which, moreover, was its ultimate objective. If the aim was for Calcestruzzi to cease importing cement from Greece and to begin to obtain it from the Italian manufacturers, thus complying with the 'everyone stays at home' rule inherent in the Cembureau principle, it was essential to regulate the supply of cement to Calcestruzzi, in accordance with the contracts and agreements signed on 3 and 15 April 1987.

102. As may be appreciated, it is not certain that those contracts were unconnected with that principle and there is nothing strange about the fact that, from 1989 until 3 April 1992, only the three Italian cement manufacturers continued to apply the Cembureau agreement.

71 — I disagree with that approach since, as I have just pointed out, the national authorities and the Commission supervise the same values when they punish the same conduct by applying competition law, whether national or Community.

72 — Paragraph 11.

73 — In Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281, the Court of Justice held that there had been no breach of the *ne bis in idem* principle because '[a]lthough the actions on which the two convictions in question are based arise out of the same set of agreements they nevertheless differ essentially as regards both their object and their geographical emphasis' (paragraph 4).

103. The duration of the infringement referred to in Article 4(3)(b) of the Decision was determined by reference to the period of validity of the contracts and agreements signed with Calcestruzzi. Once it has been shown that Unicem, Italcementi and Cementir had agreed to prevent imports of Greek cement by Calcestruzzi, in the context of which they signed the contracts of supply with that company, there is nothing contradictory or illogical about the fact that the duration of that agreement was determined with reference to the validity of those agreements, which constitute the external expression of that duration. That is the meaning of paragraphs 3396 and 4340 and similar paragraphs of the judgment under appeal.

104. Nor is that assertion inconsistent with the reasoning in paragraph 4278 of the judgment under appeal. The Cembureau agreement on non-transhipment to home markets was a global anti-competitive agreement applied by most Community cement producers. All the undertakings on which penalties were imposed participated in its adoption or implementation or in one of the two practices, and did so by means which were more or less permanent. The fact that the three Italian producers maintained the agreement until 3 April 1992, by which time the remaining manufacturers had ceased to apply it, only means that they extended it for longer than the other undertakings did.

2 — *Pleas whereby the appellant seeks annulment or reduction of the fine*

105. Italcementi devotes the second part of its appeal, which is made up of six pleas, to contesting the judgment in so far as the Court of First Instance did not annul or reduce the amount of the fine imposed on it by the Commission. Three of those pleas (the fourth, fifth and sixth), whereby the appellant sought annulment of the entire fine, were rejected as manifestly unfounded by the order of 5 June 2002. It remains to examine the other three, which seek, in the alternative, a reduction of the fine.

A — The intangibility of the fine in spite of the partial annulment of the Decision (seventh plea in law)

106. Italcementi complains that the annulment of Articles 2 and 5 of the Decision was not reflected in the size of the fine imposed on it. It maintains that that circumstance infringes Article 15 of Regulation No 17 and breaches the principles of proportionality and non-discrimination.

107. Having regard to the structure of the Decision and the ground on which the fine was imposed,[74] I must state that Italcementi's complaint proceeds from a premiss which is incorrect in part. When it complains that the annulment of Article 2(1) and (2) of the Decision was not reflected in the penalty, it is simply mistaken.

108. The Court of First Instance annulled those two provisions because the appellant was found to have collaborated in the infringements described therein before 19 March 1984. On the basis of that finding, the Court annulled Article 1 in so far it concerned the appellant's involvement in the Cembureau agreement after 14 January 1983[75] and, since the penalty was imposed according to the duration of each undertaking's participation in the cartel, it reduced the fine proportionately. Thus, it is not true that the annulment of Article 2, in so far as it concerned Italcementi, was not reflected in the amount of the fine.

109. The complaint is well founded in so far as it concerns Article 5, but its formulation shows that the appellant has understood neither the structure nor the basis of the penalty imposed on it. So far as the market in grey cement is concerned, in respect of which Italcementi raises its complaint, the Commission punished a single practice, namely participation in the Cembureau agreement referred to in Article 1 of the Decision. The conduct described in Articles 2 to 6 are measures implementing that agreement and are not punished separately.

110. Each entity received a fine in proportion to the intensity of its participation in the agreement. To that end, the Commission identified two groups of undertakings and associations: those which participated in the Cembureau agreement and the remaining undertakings, which were less interventionist and whose responsibility was therefore lesser.[76]

111. Within the former category, the Commission distinguished three sub-groups: (1) that consisting of the undertakings and associations which, as members of Cembureau, had participated directly in the adoption of the agreement on non-transhipment to home markets and in measures directly protecting those markets (the Commission included Italcementi in this group); (2) a second sub-group composed of the companies which, through their most senior staff, had performed the function of Head Delegates within Cembureau either

74 — See my reasoning on the matter at points 83 to 93 of the Opinion which I have delivered today in Case C-204/00 P *Aalborg* v *Commission*.

75 — See paragraph 4381 of the judgment.

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

at the time when the agreement was concluded or during the period of its implementation; and (3) the final sub-group, made up of the companies which had taken part in measures implementing the agreement and designed to protect home markets. [77]

112. In the second category, the Commission also distinguished between three levels of responsibility: (1) the undertakings which had only helped 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 agreement was adopted, had not put any implementing measure into effect. [78]

113. 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. [79]

114. Accordingly, there was no breach of Article 15 of Regulation No 17 or of the principles of proportionality and equal treatment in so far as the Court of First Instance did not reduce the fine imposed on Italcementi after declaring that the conduct described in Article 5 of the Decision did not constitute an infringement of Article 85(1) of the Treaty.

115. The annulment of Article 5 of the Decision does not reduce the gravity of its conduct or reduce the period during which it occurred, criteria which, under Article 15(2) of Regulation No 17, are to be taken into account when setting the fine. Consequently, its annulment was not required to be reflected in the penalty in the form of a reduction of its amount. As the Court of First Instance stated in the judgment, '[t]he number of individual infringements committed by a given undertaking in the framework of the Cembureau agreement does not constitute... an appropriate criterion by which to assess its degree of responsibility in that agreement'. [80]

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

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

79 — 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 judgment under appeal.

80 — Paragraph 4966.

116. In accordance with the foregoing, this plea should be rejected.

B — Insufficient reasoning as regards the gravity of the infringement imputed to Italcementi (eighth plea in law)

117. At first instance, Italcementi claimed that the Decision lacked adequate reasoning in so far as it referred to the gravity of the infringement imputed to each undertaking. In particular, it emphasised its marginal and passive role in the cartel. In the appeal, it claims that the Court of First Instance made the same error. The judgment is not exhaustive, it does not weigh up the different levels of responsibility of the undertakings for the unlawful conduct and it does not state why its conduct was always of the same gravity, when, in Italcementi's submission, there were times when it was closely involved in the cartel and others when the links were less close.

118. The complaint alleging lack of or insufficient reasoning is reiterated in virtually all the appeals against the judgment at first instance. The truth is that the judgment under appeal might be criticised for being long, confused or unexciting, but never for not being properly reasoned. The answer which the appellant claims to be absent is to be found in the judgment. At paragraph 4944 the Court of First Instance refers to the complaints which the appellant infers on the matter and at paragraph 4964 et seq. the Court argues, in response to the arguments of all the parties, in respect of the legal correctness of the criterion applied by the Commission.

119. I consider it necessary to point out that the statement of reasons demanded of the Community institutions [81] and, more particularly, of decisions adopted by its judicial organs, does not require a discourse which follows word for word all the arguments put forward by the parties; it is sufficient if the statement of reasons allows the parties concerned to ascertain the reasons for the decision and, where necessary, the competent court to have all the specific evidence to exercise its power of review. [82] The reasons implicit in the judgment are also lawful in so far as they satisfy the aims pursued by that guarantee of the reasonable exercise of power.

120. In reality, by this complaint Italcementi is questioning not so much a failure to state the reasons for that judicial shortcoming as a discrepancy between the criteria applied by the Commission to classify the fines, which were approved by

81 — See Article 253 EC.

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

the Court of First Instance. It maintains that they infringed the principle of proportionality by underestimating the intensity of the participation of each undertaking in the cartel.

121. That approach is unfounded.

122. 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 potential 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.

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

124. 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. [83]

125. 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 relevant market; 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. [84]

126. 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

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

84 — E. David states in '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. 511-545, 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. 552).

and the number and intensity of the implementing measures adopted are relevant.

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

128. 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,[85] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each of them.[86] 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.

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

130. 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.

131. There is nothing unlawful in that approach, since, as I have already said, the gravity of an infringement may be assessed in the light of 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

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

86 — 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 623, and *Hercules Chemicals* v *Commission*, cited above, paragraph 110.

degree of adhesion to the Cembureau agreement and, therefore, a lesser responsibility in the infringement'. The position was the same as regards the harm to competition.

132. The reasons stated by the Commission, and approved by the Court of First Instance,[87] 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',[88] were classified as less serious.

133. This plea must therefore be rejected as unfounded.

134. The argument is also inadmissible in so far as, in setting it out, Italcementi enters a no-go area for appeals. When it states that the Court of First Instance did not distinguish the periods during which its support for the cartel was less strong than those others in which it was more involved, it proposes a new reading of the facts of the case, which the Court of Justice is unable to undertake.[89]

C — Incorrect appraisal of the duration of the infringement imputed to Italcementi (ninth plea in law)

135. This law plea lacks a substantive content of its own. It is a rehash of the second and third pleas. Italcementi claims that, in so far as either of the two[90] should be upheld, the Court of Justice should set aside the judgment under appeal in so far as it extends the appellant's participation in the Cembureau Agreement until 3 April 1992 and, in any event, beyond 31 December 1988. It further claims that the Court of Justice, in the exercise of its unlimited jurisdiction under the Treaty and the Rules of Procedure, should give final judgment in the case and reduce the amount of its fine.

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

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

89 — See the reasoning set out at point 46 of this Opinion.

90 — Which relate to Article 4(3)(b) of the Decision.

136. Because the two pleas of which the present plea is the corollary were rejected, the present plea must be rejected without the need for further argument.

137. As all the pleas which were declared admissible should be rejected, the appeal should be dismissed in its entirety.

V — Costs

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

VI — Conclusion

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

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

(2) Uphold the judgment under appeal in so far as it concerns that undertaking;

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