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

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1. This is an appeal by Cementir — Cementerie del Tirreno SpA ('Cementir') against the judgment of 15 March 2000 of the Fourth Chamber, Extended Composition, of the Court of First Instance in the case known as *Cimenteries CBR and Others* v *Commission*. [2]

I — The facts

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

— From April 1989 to July 1990, the Commission carried out investigations into European cement producers and trade associations in the sector pursuant to Article 14(2) and (3) of Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EC Treaty (now 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 Cementir and other undertakings in the sector. [5]

— On 25 November 1991, the Commission sent the Statement of Objections

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 [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 contested judgment.

to the 76 undertakings and associations of undertakings concerned; Cementir 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 Cementir had infringed Article 85(1) of the EC Treaty [9] by its anti-competitive conduct in participating:

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

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

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

   (a) the Belgian and Dutch producers' minimum prices for

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.

supplies of cement by lorry and the Luxembourg producer's prices, inclusive of rebates;

(b) the Danish and Irish producers' individual price lists, trade price 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 SA, 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 firm Calcestruzzi as a customer from the Greek producers, and from Titan Cement Company SA 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).

— The Commission ordered Cementir to bring the infringements in question to an end and to refrain from any agreement or concerted practice contrary to free competition in the markets for grey cement and white cement (Article 8), imposed a fine of

ECU 8 248 000 plus interest with effect from expiry of the deadline set for payment, which was three months from the date of notification of the Decision (Articles 9 and 11).

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

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

4. Cementir seeks, primarily, annulment of the Decision in whole or in part and, in the alternative, annulment or reduction of the fine. In any event, it claims that the Commission should 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 the undertakings concerned, later 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.

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

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]

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

12 — Ciments luxembourgeois SA.

13 — Paragraphs 169 and 170 of the judgment.

8. In the contested judgment, the Court of First Instance granted Cementir'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 3 April 1992;

— annul[led] Article 2(1) of Decision 94/815 in so far as it [found] that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it [found] that the applicant [had] participated in the infringement after 14 January 1983;

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

— annul[led] Article 4(1) and (2) of Decision 94/815 in so far as they concern[ed] the applicant;

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

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

— fixe[d] the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 7 471 000;

— 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 Cementir was liable for anti-competitive conduct for having participated:

1. in the Cembureau agreement on non-transhipment to home markets of grey cement (Article 1 of the Decision) between 14 January 1983 and 3 April 1992;

2. on 14 January 1983, in exchanges of specific information on prices of grey cement (Article 2(1) of the Decision);

3. between 1 January 1984 and 31 December 1988, in the periodic 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);

4. in the 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;

5. from 3 April 1987 to 3 April 1992, in the 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)).

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 fourth and sixth heads of the sixth plea 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.

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

IV — The appeal

12. Cementir claims that the Court of Justice should set aside the contested judgment and annul the Decision in whole or in part or, at least, cancel or reduce the fine imposed on it. In the alternative, it submits that after the judgment has been set aside the matter should be referred back to the Court of First Instance so that it can determine the case again in the light of the information with which the Court of Justice will provide it in upholding the Decision, or do so in part. Last, it asks that in any event the Commission be ordered to pay the costs of the proceedings at first instance and of the appeal.

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

14. In support of its claims, the appellant puts forward six pleas in law, some of which consist of a number of heads. As I have just stated, two of those heads have been dismissed.

15. The complaints submitted by Cementir and the replies thereto of the Commission

are set out below; they are analysed to provide the reasons for my suggestions.

1 — *Breach of the rights of defence in the access to the administrative file*

A — General evaluation (first plea in law)

(1) Arguments of the parties

16. In Cementir's opinion, paragraphs 142 to 263 of the judgment at first instance render void of meaning the right of access to the administrative file. The two criteria which it uses (objective connection between the documents and the facts and capacity to invalidate specific inculpatory evidence) lead to a serious restriction of the right to exercise the rights of defence without impact on the validity of the final decision.

17. In its opinion, the relevance of a document as evidence must be assessed at the stage of the administrative investigation, not during the subsequent judicial stage. Otherwise, the investigative discussion 'moves' to a place which is not its own, leading to an 'amputation' of the rights of defence. Furthermore, the requirement that the document to which access was not granted during the administrative procedure be capable of destroying direct inculpatory evidence imposed on the Court of First Instance an analysis which should have been carried out by the Commission, which the Court of First Instance supplants. In this way, procedural breaches such as failure to communicate documents during the administrative procedure lose all their meaning, since they may be 'regularised' by the judicial assessment of the documents which were prohibited.

18. The appellant further states that the Court of First Instance reversed the burden of proof by requiring that the undertaking concerned show that the documents which it was unable to consult are capable of invalidating the direct evidence used by the Commission. That position has no foundation in the case-law, since the judgments in *Solvay* v *Commission* [15] and *ICI* v *Commission* [16] establish the principle that, when it is shown that a document of use to the defence has been concealed, it must be found that the right of defence has been breached and the decision must be annulled. It is not appropriate to carry out a specific judicial examination of each undisclosed document or to compare it

15 — Case T-30/91 [1995] ECR II-1775.
16 — Case T-36/91 [1995] ECR II-1847.

with the evidence found in the decision. In *Hercules Chemicals* v *Commission*[17] and *Distillers Company* v *Commission*,[18] the Court of Justice held, without examining their content, that the documents to which access had not been given were not manifestly relevant to establishing the infringement.

19. The Commission contends that there is only a breach of the rights of defence when the undertakings concerned did not have access to documents which were of use to their defence. The Court of First Instance did not purport to make good the shortcomings in the administrative procedure, but merely ascertained whether the rights of defence of the undertakings and associations under investigation were infringed because the entire range of documents in the file was not made available to them.

20. In the Commission's view, the Court of First Instance's approach was confirmed by the Court of Justice in *Hercules Chemicals* v *Commission*. Paragraph 247 of the contested judgment is correct, since the lack of any objective connection between a document which was not consulted during the administrative proceedings and the imputed evidence was not discussed. The assessment of the existence of such a connection is a question of fact reserved for the Court of First Instance.

21. Nor was the burden of proof reversed in the judgment under appeal. The determination of the usefulness of a document which was not consulted is a matter for the Court, since if it were again entrusted to the Commission the principle of equality of arms would be infringed.

(2) The legitimacy of the measures of organisation of procedure and the competence of the Court of First Instance to order them

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

23. In the judgment under appeal, the Court of First Instance analysed the documents indicated by the applicants and the

17 — Case C-51/92 P [1999] ECR I-4235.

18 — Case 30/78 [1980] ECR 2229.

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

observations submitted by them and, in Cementir's case, reached the decision set out at paragraph 39 of the operative part and at point 8 of this Opinion. The Court of First Instance proceeded according to the following principle: the appellants' rights of defence would have been infringed if there had been even a small chance that the outcome of the administrative procedure might have been different if they could have relied on the documents to which access had been denied. [20]

24. Cementir disputes the way in which the Court of First Instance proceeded, since, as a result of the inappropriate criteria which it used, serious procedural irregularities have no impact on the final decision and since, in reality, in assessing the way in which the documents which were not disclosed during the administrative procedure might have been able to influence the final decision, it placed itself in a position which was not its own but the Commission's.

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

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

20 — See paragraph 241 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', in *Journal des tribunaux*, No 5973 (2000), pp. 496 to 504. Also of interest is the study by L. Goossens, 'Concurrence et droits de la défense: la phase administrative devant la Commission', in *Journal des tribunaux, Droit européen*, No 52 (1998), pp. 169 to 175, and No 53 (1998), pp. 200 to 204. Also of interest, in spite of its relative age, is the work by O. Due, former President of the Court of Justice, 'Le respect des droits de la défense dans le droit administratif communautaire', in *Cahiers de droit européen*, Nos 1 and 2 (1987), pp. 383 to 396.

22 — OJ 1998 L 354, p. 18. This regulation replaced Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, 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, *Hercules Chemicals* v *Commission*, cited above, paragraph 75 et seq.

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

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 adversely is taken and the right to have access to his file. [28]

27. 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.

28. 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. [31] In each case, the final decision must be annulled and, if appropriate, the procedure repeated in order to put it right.

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 (Series A No 43) 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 (the '*PVC*' cases), points 331 and 125 respectively, in which judgment was given on 15 October 2002 (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM and Others* v *Commission* [2002] ECR I-8375, '*PVC II*').

31 — As the Court of Justice held in *Distillers Company* v *Commission*, on which the appellant relies. At paragraph 26 of that judgment, the Court of Justice held that it is necessary to consider the alleged procedural irregularities 'only if in the absence of those irregularities the administrative proceedings could have led to a different result'.

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

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

31. 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.

32. Thus the Court of First Instance did not assume the role of the Commission or improperly occupy its position. On the contrary, it confined itself, within the limits of its competence, to exercising judicial power to perfection, reviewing the legality of the administrative procedure before the Commission; and, adopting that approach, the Court of First Instance, which looks back to events which happened in the past, must express its views using all the material at its disposal in the present, which affords it richer resources and increases its prospects of success. [32]

(3) The Court of First Instance did not fail to have regard to its case-law or to that of the Court of Justice

33. 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 docu-

32 — 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.

ments in presenting their written and oral observations to the Commission. [33]

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

35. 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 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. The Court of Justice reached a similar conclusion in its judgment in *Distillers Company* v *Commission*, to which I have already referred.

36. Nor did the Court of First Instance fail to have regard to the principle which it established in *Solvay* v *Commission* and *ICI* v *Commission*, both cited above. On the contrary, it applied it quite correctly.

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

38. This last judgment clearly shows that, so far as the Court of First Instance is concerned, the decisive factor (and it could not be otherwise) is that the procedural defect produces adverse effects in the sphere of the rights of defence of the applicant companies. There is an obvious explanation for the fact that the Court of First Instance arrived at different solutions in *Solvay* v *Commission* and Case T-36/91 *ICI* v *Commission* and in the present case. In the first two judgments, the Court reviewed a Commission decision imposing

33 — Paragraphs 78 and 79.

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

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

36 — Paragraphs 98 and 108 respectively.

37 — Case T-37/91 [1995] ECR II-1901.

38 — See paragraphs 66 and 70.

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

(4) No reversal of the burden of proof

39. That approach does not entail a reversal of the burden of proof. That principle, which is procedural in nature, operates for the benefit of the fundamental right to the presumption of innocence, which is of a substantive dimension and with which it must not be confused.

40. The presumption of innocence prevents the penalty from being imposed if guilt is not proven. Consequently, anyone making an accusation must prove that the person accused has carried out the acts constituting the infringement and also that the additional elements of fact and of law which allow him to be held responsible are present. This is the point at which the presumption of innocence and the burden of proof meet. The Commission imputed certain anti-competitive practices to the appellant undertakings and used various forms of evidence to support its accusation. In principle, therefore, it satisfied the procedural rule represented by the burden of proof. A separate issue, which does not fall to be dealt with here, is whether the documents used are capable of overriding that presumption.

41. Following the adoption of the decision to impose penalties, it was the subject of an action by Cementir, among others, which sought its annulment on the ground that it breached its rights of defence because Cementir had not been given full access to 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 Cementir to prove the assump-

39 — See paragraph 61 of *Solvay* v *Commission* and paragraph 71 of T-36/91 *ICI* v *Commission*.

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

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

tions of fact in that allegation: first, that it was not provided with all the documents used by the Commission in the administrative procedure and, second, that that defect was the cause of a breach of its rights of defence.

42. In other words, once the Commission had fulfilled its obligation, the accused undertakings and associations had to rebut the incriminating evidence with all the means at their disposal. Applying the judicial test set out at paragraphs 241 and 247 of the judgment, the Court of First Instance concluded that the procedural defect, the lack of access to those documents during the administrative procedure, was irrelevant from the aspect of the rights of defence.

43. It follows that there was a strict application of the principle of the burden of proof, so that Cementir's abstract and formalistic approach is inadmissible: any procedural error, no matter how slight, entails annulment of the decision, without it being necessary to question the influence that the defect has had in the substantial amendment of the decision. That approach would lead, without providing any additional guarantee for the rights of persons subject to administrative procedure, to administrative paralysis, to the detriment of the principle of efficacy.

(5) The reasonableness of the test used by the Court of First Instance

44. Thus, the Commission fulfilled its obligation to adduce probative evidence of the guilt of the impugned undertakings and associations. It had recourse to 'specific documentary evidence' [42] and not to 'parallel conduct on the market'. [43]

45. And this approach reveals the full import of the test used by the Court of First Instance, which consisted in restricting the range of evidence capable of refuting the findings of fact made by the Commission to that contained in 'documents relating directly to the infringements' imputed to the applicants in the Decision. [44] That is to say, the Court of First Instance was correct to apply the rule that there would have been a breach of the applicants' rights of defence if, during the administrative procedure, they had been denied access to evidence capable of refuting the evidence used by the Commission, [45] 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.

42 — That indicated at recitals 18, 19 and 45 of the Decision.

43 — Paragraph 264 of the contested judgment.

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

45 — See paragraph 263 of the judgment under appeal.

46. One example is sufficient to illustrate this point. The Commission concluded from certain documents that anti-competitive agreements were adopted at the meetings between the European cement producers held on 14 January 1983 and 19 March and 7 November 1984 (Cementir did not participate in the second of these).[46] 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.[47]

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

46 — See paragraph 1250 of the judgment.

47 — See paragraph 247 of the judgment under appeal.

48. 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 Cementir's conduct became irrelevant and, consequently, the fact that that evidence was not consulted during the administrative procedure could not breach the appellant's rights of defence. A careful reading of paragraphs 1277 to 1284 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.

49. On the basis of the foregoing reasoning, Cementir's first plea in law must be rejected as unfounded.

B — Evaluation of the right of defence in particular

(1) In connection with the Cembureau agreement (second plea in law, second head)

(a) Arguments of the parties

50. Cementir maintains that the Court of First Instance confused itself by stating that

the lack of access to Mr Toscano's note and to other documents did not amount to a breach of its rights of defence.

(i) Mr Toscano's note

51. The appellant puts forward three arguments in respect of that document.

52. First, it states that at the public hearings organised by the Court of First Instance the Commission admitted that Mr Toscano's note should have been made available to the parties during the administrative procedure [48] and that it was important for the purpose of explaining the meeting of 14 January 1983 and determining that its anti-competitive purpose was not sufficiently proven. [49] Since the 'Cement' cases were joined only for the purposes of judgment, the appellant requested that the oral stage be reopened so that that admission could be taken into account, but the Court of First Instance refused its request. That refusal, in the appellant's opinion, constitutes a procedural defect which led to an incorrect assessment of the plea relating to the breach of its rights of defence during the administrative procedure.

48 — Hearing of 14 October 1998 in Case T-25/95 *CBR* v *Commission*.

49 — Hearing of 14 October 1998 in Case T-60/95 *Irish Cement* v *Commission*.

53. The Commission denies having admitted that Mr Toscano's note was essential for the exercise of the rights of defence; it merely qualified it as relevant, because it referred to the meeting of 14 January 1983. Furthermore, because it was a partial and incomplete document, it did not justify reopening the oral procedure.

54. Second, in Cementir's view, that document, which refers exclusively to discussions on dumped exports from other countries on the European continent, provides a different interpretation of the matters discussed at the meeting of January 1983.

55. The Commission believes that the appellant is repeating what it had already stated at first instance, in a document of 29 December 1997, concerning access to the documents. In reality, the appellant is asking the Court of Justice to reconsider the request which it submitted to the Court of First Instance, which is not possible in an appeal.

56. Third, Cementir goes on to state that the probative value of Mr Toscano's note is

reinforced by other documents (the 'notes for the Chairman' [50] and 'the Cimpor note' [51]), neither of which contains any reference to discussions on non-transhipment to home markets. Taken together, the three pieces of evidence prove that there was a catalogue of evidence which refutes the Commission's arguments.

57. The Commission contends that the complaint is inadmissible, as it refers to an issue of fact, and unfounded, since the Court of First Instance properly assessed the evidential material.

(ii) Other matters

58. Cementir criticises the Court of First Instance for failing to provide adequate reasons for its decision to disregard certain documents which would prove that the agreements, concerted practices and other forms of cooperation in certain geographic areas had purely local origins and reasons and had no connection with an alleged European cartel. The documents in question are those cited at paragraphs 1277 to 1282 and 1435 to 1439 of the contested judgment and also the minutes of the board meetings of the Federation of the Cement Industry (FIC) held on 8 December 1982 [52] and 1 September 1987. [53]

59. The Commission does not accept that it is appropriate to reconsider the facts, because the Court of First Instance provided adequate reasons.

(b) No procedural infringement at first instance

60. The reopening of the oral stage of the procedure is a requirement inherent in the right to an adversarial process and a fair hearing within the meaning of Article 6 of the European Convention on Human Rights. Both the Court of Justice, on a proposal from the Advocate General, and the Court of First Instance [54] must make an order to that effect either of their own motion or upon application by the parties when they consider that they lack sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties. [55] In the latter situation, the aim is to protect the

50 — Documents 33.126/11630 to 11633.

51 — Documents 33.322/308 to 312.

52 — Documents 33.126/2023 to 2049.

53 — Documents 33.126/2105 to 2113.

54 — See Articles 61 and 62, respectively, of the Rules of Procedure.

55 — See, among others, the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and Joined Cases C-270/97 and C-271/97 *Deutsche Post* [2000] ECR I-929, paragraph 30.

parties from being taken by surprise, [56] i.e. to ensure that the matter is not decided on grounds not adduced by the parties or which were adduced by one party but which the other party did not have the opportunity to dispute or refute.

61. Cementir's complaint belongs to the latter situation and is unfounded, since, although during the hearings in *CBR* v *Commission* and *Irish Cement* v *Commission* the Commission admitted that Mr Toscano's note was relevant for the purpose of evaluating the meeting of 14 January 1983, paragraph 155 of the contested judgment did not accept that the Commission 'infringed the rights of defence of the applicants during the administrative procedure by not giving access to some documents in the investigation file'. Thus, the terms of the discussion had not changed, and remained the same before and after the hearings, so that the Court was not required to reopen the oral stage.

62. Even when one considers that the statements made by the Commission at the hearings incorporated a new element, since, according to the appellant, they amounted to an admission, the refusal to reopen the oral stage cannot have caused the appellant any harm, since there would have been nothing to refute or to add to a fact which in itself was favourable to it. It would have been a pointless step.

63. Cementir proposes, once again, returning to the forms and to their sacred nature. In my Opinion in *Kaba*, cited above, I stated that 'the requirements of an adversarial process only call for particular attention when a failure to observe them results in the breach of a fundamental right, that is to say, when it infringes the right to a fair hearing', [57] and the failure to discuss a fact which is clearly favourable to the appellant does not infringe that right.

(c) The probative value of Mr Toscano's note and of other documents

64. The Court of First Instance considered that this fact, which was duly evaluated, did not alter the situation.

56 — See footnote 62 to my Opinion in Case C-466/00 *Kaba* [2003] ECR I-2219, I-2222.

57 — Point 93.

65. Applying the procedural criterion set out at paragraph 241, the legitimacy of which I noted in my observations on the first plea in law, the contested judgment states that the documents disclosed were not such as to alter the version of the facts established by the Commission. The Court of First Instance held that Mr Toscano's notes confirmed that questions of importance to the cement sector were raised at the Head Delegates' meeting of 14 January 1983 but that they did not disprove or deny that anti-competitive agreements were adopted, a point which the Commission inferred from direct documentary evidence. [58] As may be seen, the discussion which Cementir seeks to provoke does not go beyond the assessment of the evidence or the establishment of the facts of the case.

66. For the remainder, by emphasising, without further details, the value of the 'notes for the Chairman' and the 'Cimpor note', which in its view support Mr Toscano's note, Cementir is again entering an area which is prohibited in an appeal. The Court of First Instance took both documents into account and held that they were not official minutes of the meeting of 14 January 1983, [59] of which no record was drawn up, but it did not infer from that fact that the Cembureau principle was not adopted, a fact which it considered established for the reasons set out at paragraph 862 et seq. of the contested judgment.

67. The same may be said as regards the remaining documents cited by Cementir to show that the agreements, concerted practices and other forms of cooperation in certain geographic areas had purely local origins and justification and had no connection with any alleged European agreement.

68. It is sufficient to read paragraphs 1277 to 1282 and 1435 to 1439 of the judgment under appeal to reject the claim that it failed to state reasons, since the Court of First Instance analysed the documents to which the plea in law refers, evaluated them and set out the reasons why that exculpatory evidence, even if it had been made available to Cementir during the administrative procedure, would not have led to a different result. The judgment contains a logical argument which satisfies the requirement to state reasons. Of course, it could have been developed more fully, but in its context it constitutes an adequate explanation. The obligation to state reasons does not require that the Court give an exhaustive description of the intellectual process which it followed in order to find in a given sense or require that the reasoning employed be of a specific extent, intensity or scope. It is enough that the basis of the

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

59 — See paragraphs 973 and 1131 of the judgment.

decision adopted is clear, as in the above-mentioned paragraphs of the judgment under appeal.

any of the evidence, did not infringe any provision and did not contradict itself, because the evidence in question could not have led to a different result in the administrative procedure.

(2) Concerning the exchange of price information and the measures to protect the Italian market (second head of the third and fourth pleas in law)

(a) Arguments of the parties

69. Cementir criticises the fact that the Court of First Instance attached little importance to the documents which confirm that a company's prices vary according to various factors (discounts, transport costs, etc.), on the ground that, even if the Commission had taken such parameters into account, it would have arrived at the same result. The appellant reiterates that they were of use for its defence, since they showed that the exchanges of price information could not play a part in the application of the alleged Cembureau agreement.

70. The Commission submits that the second head of the third plea in law is inadmissible because it relates to the evaluation of the facts and reiterates the arguments put forward at first instance, when the Court of First Instance did not distort

71. As regards the so-called measures to protect the Italian market, the appellant criticises the Court of First Instance for having failed to take into account a series of documents which, like the minutes of the meeting of the board of directors of the Greek undertaking Heracles on 23 July 1986,[60] confirmed that the appellant's participation in the agreements with Calcestruzzi only had strictly commercial intentions. The appellant also refers to the documents showing that certain Italian producers had adopted measures to protect their markets from Greek imports outside Cembureau,[61] and to the others which show the significant inroads made by those imports into the Italian market and which negate the existence of a European agreement on non-transhipment to home markets.[62] In the absence of specific evidence that its accession to the agreements with Calcestruzzi was connected with the discussions within the European Task Force, Cementir maintains that the Court of First Instance did not properly evaluate the relevance of admitting those documents, which cast fresh light on the facts.

60 — Documents 33.126/19878 to 19880.

61 — Documents 33.126/2945 to 2951, 2934, 2935, 2954 to 2966 and 3065 to 3068.

62 — Documents 33.126/19369 to 19377, 18387, 19389, 19401, 19410, 19412, 19433, 19781, 19889, 20001, 20124 to 20137, 20140 to 20156, 20275 to 20282 and 20294.

72. In the Commission's view, those documents are adequately evaluated at paragraphs 3387 to 3396 of the contested judgment, so that, even if they had been consulted during the administrative procedure, the outcome of the proceedings would have been the same.

(b) A recurring complaint, inadmissible and unfounded — Reference to other pleas

73. The Commission correctly observes that in the second heads of the third and fourth pleas in law, whose substance is the same as that of the first plea in law and of the second head of the second plea in law, Cementir does not point to any distortion of evidence on the part of the Court of First Instance, does not identify any contradiction in the reasoning on which the judgment is based or cite any rule which has been infringed. In those circumstances, its complaint amounts to a mere disagreement with paragraphs 1773, 1775, 1776 and 3392 to 3396 of the impugned judgment and, as such, is inadmissible.

74. In reality, Cementir is complaining that the documents to which it refers, which it was not able to consult during the administrative procedure, showed that the data provided through the information exchanges were not personalised and that, consequently, they did not serve to determine precisely the prices applied by the various European cement producers. The Court of First Instance states that the Commission duly took that circumstance into account in the Decision. [63]

75. The same lot should befall the documents relating to the measures to defend the Italian markets whereby Cementir claims to show that its involvement in the contracts with Calcestruzzi satisfied exclusively commercial criteria, that other Italian producers had adopted similar measures outside the Cembureau agreement and that imports of Greek cement were quantitatively significant. At paragraphs 3393 to 3395 of the judgment under appeal, the Court of First Instance uses a logical and reasoned argument to make clear that the comments which Cementir could have made in the light of such evidence during the administrative procedure would not have led to a different outcome.

76. By 'disapproving' of that reasoning in the judgment, the appellant is reproducing the argument which it put forward in the first plea in law of the appeal, and for that reason I refer to the considerations which I set out above on the matter.

63 — See recital 47, paragraph 14, of the Decision.

77. Therefore, the second heads of the third and fourth pleas in law must also be rejected.

2 — *Errors of law and faulty reasoning*

A — In the examination of the Cembureau agreement (second plea in law, first head)

(1) Arguments of the parties

78. According to Cementir, the analysis carried out at paragraphs 861 to 1095 of the judgment under appeal concerning the existence of the Cembureau agreement reveals defective reasoning and an error in the legal classification of the facts which distorts the evidence.

79. It observes that the existence of consensus on the Cembureau agreement between specific undertakings should have been established by certain and clear evidence which left no room for reasonable doubt. In the absence of such evidence, the fundamental principle of the presumption of innocence, set out in *Hüls* v *Commission*,[64] precluded the imputation of any infringement of Article 85 of the Treaty to the undertakings and associations of undertakings concerned. The Court of First Instance therefore did not carry out a proper assessment and was mistaken as to the legal classification.

80. The Commission points out that it is not for the Court of Justice to establish the facts of the case. In the present case, there was no distortion of the evidence, therefore Cementir's complaint contains no question of law which should be reviewed by the Court of Justice. The Commission therefore submits that the plea is inadmissible.

(a) The letter convening the Head Delegates' meeting of 14 January 1983[65]

81. According to Cementir, the fact that it was invited to the Head Delegates' meeting of 14 January 1983 does not prove that it participated in the Cembureau agreement. The reasons are as follows: (i) it only received the official invitation, which omitted any reference to transfers of cement between the countries to which the Cembureau agreement applied; (ii) Mr Braz de Oliveira's letter was addressed to only two undertakings, one Irish and the

64 — Case C-199/92 P [1999] ECR I-4287.
65 — Document 33.126/11559.

other Danish; (iii) the appellant did not take part in the meeting of the Executive Committee on 5 November 1982, at which reference was made to the need to protect the cement industry by 'appropriate measures'; and (iv) it did not receive the telex sent to Mr Van Hove.

82. The Commission contends that this complaint is inadmissible, since it refers to the assessment of the evidence by the Court of First Instance. The contested judgment is not vitiated by defective reasoning or an error of law: at paragraphs 935 and 936, it is shown that the two letters convening the meeting of 14 January 1983 were not contradictory. The Court of First Instance did not incorrectly assess the specific position of Cementir, which is confirmed by the telex sent to Mr Van Hove, which included the agenda for the January 1983 meeting.

(b) The documents relating to the conduct of the meeting of 14 January 1983

83. Cementir puts forward five arguments, which the Commission claims are inadmissible, to show that the dates taken into consideration by the Court of First Instance do not make it possible to establish with the clarity and certainty demanded by the presumption of innocence that it participated in the adoption of the Cembureau agreement at the meeting of 14 January 1983.

(i) The Chairman's introductory statement

84. The provisional text of the introductory statement of the Chairman of Cembureau does not prove that there was an anti-competitive agreement. In the appellant's opinion, it only expresses a desire to lay down possible rules. The Commission claims that the draft was drawn up by the Directors of Cembureau, Ms Dutron and Mr Collis.

(ii) The absence of minutes of the meeting

85. Cementir maintains that the decision not to take minutes of the deliberations is not specific and positive proof of the adoption of the Cembureau agreement. The Commission believes that paragraphs 962, 964 and 972 to 976 of the judgment at first instance properly stated the reason for the absence of an account of the discussions, which was mentioned in the draft introductory statement, namely that they were confidential.

(iii) The Blue Circle memoranda [66]

86. Before the Court of First Instance, Cementir claimed that the Blue Circle memoranda were drawn up by third parties, that it was not aware of their existence and that they did not concern it directly, [67] but the Court of First Instance held that the documents in question also referred to the risk that the imports would increase surpluses on the domestic markets. That assessment is mere conjecture and not a certain indication (much less specific evidence) that it was responsible for the facts penalised. The Commission denies that there was a failure to state reasons; it refers to paragraphs 885 and 886 of the judgment under appeal, where it is fully demonstrated that the problem of dumped imports was closely linked with the problem of observance of the Cembureau agreement. The Commission concludes that the Blue Circle memoranda have considerable probative value and states that it was significant that the head of the Spanish delegation (implicated in that predatory practice) had attended the meeting of 14 January 1983.

(iv) The statement of Mr Kalogeropoulos [68]

87. Cementir believes that a document issued by a third party, dated 1986, cannot constitute specific evidence of its acquiescence to the Cembureau agreement. The Commission replies that the statement of Mr Kalogeropoulos concerned, in substance, all the European cement producers and it would have been illogical for the Court of First Instance to give probative force only to a document in which all the undertakings involved in the agreement on non-transhipment to home markets were mentioned by name.

(c) The Head Delegates' meeting of 19 March 1984

88. Cementir states that as it was not present at that meeting the fact that the Cembureau agreement was confirmed at it cannot affect it.

89. The Commission replies that the Court of First Instance did not assess the appellant's responsibility by reference to the number of meetings it attended. The meeting of 19 March 1984 is relevant because it demonstrates the existence and terms of prohibited agreements. The problem of Cementir's participation arises at a different level. In any case, the decision to penalise collaboration in the Cembureau agreement was duly justified, even if it was not shown that an undertaking was involved in any of the implementing measures.

66 — Documents 33.126/11332 to 11334 and 11335 to 11337.

67 — According to this theory, the memoranda referred to dumped imports from Eastern Europe and Spain (which at the time had not been incorporated into the Community).

68 — Documents 33.126/19875 to 19877.

(d) The Head Delegates' meeting of 7 November 1984

90. Cementir disputes the assertion that the Head Delegates demonstrated their accession to the agreement on non-transhipment to home markets. There has therefore been a failure to observe the presumption of innocence. Irrespective of any rule on non-transhipment to home markets, the European producers could not but approve of the fact that any surplus capacity would find an outlet outside the European area. In that regard, 'sympathy' for the Greco-Spanish agreement is not an indication that the Cembureau agreement existed.

91. The contradictory nature of the reasoning is also clear, since, on the one hand, it states that the Decision was only based on specific evidence and, on the other, it takes into consideration factors which are pure deduction.

92. The Commission contends that the appellant is once again challenging the findings of fact in the case and that this plea is therefore also inadmissible. Although the Cembureau agreement sought to ensure the stability of the Community market in cement, the tensions in the export sector had repercussions on prices within the Community, where producers had inevitably placed a part of their surplus capacity. It was logical that such problems should end up on the table of the Head Delegates, as may be seen from paragraphs 1031 to 1033 of the judgment under appeal.

(e) Other elements of assessment

93. In Cementir's opinion, the Court of First Instance paid little attention to significant evidence in order to qualify the conduct of certain undertakings: (i) during the period 1983 to 1985 there were two other Head Delegates' meetings, at which there was no reference to intra-Community trade in cement or to an alleged Cembureau agreement; (ii) the appellant only attended two meetings out of the five which took place during those three years; and (iii) it showed little interest in the Cembureau association, since, before 1983, it had not participated in intra-Community trade, but limited its activities to its local customers. In the presence of fragmentary, uncertain and equivocal evidence, it is imprudent to disregard such matters.

94. The Commission contends that this plea is inadmissible too, and states that the matter was analysed fully and carefully by the Court of First Instance, since it did not ignore the meetings held in May 1983 and June 1985. The Commission states that even though trade within the Community

was not on the agenda at those meetings, they did not invalidate the documentary evidence which proved that the meetings of 14 January 1983 and 7 November 1984 were unlawful.

(2) This plea is inadmissible...

95. The plea does not go beyond the establishment of the facts of the case and is therefore inadmissible. 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. [69]

(3) ... and unfounded

96. It is appropriate to describe the approach taken by the Court of First Instance, which endorsed in part the Commission's assessment of the evidence. On the basis of certain documentary evidence, which it classified as specific, [70] it concluded that at the Head Delegates' meeting on 14 January 1983 an agreement had been concluded contrary to the then Article 85(1) of the Treaty, the object of the agreement being 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing', and confirmed at the meeting of 7 November 1984. [71] Cementir, a direct member of Cembureau, attended both meetings, a fact which, taken together with its failure to distance itself from what was discussed there, allowed the Commission, according to a test approved by the Court of First Instance, to conclude that it participated in the agreement. [72]

97. That use of proof based on presumptions is perfectly legitimate [73] and complies with the right to be presumed innocent. It consists in taking as proven certain incriminatory facts founded on conjecture based on logic and reason, and also on common understanding and experience. For that purpose, it is necessary to proceed from

69 — 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 to 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.

70 — That described at recitals 18, 19 and 45 of the Decision. In the judgment, see paragraph 861 et seq., in particular paragraphs 875 to 901, for the Blue Circle internal memoranda; 902 to 913, for the statement of Mr Kalogeropoulos; 930 to 941, which refer to the letter convening the Head Delegates' meeting of 14 January 1983; 971 to 976 concerning the absence of any minutes of that meeting; and 1028 to 1046 concerning the meeting of 7 November 1984, at which the Cembureau agreement was confirmed.

71 — See recital 45, paragraph 9, of the Decision and paragraphs 1003, 1046, 1086 and 1095 of the judgment.

72 — See paragraphs 1343 to 1345, 1352, 1353, 1376, 1391, 1400 and 1401 of the contested judgment.

73 — See Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 96; *Hüls* v *Commission*, cited above, paragraph 155; and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181.

certain established facts from which it is possible, by following a mental process which is consistent with common sense, and which is properly described in the judgment, i.e. adequately reasoned, to succeed in demonstrating the facts.

98. That is the task carried out by the Court of First Instance. Proceeding from certain undisputed facts (the meetings were held, agreements were adopted at those meetings, Cementir attended two of those meetings, and failed to distance itself from what was discussed at them), it found as proved that there was a cartel, in which Cementir was included. That idea is rational and is adequately explained in the contested judgment.

99. On the contrary, a separate analysis of each of the pieces of evidence in order, in an oblique way, to suggest an alternative assessment, bringing out any inconsistencies between the various documents, is out of place.

100. In any event, even when I adopt the partial and oblique perspective suggested by Cementir, its complaints are unfounded.

(a) The meeting of 14 January 1983

(i) The letter convening the meeting

101. The letter from Mr Braz de Oliveira, the meeting of the Executive Committee held on 5 November 1982 and the telex sent to Mr Van Hove are items of evidence used by the Commission to prove that the agreement on non-transhipment to home markets was adopted at the Head Delegates' meeting of 14 January 1983, so that it is irrelevant that Cementir was not an addressee of the letter, did not attend the meeting or did not receive the telex, since its responsibility for the agreement is based on the fact that it took part in the meeting of 14 January 1983. Those three items of evidence are encountered at an earlier stage (the stage of the existence of the agreement) than that in which the appellant is seeking to place them (the stage of the participation and responsibility of each undertaking).

102. For the remainder, the probative value of Mr Braz de Oliveira's letter is explained at paragraphs 930 to 940 and 979 of the contested judgment.

(ii) The conduct of the meeting

103. The draft introductory statement of the Chairman of Cembureau expressed his desire that the undertakings and associations of undertakings present at the meeting should agree on 'certain rules of the game which it is in the interests of all of us to follow', [74] and stated that there would be no minutes of the deliberations or of the discussions. [75] Paragraphs 960, 964, 966, 968, 969, 972, 973 and 976 of the judgment under appeal properly assess the various items of evidence. They confirm that the Chairman of Cembureau wished the participants in the Head Delegates' meeting of 14 January 1983 to reach agreement on the 'rules of the game' and decided not to take minutes of the deliberations in order to keep them secret. They explain, on the basis of the case-law of the Court of Justice, that the agreement is contrary to Article 85(1) of the Treaty, state the reasons for attributing the draft introductory statement to the Chairman of Cembureau and those which allow the decision not to take minutes of the meeting to be construed as expressing the wish to keep secret the matters discussed and the agreements adopted.

104. It is irrelevant that Cementir was not involved in drafting the Blue Circle memoranda or that it was not aware of their existence, for the reasons stated above in regard to the documents convening the meeting. The Blue Circle memoranda were not used to prove that the appellant participated in the Cembureau agreement but to prove that the agreement existed.

105. The lack of reasoning which Cementir attributes to the judgment on this point is of no consequence. In my Opinion of today's date in Case C-205/00 P *Irish Cement* v *Commission*, I stated that the complaints which concern the reasoning are inappropriate, especially because of the insistence with which they are made. A judgment which takes up some 1 200 pages in the European Court Reports, which contains 5 134 paragraphs, and in which the Court, making a great effort to summarise them, sets out the arguments put forward by 41 applicants, in order to provide an answer to all of them, is one which could be wished less fully reasoned. On the assumption that the express answer to any individual argument may have been omitted and that the extrapolation of a specific point, taken out of context, may reveal apparent contradictions, but, specifically, because it constitutes a single, integrated document, the solution in many cases is implicit in the reasoning. [76] In those circumstances, any partial and biased reading of its content must be rejected, even though it is understandable from the lawful exercise of the rights of defence.

74 — See paragraph 959 of the judgment at first instance.

75 — See paragraph 962 of the judgment.

76 — See points 126 and 127 of the Opinion.

106. Paragraphs 885 and 886 of the judgment under appeal draw a comparison between imports from outside the Community at dumped prices and the policy of non-transhipment to home markets, and state that the Blue Circle memoranda prove the existence of the Cembureau agreement. Once again, Cementir disagrees with the evaluation of the body of evidence by the Court of First Instance.

107. Cementir claims that the Court of First Instance misunderstood the meaning of its complaints concerning Mr Kalogeropoulos's note and that the answer given at paragraph 910 of the contested judgment is therefore inadequate. A document from a third party, dated 1986 and in which there is a reference to exports of cement into the United Kingdom, could not constitute specific evidence of the appellant's consent to the adoption of the Cembureau agreement. However, the statement in question was not used to prove that Cementir acquiesced to the Cembureau agreement but to prove the existence of an agreement on non-transhipment to home markets between all the European producers. [77]

(b) The meeting of 19 March 1984

108. What the appellant says about this meeting, which it did not attend, makes no sense. First the Commission and then the Court of First Instance recognised that the Cembureau agreement was confirmed at the meeting of 19 March 1984, as it was at the meeting held on 7 November of that year. They also confirm that Cementir, a direct member of Cembureau, formed part of the cartel by attending two meetings, [78] but, as the Commission argues in its defence, the number of meetings which each undertaking attended did not affect the gravity of the infringement or the degree of the penalty.

(c) The meeting of 7 November 1984

109. At paragraphs 1031 to 1037 of the judgment under appeal, the Court of First Instance explains that the Cembureau agreement was confirmed at the meeting of 7 November 1984 by supporting the channelling of Greek and Spanish production surpluses so as to avoid destabilising European markets. Its assessments take into account, in addition to the minutes of the meeting and those of the meeting of the Executive Committee held on the following day, the summary notes dated 12 November 1984, from which it was inferred that the purpose of support for the Greco-Spanish

77 — See paragraphs 903 and 910 of the contested judgment.

78 — See paragraphs 1302, 1345 and 1352 of the contested judgment.

agreement was to avoid 'the risk of a destabilisation in Europe', and also the Blue Circle internal memorandum of 1 December 1983, from which it follows that 'non-transhipment to home markets and the channelling of exports went hand in hand'.

110. One may be more or less in agreement with the logic followed by the Court of First Instance, but, of course, one cannot attribute to it the defects capable of justifying the Court of Justice's interference in an area which, like the assessment of evidence, is in principle prohibited to it.

111. It is true that, taken in isolation, the meeting of 7 November 1984 does not prove anything, but, if it is taken together with other documents which describe it and with the meetings held in January 1983 and March 1984, including those relating to their preparation and conduct, and also with the subsequent implementing measures, the assessments made by the Commission and the Court of First Instance acquire their full meaning. Much as one does when looking at an impressionist painting, one must stand back in order to contemplate it as a whole and understand it in its entirety.

112. The appellant also errs where it claims to find a contradiction in the reasoning of the judgment where it classifies as specific evidence a matter which in its opinion is a mere deduction. It is confusing the probative material with the logical inferences drawn by the Court of First Instance. Of course, the minutes and other documents used are specific, material and tangible evidence, which, after being assessed and evaluated in its entirety, made it possible to establish that the Cembureau agreement existed.

(d) The other elements of assessment

113. Once again, Cementir is disputing the evaluation of the evidence by the Court of First Instance and is confusing the right to obtain a judicial answer with the desire that it be consistent with the allegations put forward. However, the judgment under appeal accepts that, even though intra-Community trade was not dealt with at the meetings of 30 May 1983 and 10 June 1985, that does not 'shed a different light on the body of documentary evidence showing that an agreement not to tranship to home markets was concluded, and then confirmed, at the meetings held on 14 January 1983, 19 March and 7 November 1984'.[79]

114. In short, the first head of the second plea in law put forward by Cementir must be rejected as inadmissible and unfounded.

79 — Paragraph 1049.

B — In the examination of the exchanges of price information (third plea in law, first head)

(1) Arguments of the parties

(a) The specific exchanges during the Head Delegates' meetings (Article 2(1) of the Decision)

115. The appellant contends that this infringement should not be imputed to it, because: (a) the data exchanged were of no interest from the point of view of competition; (b) the draft introductory statement of the Chairman of Cembureau for the meeting of 14 January 1983 was a general document from which the anti-competitive nature of the information exchanged could not be inferred; and (c) the documents relating to the meeting of 19 March 1984 could not apply to the appellant, because it was not present.

116. The Commission submits that this complaint is inadmissible, since it reiterates the arguments put forward at first instance.

(b) The periodic exchanges (Article 2(2) of the Decision)

117. Cementir expresses its views on the draft introductory statement of the Chairman of Cembureau and states that it does not understand how a system involving information on known data, which was in practice before 14 January 1983, can be illegal. The documents relating to the meeting of 19 March 1984, which were drawn up by third parties, which were not addressed to it and referred to an event in which it did not participate, cannot concern it. The document on national average prices was not distributed at the meeting held in January 1983, but at the one held on 30 May 1983, which the appellant did not attend. In Cementir's submission, therefore, the Court of First Instance distorted the evidence which it examined and produced inadequate reasoning.

118. The Commission considers this complaint inadmissible, since Cementir is repeating what it submitted at first instance. Furthermore, the Court of First Instance's reasoning is clear and the appellant does not explain why the exchanges of price information at the Head Delegates' meetings could not form part of the periodic information system. One practice forms part of the other. The exchanges, which were lawful before the adoption of the Cembureau agreement, served anti-competitive purposes after 1983. The

material error on the date of distribution of the table of prices corroborates its argument. Although it was distributed during a meeting which Cementir did not attend, the other evidence relating to the illegal nature of the cartel is not invalidated.

(2) Cementir and the exchanges of price information

119. The Commission's contention that the plea is inadmissible is unfounded. It is sufficient to read Part III.1 of the appeal to find that, in addition to reproducing the arguments raised at first instance, Cementir is challenging the answer given in the contested judgment.

120. The appellant does not deny that price information was exchanged, but, as regards the information produced at the meetings of 14 January 1983 and 19 March 1984, [80] it draws attention to the fact that the Court of First Instance accepted that it did not attend the second meeting. [81]

121. Nor were the periodic exchanges of prices in Denmark, Ireland, Greece, Italy, Portugal, Germany, France, Spain and the United Kingdom discussed [82] or Cementir's participation between 1 January 1984 and 31 December 1988. [83] The decisive factor, according to the Commission, is that that practice, which had been in place since 1981, constituted from 1984 a means of applying the Cembureau agreement, because it facilitated its implementation. [84]

122. The Court of First Instance approved that conclusion on the basis of facts which were fully proven and undisputed: (i) the Head Delegates' meetings at which concern for the marked reduction in certain prices was expressed and at which information in that regard was distributed; (ii) the table of 'domestic prices' referred to at paragraph 1646 of the judgment under appeal, which was distributed during the Head Delegates' meeting of 30 May 1983; [85] and (iii) the existence of the exchanges of information, which were apt to give indications of trends in price differences between the member

80 — See paragraph 1470 of the contested judgment.

81 — See paragraph 1571 and the second indent of point 39 of the operative part of the judgment.

82 — See paragraph 1577 of the judgment. It must be borne in mind that Article 2(2)(a) of the Decision, on prices in Belgium, the Netherlands and Luxembourg, was annulled by the Court of First Instance.

83 — See paragraphs 1751 to 1755 and 4400 of the judgment.

84 — Recital 47, paragraph 13, of the Decision.

85 — The judgment incorrectly states that it was at the meeting of 14 January 1983, but in recital 16, paragraph 5, of the Decision the reference is to the meeting of 30 May 1983.

countries of Cembureau [86] and to provide information with the aim of setting them at dissuasive levels. [87] The Court of First Instance inferred from such facts that the regular exchange of information following the adoption of the Cembureau agreement served to facilitate the implementation of the agreement. [88]

123. Against that background, Cementir's complaints lose all their consistency.

124. The Court of First Instance provided adequate reasons for its finding that the information exchanged was not only relevant from the point of view of competition but that it served the agreement on non-transhipment to home markets. [89] The fact that the information was public does not mean that its dissemination cannot have had as its object to collaborate in and facilitate the implementation of the Cembureau agreement. On the other hand, conduct which is lawful in principle may become illegal if it serves the purpose of an agreement which restricts competition. [90]

125. The Court of First Instance set out the reasons why the information was provided at the meeting of 14 January 1983 and specified the documents which supported such an assertion. [91]

126. The documents relating to the meeting of 19 March 1984 were not taken into account against Cementir, which was not held responsible by the Court of First Instance for exchanging information on grey cement prices. The appellant is again confusing two successive stages: the finding of the infringement and participation in its implementation by the various undertakings and associations of undertakings concerned.

127. It is certain that the table headed 'Domestic prices (exclusive of tax)' was distributed not at the Head Delegates' meeting of 14 January 1983, as the Court of First Instance incorrectly states, but at the meeting of 30 May 1983, [92] but that error does not have the consequence that Cementir alleges.

128. The Court of First Instance used that document not to prove the infringement

86 — See paragraph 1643 of the judgment.

87 — The exchanges 'in fact enabled an undertaking with an order from a potential customer in another member country to know the general level of prices in force at that time in that country and to align its export prices accordingly, so as to dissuade that customer from seeking cement outside his country, and so avoid competing with local producers' (paragraph 1642 of the judgment).

88 — See paragraphs 1644 to 1646 of the judgment under appeal.

89 — See paragraph 1518 of the judgment, for specific exchanges, and paragraph 1644, for periodic exchanges.

90 — See point 134 of the Opinion which I delivered today in Case C-204/00 P *Aalborg Portland* v *Commission*. See also paragraphs 1634 and 1638 of the judgment.

91 — See paragraph 1473 of the judgment at first instance.

92 — Recital 16, paragraph 5, of the Decision refers to the meeting of 30 May 1983.

but to corroborate the validity of the assessment of that matter by the Commission.[93] Nor did it take that table into account for the purpose of proving that exchanges of information had taken place at the meeting of 14 January 1983, but to support its finding, on the basis of the material error, that such exchanges had not been effected at the second meeting, the one held on 30 May 1983.[94]

C — In the examination of the measures to protect the Italian market (fourth plea in law)

(1) The pressure brought to bear on Calcestruzzi (Article 4(3)(a) of the Decision) (first head)

(a) Arguments of the parties

129. Cementir submits that none of the evidence used by the Court of First Instance indicates that it was one of the Italian cement producers which put pressure on the Ferruzzi group to ensure that Calcestruzzi ceased to implement the supply contract which it had signed with the Greek producer Titan:

1. The minutes of the Head Delegates' meeting held in Baden-Baden on 9 September 1986 could not be used against it, because it did not attend that meeting.

2. It did not take part in any of the meetings of the European Task Force, as the Court of First Instance acknowledged.

3. Furthermore, the letter from Titan to its English lawyers[95] does not show that the appellant's relationship with Calcestruzzi corresponded to a concerted practice with other European producers, since, although it intended to attract Calcestruzzi as a customer, it always acted on its own behalf and not within the framework of the European Task Force, a body of which it never formed part.

93 — See paragraphs 1644 and 1645 of the judgment at first instance.

94 — See paragraph 1475 of the judgment.

95 — Document 33.126/19196.

4. Last, the telexes which Italcementi and Calcestruzzi sent to Titan to confirm suspension of the agreed deliveries of cement do not presume the existence of anti-competitive practices. They only show that there was a trade agreement between various Italian producers and Calcestruzzi, to which Cementir adhered in its own interest, as did many others.

130. There is no evidence, therefore, that it participated in the infringement described in Article 4(3)(a) of the Decision. The findings of the Court of First Instance are not adequately reasoned, since it was not shown that Cementir's initiatives in relation to Calcestruzzi, which led to the negotiation of the 'SIPAC' (Societá Italiana per le Promozioni ed Applicazioni del Calcestruzzo SpA) agreements, were objectively linked with agreements adopted at European level.

131. Cementir considers that, in the absence of other evidence, the Court of First Instance relied on a mere presumption which obliged it to produce a *probatio diabolica* to prove the absence of a non-existent connection, and consequently, in the appellant's opinion, the right to be presumed innocent was infringed.

132. The Commission contends that the plea is inadmissible on the ground that it refers to the assessment of the evidence.

133. The reference to the Italian cement producers cannot be criticised as 'very general', since Calcestruzzi's telex of 28 May 1987 to Titan refers to the various undertakings, including Cementir, by name, as well as referring to them as the 'Italian cement producers' and the 'Italian cement industries'.

(b) Cementir and the pressure brought to bear on Calcestruzzi

134. Once again, Cementir is simply disputing the Court of First Instance's assessment of the evidence and the plea is therefore inadmissible.

135. Paragraphs 3151 to 3163 of the judgment under appeal all analyse the evidence and find that the Commission had sufficient reason to penalise the concerted practice described at Article 4(3)(a) of the Decision; more particularly, paragraphs 3283 to 3290 explain the participation by

Cementir, which is once again confusing absence of reasoning or inadequate reasoning with rejection of its claims.

136. The plea is also unfounded.

137. The fact that the appellant did not attend the Baden-Baden meeting [96] or the meetings of the European Task Force [97] does not prove that it did not participate in the practice described at Article 4(3)(a) of the Decision. There is other evidence which implicates it: Titan's letter to its English lawyers and the telexes which Italcementi and Calcestruzzi sent to Titan.

138. In reality, those meetings serve not to prove that it was involved in the agreement but to show that it was connected with the European Task Force. It should be taken into account that Article 4(3)(a) of the Decision describes as an infringement the cooperation 'in concerted practices designed to withdraw Calcestruzzi... as a customer from the Greek producers, and from Titan in particular'. Some undertakings were involved through the European Task Force, while others, like Cementir (and Italcementi and Unicem too) did so directly by entering into negotiations with Ferruzzi so that its subsidiary Calcestruzzi would suspend implementation of the agreement concluded with Titan.

139. The appellant itself recognises the facts by implication in its appeal and admits having attempted to attract Calcestruzzi as a customer, but in its own interest and not within the framework of the implementation or the inception of a plan conceived within the European Task Force. However, the fact that it acted in its 'own interest' does not preclude the existence of a cartel.

140. Therefore, first the Commission and then the Court of First Instance were able to infer that Cementir and the other Italian producers entered into negotiations with Feruzzi so that Calcestruzzi would not implement the imports agreed with Titan and to presume [98] that such agreements took place within an agreement on a European scale to withdraw that undertaking, which at the time was the major Italian manufacturer of ready-mix concrete, as a customer of the Greek cement manufacturers.

96 — See, for example, paragraph 3077 of the judgment under appeal.

97 — See paragraph 2768 of the judgment.

98 — See my thoughts in this Opinion and in the related ones of today's date concerning the lawfulness of using proof based on presumptions to rebut the presumption of innocence.

(2) The agreements with Calcestruzzi (Article 4(3)(b) of the Decision) (second head)

(a) Arguments of the parties

141. Cementir submits that the evidence of its participation in that infringement is irrelevant, for the simple reason that it did not attend the meetings of the European producers at which its perpetration was discussed.

142. As regards the meeting held in Luxembourg on 27 May 1987 between Titan, Cementir and the other Italian cement producers, paragraph 3359 of the judgment under appeal distorted its arguments, since the appellant attended with the sole aim of maintaining its own agreement with Calcestruzzi and not of implementing the agreement between Calcestruzzi and Titan (sic). Furthermore, paragraph 2780 recognised that there is no connection whatsoever between its involvement in the Luxembourg meeting and the contacts between European producers which were taking place at the same time within the European Task Force.

143. Cementir further submits that the Court of First Instance made a manifest error of qualification in connecting its accession to the agreements with Calcestruzzi with the anti-competitive agreements which may have been entered into by other producers within the European Task Force.

144. The Commission contends that Cementir is reproducing what it already stated, without disproving the assessments in paragraphs 3353 to 3357 of the contested judgment on the relation between the contracts signed by the Italian producers in April 1987 and the Cembureau agreement.

(b) Cementir and the contracts with Calcestruzzi

145. The appellant's complaint in respect of the contracts signed with Calcestruzzi is essentially the same as the complaint it puts forward in respect of the infringement described at Article 4(3)(a) of the Decision and it must, therefore, meet the same fate. The appellant does not deny the existence of the contracts signed with Calcestruzzi on 3 and 15 April 1987 or that they were the result or the object of the agreement between the three Italian producers and Ferruzzi, to which the telexes already mentioned in this Opinion refer. [99] In those circumstances, the assessments set out in

99 — See paragraphs 3345, 3353 and 3355 of the judgment under appeal.

paragraphs 3356, 3360, 3361, 3367, 3372, 3377 and similar paragraphs of the judgment under appeal cannot be classified as unfounded.

146. In particular, the interpretation which it gives of the meeting in Luxembourg does not distort Cementir's arguments or distort any of the evidence, because it can be inferred from the documents used by the Commission that the meeting sought a solution to the inconvenience caused by the suspension of deliveries of cement by Titan as a consequence of the agreement reached with Italcementi, Unicem and Cementir. [100]

147. It is irrelevant that Cementir did not form part of the European Task Force or that it did not attend the Head Delegates' meeting held in Luxembourg on 27 May 1987 on the occasion of the Cembureau general assembly. [101] The infringement found at Article 4(3)(b) of the Decision is not an agreement of European dimension, since only the three Italian manufacturers took part in it. In other words, the contracts and agreements signed on 3 and 15 April 1987 represent the implementation of the agreement between Cementir, Italcementi and Unicem, the purpose of which was to avoid a threat of the import of 1.5 million tonnes of Greek cement by Calcestruzzi, [102] an account of which was given at the meetings of the European Task Force on 11 February and 15 March 1987. [103] In that context, the appellant's arguments lose all their force, because the agreement described in that provision was not adopted within that group.

148. The former considerations have the effect that the same applies to the complaint concerning the failure to adduce evidence that any connection existed between the infringement found at Article 4(3)(b) of the Decision and the European Task Force. The Commission and the Court of First Instance had before them sufficient evidence to detect that connection, because at both meetings the agreement between the Italian manufacturers and Calcestruzzi was communicated, which made it possible to avoid a threat of exports which would have been 'catastrophic for prices', [104] and to infer that

100 — See paragraph 3360 of the judgment, which incorrectly refers to document 33.126/19218; in reality, as stated in recital 27, paragraph 10, second subparagraph, of the Decision, the reference should be to document 33.126/19208.

101 — As the Court of First Instance itself recognises at paragraph 2780 of the judgment.

102 — See recital 55, paragraph 2, of the Decision.

103 — See paragraphs 3286 and 3345 of the judgment.

104 — Record of the European Task Force meeting of 11 February 1987 (see recital 27, paragraph 5, of the Decision).

the Italian agreement was liable to 'affect trade between Member States' [105] since it sought to prevent Calcestruzzi from importing Greek cement. [106]

D — In the classification of the single, continuous agreement (fifth plea in law)

(1) Arguments of the parties

(a) A single, continuous agreement relating to the European Task Force (first head)

149. The appellant maintains that paragraph 3760 of the judgment under appeal is incorrect, since it has no legal basis and is contradictory, as it assumes that the contracts signed with Calcestruzzi interfered with competition and presumes that Cementir was aware that they formed part of a global plan. It states two reasons for its position:

1. it is contradictory to consider that Cementir did not participate in the infringements relating to the European Task Force and to Interciment (Article 4(1) and (2) of the Decision) and, immediately afterwards, to hold it responsible for a single, continuous agreement whose purpose was that cartel;

2. as Cementir had not been represented in the European Task Force or in Interciment by other Italian undertakings, it cannot be presumed that it 'necessarily' found out through third parties about the anti-competitive plans. The contested judgment accuses the appellant of being aware of the connection between the agreements and an alleged single, continuous agreement, without offering any explanation, which in the appellant's view is incompatible with the right to be presumed innocent.

150. The Commission contends that the alleged contradiction is fictitious. Paragraph 3761 of the contested judgment stated that the fact that Cementir did not participate in all the constituent elements of the infringement could not exonerate it of responsibility, according to the relevant case-law. Although the Commission did not prove that the appellant participated in

105 — See paragraph 3378 of the contested judgment, which refers to recital 57 of the Decision.

106 — By the contracts and supply agreements signed on 3 and 15 April 1987 by Unicem, Italcementi, Cementir and Calcestruzzi, a joint subsidiary known as Societá Italiana per le Promozioni ed Applicazioni del Calcestruzzo SpA (SIPAC) was set up (see paragraphs 444 and 445 of the judgment). The three producers undertook to meet all Calcestruzzi's cement requirements and to apply the price reductions specified. For its part, Calcestruzzi undertook to channel half of those discounts to the joint subsidiary, which was to invest the sums in ready-mix 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 purchases were less than 95% of its requirements, the three producers reserved the right to terminate the agreements and contracts (see recital 27, paragraph 6, of the Decision and paragraph 3345 of the judgment).

the setting-up of the European Task Force, it showed that it was involved in subsequent acts, such as the concerted practices and the agreements with Calcestruzzi, both of which were manifestations of the Cembureau agreement.

151. Furthermore, the Commission asks whether the Court of First Instance could have interpreted otherwise the telex which Calcestruzzi sent to Titan on 13 May 1987, in which it referred to a meeting held in Luxembourg to resolve the problems with Titan, following the signature of the agreement with Calcestruzzi.

(b) A single, continuous agreement relating to the Cembureau principle (second head)

152. Cementir denies that the fact that it attended one or two meetings of the Cembureau Head Delegates proves that it was involved in a single, continuous agreement and disagrees in particular with paragraph 4127 of the contested judgment, where it is stated that owing to the simple nature of the Cembureau principle ('everyone stays at home') it was not necessary to hold regular meetings; that test is unfounded and summary, since an agreement such as the one in question would not exist without being administered with a certain degree of continuity and regularity. Even more, when the infringements relating to the European Cement Export Committee and the European Export Policy Committee (Articles 5 and 6 of the Decision) and, in so far as they concern the appellant, those relating to the European Task Force and Interciment had been annulled, the Court of First Instance should have declared that the Commission's theory concerning a single plan, made up of a series of implementing measures, was demolished.

153. The appellant admits having attended the meeting of 14 January 1983 and the one held on 7 November 1984, at which intra-Community trade in cement was not discussed, but it maintains that its presence does not mean continuous adherence to the Cembureau agreement. More specifically, it states:

1. that there is no connection between those meetings and the agreements with Calcestruzzi, which were signed more than four years after the first meeting in 1983;

2. that the agreements are not connected with the meetings of the European Task Force; and

3. that the periodic exchanges of price information were extraneous to the agreement allegedly reached at the meeting of 14 January 1983.

154. Last, the appellant is unable to understand why paragraph 4064 of the contested judgment states that it 'must' have been aware that its conduct formed part of a common anti-competitive plan which extended over 10 years.

155. The Commission complains that Cementir is reiterating its allegations and relying on evidence adduced at first instance. It claims that the plea should be rejected as inadmissible.

156. Although it was not proved that the appellant participated in setting up the European Task Force and in Interciment, it was proved that it was involved in the Cembureau agreement and, in particular, in some of its unlawful manifestations. Although certain aspects of the Decision were annulled, its structure was largely untouched, so that the fundamental part of the administrative finding was left intact: the existence of a global agreement on non-transhipment to home markets, applied by multiple implementing measures.

(2) The concept of a single, continuous agreement.

157. Article 85 of the Treaty prohibits agreements between undertakings and decisions by associations of undertakings and, generally, concerted practices, including conduct implementing those agreements or decisions, when they may affect intra-Community trade and have an anti-competitive object or effect. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. [107] The decisive factor is the existence of a common subjective element and of the same unlawful design which links them. [108]

158. In principle, it is legitimate to classify as a single, continuous infringement the series of activities taking place within a system of periodical meetings, with the common objective of non-transhipment to cement markets, in the furtherance of which the persons concerned adopt, inter alia, measures to change price information to persuade and bring pressure to bear on importers which threaten stability on the markets

107 — See *Commission* v *Anic* cited above, paragraph 81.

108 — See *Montecatini* v *Commission*, cited above, paragraph 195.

159. Against that background, it is irrelevant whether any act, taken in isolation, constitutes an autonomous infringement of Article 85 of the Treaty; [109] it is also irrelevant that an undertaking has not cooperated in all the ingredients of the collusive practice, has played a minor role [110] or has not applied it. [111]

160. Therefore, if a company participates in an infringement of this type by engaging in conduct of its own which is intended to bring about the common goal, it is responsible, during the period of its involvement, for the conduct of other economic operators within the framework of that infringement. 'That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.' [112]

(3) The single, continuous agreement relating to the European Task Force and its implementing measures

161. Cementir does not dispute the Court of First Instance's classification of the infringements which the Commission describes in the different parts of Article 4 of the Decision as a single, continuous agreement, but it denies having participated in them.

162. In the light of the case-law of the Court of Justice which I have just described, there is nothing contradictory about the fact that an undertaking which was not involved in setting up an agreement, but was involved in certain of its implementing measures, should be responsible for the single, continuous anti-competitive agreement.

163. The decisive point is whether it has been shown that Cementir was aware or could reasonably have been aware of the unlawful agreements set up by its competitors, in which it was not involved, and also of the existence of a link between those agreements and the practices in which it took part.

164. On this last point, I refer to my considerations a few lines above, when I analysed the second head of the fourth plea in law, in particular point 148.

165. As regards the appellant's possible awareness of the setting-up of the European Task Force, paragraph 3760 of the contested judgment does not appear to be illogical or unfounded. Unicem and Italce-

109 — See *Commission* v *Anic*, paragraph 81.

110 — Without prejudice to its impact on the assessment of the gravity of the infringement and, consequently, the intensity of the penalty (see paragraph 90 of the judgment cited in the previous footnote).

111 — See Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 50.

112 — *Commission* v *Anic*, cited above, paragraph 83. See also paragraph 203.

menti were fully aware that the pressure on Calcestruzzi and the agreement which derived from the signing of contracts of supply with that undertaking formed part of the wider strategy outlined within the European Task Force (aimed at eliminating imports from Western Europe), for which reason, at the meetings of the European Task Force held on 11 February and 15 March 1987, an account was given of the measures to protect the Italian market. Therefore, it is consistent to infer that Cementir, which was acting in agreement with those other two Italian producers first to bring pressure on, and then to collude with, Calcestruzzi, was aware of the existence of that wider agreement, in the setting-up of which it was not involved, and that the pressure and the agreements with Calcestruzzi served the same object. The proof of presumptions, on whose legitimacy I have expressed my views in this Opinion, supports that finding.

166. There is a further element which supports that inference. The meeting held in Luxembourg on 24 May 1987 between the three Italian cement manufacturers and the Greek producer Titan was parallel to the meetings held there on 25 to 28 of that month by the Cembureau Head Delegates, at which the future of the European Task Force was discussed.

(4) The single, continuous Cembureau agreement

167. Paragraphs 4025 to 4417 of the contested judgment set out the reasons why the Cembureau principle was qualified as a single, continuous agreement and examine the participation of each of the undertakings. Cementir focuses its criticisms on three specific aspects:

1. the fact that it attended two meetings is not sufficient for its conduct to be regarded as having formed part of a single, continuous agreement, especially if account is taken of the fact that there is no connection between the agreements with Calcestruzzi and those meetings and the meetings of the European Task Force, and that the periodic exchanges of price information were extraneous to their conduct;

2. when Articles 5 and 6 of the Decision had been annulled, the concept of a single, continuous agreement lost its foundation and was demolished;

3. it is an unacceptable presumption to claim that it 'must' have been aware that its conduct formed part of a common anti-competitive plan.

168. On the basis of the case-law cited above, it is possible to declare that an undertaking participated in a single, continuous anti-competitive agreement irrespective of the number of occasions, the significance and the degree to which it was involved. The decisive factor lies elsewhere, in the knowledge or foreseeability of the unlawful activities of the other participants and in the awareness that it is contributing by its involvement to a common anti-competitive purpose. It follows that the fact that Cementir only attended the meetings of 14 January 1983 and 9 November 1984 is irrelevant. It should be noted, moreover, that it also participated in the exchanges of price information and in the measures adopted to protect the Italian cement market. [113]

169. In order to deny the consequences of that fact, the appellant seeks to dissociate those measures from the meetings at which the Cembureau principle was ratified, which it attended. Cementir is thus reopening a discussion which has already been answered in this Opinion and which, as I have stated, is inadmissible and unfounded. What is certain is that the Court of First Instance set out both the reasons why the exchanges of price information sought to facilitate the implementation of the Cembureau agreement [114] and the reasons why the pressure brought to bear on Calcestruzzi and the agreement relating to the contracts signed with Calcestruzzi were connected with the European Task Force and with the Cembureau principle, with whose objectives they tallied perfectly. [115]

170. A second aspect of Cementir's complaint proceeds from a premiss which is mistaken in part. The Court of First Instance did not annul Article 6 of the Decision in its entirety, [116] but only in regard to the undertakings referred to at paragraph 4015 of the judgment. That is to say, the concerted practice within the framework of the European Export Policy Committee existed and, because it was intended to prevent incursions by competitors on respective national markets in the Community, [117] an aspect which Cementir does not dispute, is a further reason to classify the Cembureau agreement as a single, continuous practice.

171. As regards the criticism relating to paragraph 4064 of the contested judgment, I refer to what I said at point 165 of this Opinion. If the appellant was present at the meetings and was involved in the practices described at point 168 above, there is nothing arbitrary in stating that it 'must' have been aware that it was part of a global anti-competitive plan whose purpose was non-transhipment to home markets. In fact, (a) if it attended the meeting at which the

113 — See paragraph 4400 of the contested judgment.

114 — See paragraphs 1501 to 1518 and 1620 to 1682 of the judgment at first instance.

115 — See paragraphs 3068 to 3163 and 3345 to 3386 of the contested judgment.

116 — In which, certainly, Cementir was not found to have been involved in the infringement described therein.

117 — See paragraphs 3919, 4055 and similar paragraphs of the judgment under appeal.

Cembureau principle was adopted; (b) if it then attended another meeting at which the principle was confirmed; (c) if it formed part of the system for circulating price information, placed at the service of the 'everyone stays at home' rule; and (d) if, in order to protect the Italian domestic market, it was involved in 'the action' and in the 'Calcestruzzi agreements' to meet imports, especially imports from Greece, it is not implausible, incoherent or irrational to consider that Cementir was aware that it was participating in a general market-sharing agreement.

172. The fifth plea in law must therefore be rejected as well.

3 — *The fine (sixth plea in law)*

A — Arguments of the parties

173. Cementir devotes the last plea in law to the economic penalty imposed on it. It divides the complaint into six heads, two of which — the fourth and the sixth — were dismissed as manifestly unfounded in the order of 5 June 2002.

174. The four remaining heads dispute the duration and the gravity of the infringements, the time-barring of the infringement described in Article 2(1) of the Decision and the amount of the fine fixed by the Court of First Instance.

(1) The duration of the infringements (first head)

175. The appellant submits that, if the Court of Justice considers the grounds relating to the lawfulness of the exchanges of price information, and also those referring to the pressure brought to bear on and the agreements with Calcestruzzi, the duration of the infringement should be reduced, in so far as it concerns the appellant, to a single day, with the consequent effect on its gravity. In particular, the duration of the infringement cannot be connected to the term of the agreement with Calcestruzzi, since the anti-competitive element lies solely in the collusion to put an end to relations between Calcestruzzi and Titan.

176. The Commission contends that this complaint constitutes an implied request by Cementir for a reconsideration of the facts and that it is therefore inadmissible. Furthermore, at paragraphs 3283 to 3290 and 3133 to 3166 of the contested judgment, the Court of First Instance accepts the argument in the Decision concerning the

duration of the infringement and emphasises that the contracts signed with Calcestruzzi, which were in force until 3 April 1992, represented a manifestation of the Cembureau agreement.

(2) The gravity of the infringement (second head)

177. Cementir claims that the part of the judgment in which, subscribing to the Commission's argument, the Court of First Instance connected the penalty with the infringement described in Article 1 of the Decision and found that it was irrelevant whether the accused undertakings had participated in one or in a number of infringements is incoherent and illegal.

178. In support of that contention, the appellant relies on the following reasons:

1. it is contrary to the principle of proportionality that the annulment of a large number of infringements has no effect on the assessment of the overall gravity of the impugned conduct, since it is paradoxical that, although four of the infringements imputed to it were annulled, Cementir was still subject to the same percentage of penalty;

2. it is also contrary to the Community case-law which makes the gravity of the infringement conditional upon the extent to which the undertakings have taken part in the single, continuous agreement;

3. it also results in unequal and unjustified treatment, since undertakings which have taken part in a different number of infringements and which have adhered in different ways to the global agreement receive the same penalty.

179. The explanation concerning the connection of the penalty to the infringement of Article 1 of the Decision was not provided by the Commission until the hearings at first instance, which, according to Cementir, had a decisive impact on the lawfulness of the Decision in the part relating to the fixing of the fine.

180. In the Commission's view, the fine was imposed on each undertaking for its participation in the Cembureau agreement and the contested judgment adopts an approach which is perfectly consistent with the case-law on fines.

(3) Adjustment of the amount of the fine (third head)

181. The turnover which Cementir communicated to the Commission at the material time was higher than the actual figure, since it included amounts received by way of transport costs, the amounts in respect of bags and other services unconnected to the transport of cement, so that paragraphs 5030 and 5032 of the contested judgment, by holding that such costs form an integral part of the sale of cement, is incorrectly reasoned and contradicts the principles of proportionality and equal treatment.

182. The Commission contends that Cementir's complaint concerns the facts and is therefore inadmissible.

(4) The infringement found at Article 2(1) of the Decision is time-barred (fifth head)

183. The Court of First Instance emphasised that Cementir collaborated in the periodic exchanges of price information for one day. However, it should have made clear that the autonomous infringement referred to at Article 2(1) of the Decision was time-barred and taken that fact into account in assessing the general gravity of the appellant's conduct.

184. The Commission reiterates that this aspect of the plea is inadmissible for the same reasons as the third head and emphasises that at paragraphs 4801 and 4802 of the contested judgment it is clearly stated that, under Regulation No 2988/74, [118] the Commission's power to impose penalties had not become time-barred when the Decision was adopted, since the infringement was committed between 14 January 1983 and 3 April 1992.

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

185. 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.

186. In the Decision, two distinct markets are envisaged, the market in grey cement and the market in white cement. As regards the first of these, it imputes the adoption of the Cembureau agreement, whereby agreement was reached on non-transhipment to home markets and the regulation of cement transfers from one country to another. Articles 2 to 6 cover bilateral or multilateral conduct designed to implement or

118 — Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

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.

187. The Commission imposed separate penalties for infringements relating to each market. [119]

188. As regards the market in grey cement, the only market in which Cementir was accused of anti-competitive conduct, 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 interconnected. [120] That approach is legitimate and is based on the Commission's power to adopt a single decision covering several infringements. [121]

189. The Commission further considered that all the undertakings and associations to which the Decision was addressed acceded to the Cembureau agreement and it set out the evidence which determined the participation of each of them. Thus, Cementir acceded, as a member of Cembureau, to the agreement or principle of not transhipping to home markets at the time when it was discussed and approved and cooperated in the adoption of the measures and arrangements agreed to supplement it and/or assist in its application. [122]

190. '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. [123]

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

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

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

121 — 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.

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

123 — 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. [124]

192. 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 Cementir 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. [125]

193. 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 assisted in directly protecting home markets, had tried to avoid implementing the Cembureau principle; and (3) Ciments luxembourgeois SA, 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 been associated with any implementing measure. [126]

194. 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. [127]

195. The Court of First Instance upheld Cementir's application in part because, in calculating the fine which it imposed on it, the Commission found that it had been in the Cembureau cartel for 122 months, whereas it was only shown to have participated for 110.5 months [128] and, for that reason, it reduced the amount of the fine in proportion. [129]

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

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

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

127 — 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.

128 — See paragraphs 4807 to 4814 of the judgment, specifically the 17th indent of paragraph 4814.

129 — See paragraph 4815 and the seventh indent of point 39 of the operative part of the judgment under appeal.

196. The appellant claims that the Court of First Instance's approach constitutes a breach of the principles of equal treatment and proportionality in the imposition of the fines.

197. Couched in those terms, this plea is inadmissible, since it reiterates the arguments set out in the application, to which the Court of First Instance responded at paragraphs 4949 to 4969 of the contested judgment. Cementir says nothing new in this plea, nothing which was not discussed and determined in the judicial proceedings. It exploits the fact that the Court of First Instance uses the same criterion in setting the fines as the Commission did to reproduce a discussion which in reality is a criticism not of the judgment under appeal but of the administrative decision imposing the fines.

C — The principles of proportionality and equal treatment

198. This plea in law is also unfounded.

199. 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.

200. 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.

201. 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. [130]

130 — 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 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

202. 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. [131]

203. 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.

204. 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.

205. 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, [132] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each. [133] 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.

206. 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.

131 — 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. 552).

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

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

207. 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.

208. 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.

209. For the same reason, the fact that the Court of First Instance annulled some of the provisions of the Decision on the ground that Cementir's contribution to the practices described had not been proven does not necessarily entail a reduction in the fine imposed, since the decisive factor was its continuous adherence to the Cembureau principle through its involvement in one or more of the implementing measures designed to afford direct protection to home markets. [134]

210. Thus, Cementir's suggestion that other undertakings which were also included in the group bearing greater responsibility made a more intensive contribution to the cartel is misplaced, even if its involvement were regarded not as intentional but as negligent, because, for the purposes of competition, infringements committed carelessly are no less serious than those committed deliberately. The Court of First Instance was not required to ascertain, in order to determine the gravity of the infringement, whether it had been committed on purpose or negligently. [135] In competition matters, the degree of culpability determines the penalty but is not a criterion for the setting of the fine. [136]

211. Nor is there a breach of the principle of equal treatment if the yardstick

134 — See paragraphs 4975 and 4976 of the contested judgment.

135 — See the order in *SPO and Others* v *Commission*, cited above, paragraphs 55 and 57.

136 — According to the case-law of the Court of Justice, Article 15(2) of Regulation No 17 deals with two distinct matters. First, it lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); these include the condition concerning the intentional or negligent nature of the infringement (first subparagraph). Secondly, it governs determination of the amount of the fine, which depends on the gravity and duration of the infringement (order in *SPO and Others* v *Commission*, cited above, paragraph 53, and *Ferriere Nord* v *Commission*, also cited above, paragraph 32).

employed is the companies in the group bearing 'less responsibility'. The reasons stated by the Commission, and approved by the Court of First Instance, [137] for distinguishing the two categories of undertakings satisfy an objective and reasonable criterion, that of the effect of the conduct on competition and, in particular, on the division and separation 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', [138] were classified as less serious.

212. 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.

D — The penalty is adequately reasoned

213. The Commission devoted recital 65 of the Decision to a very full explanation of the criteria relating to penalties which it was to apply in the operative part of its decision. For their part, paragraphs 4722 to 5057 of the contested judgment, which answer the applicants' complaints, analyse various aspects of the penalties imposed.

214. It is sufficient to read the Decision and the judgment to find that Cementir's complaint relating to the absence of reasoning for the decision to penalise only involvement in the Cembureau agreement, irrespective of the number of implementing measures in which each undertaking had been involved, is unfounded. A careful reading of the description which, on the basis of recital 65 of the Decision, I gave a few lines above on the criteria used by the Commission when imposing penalties will clearly reveal that the reasons that Cementir claims are absent are in the Decision.

215. In reality, that aspect of the plea is inadmissible, since it reproduces an allegation which received a full answer at paragraph 4722 et seq. of the judgment at first instance.

E — The duration of the infringements and, in particular, of the infringement described at Article 4(3)(b) of the Decision

216. One part of the first head of this plea takes as its starting point a hypothetical

137 — See recital 65, paragraph 9, of the Decision and paragraph 4968 of the judgment.

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

situation which did not occur: acceptance of the pleas relating to the exchanges of price information, to the pressure and to the contracts with Calcestruzzi. As I propose that those complaints should be rejected, the duration of the infringement remains, in principle, the same.

217. The second part of this first head of the fifth plea in law concerns the infringement referred to at Article 4(3)(b) of the Decision, which relates to the agreement reached between Cementir, Italcementi and Unicem whereby Calcestruzzi would cease importing cement from Greece, in connection with which the contracts with Calcestruzzi were signed, which were in force until 3 April 1992. The appellant maintains that it is contradictory that applicability of that agreement should coexist with the validity of those contracts.

218. I have already stated in my Opinion of today's date in Case C-217/00 P *Buzzi Unicem* v *Commission* [139] that Article 4(3)(b) of the Decision refers to two practices. One, which has external significance, sought to prevent imports of Greek cement by Calcestruzzi: this is the agreement between the three Italian producers. The other, which is of merely national significance, consists of the agreements and contracts signed by the three cement producers and Calcestruzzi itself. In the first, those responsible were Unicem, Italcementi and Cementir, while in the second those responsible include Calcestruzzi. The agreement between the three cement manufacturers to bring pressure to bear on whoever subsequently signed the contracts of supply is in itself an agreement which per se would attract a penalty. [140] Therefore, it is not contradictory or illogical that the duration of the cartel described at Article 4(3)(b) of the Decision should be fixed by reference to the time during which the agreements and the contracts which constituted its external expression were in force, in the same way as the length of time during which the Cembureau agreement adopted at the Head Delegates' meeting of 14 January 1983 was found to have existed was the period during which implementing measures were adopted.

F — The time-barring of the infringement consisting in the specific exchanges of price information

219. By this complaint, Cementir is reproducing the arguments put forward at first instance, without criticising the answer given at paragraphs 4801 and 4802 of the contested judgment. It follows that its arguments are inadmissible.

139 — Points 188 to 192.

140 — Penalties can be imposed in respect of agreements whose purpose is to divide markets, irrespective of whether they subsequently have the actual effect of restricting competition. In *Suiker Unie and Others* v *Commission*, cited above, the Court of Justice indicated the agreements which have the *object or effect* of influencing the market (paragraph 174; emphasis added). That principle is now established in the case-law of the Court of Justice: 'although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition' (*Hüls* v *Commission*, cited above, paragraph 165). See also *Montecatini* v *Commission*, cited above, paragraph 125.

220. In any event, they are also unfounded.

221. The answer to this plea in law must be based on the facts established in the contested judgment which have not been invalidated following an appropriate channel on appeal. Cementir attended the Head Delegates' meetings of 14 January 1983 and 7 November 1984. It also participated in the exchanges of price information at the first of those meetings and also in the periodic exchanges between 1 January 1984 and 31 December 1988. It took part in the concerted practices intended to withdraw Calcestruzzi as a customer of the Greek producers, and Titan in particular, between 9 September 1986 and 15 March 1987. Last, it joined with Unicem and Italcementi in order to prevent Calcestruzzi from importing cement from Greece, to which end they signed contracts and agreements of supply with Calcestruzzi on 3 and 15 April 1987; that practice continued until 3 April 1992. [141]

222. Therefore, even supposing that the infringement described at Article 2(1) of the Decision were time-barred, that would not in any way affect the outcome, since Cementir continued to form part of the agreement as a direct member of Cembureau, having collaborated in certain of the implementing measures. It would therefore be among the group of undertakings fined 4% of their turnover.

223. Furthermore, the appellant is forgetting that the infringement is continuous and, as such, the point at which time begins to run is the day on which the single conduct came to an end, [142] which, in the present case, was 3 April 1992. As the Statement of Objections was sent on 25 November 1991, [143] the question of a time-bar does not arise, since on that date the infringement was still producing its effects.

G — The adjustment of the turnover

224. Like the previous head, this head of the sixth plea is inadmissible, since Cementir is putting forward, without more, the same reasons as at first instance, to which an answer was given at paragraphs 5030 to 5032 of the contested judgment.

225. Furthermore, Cementir's approach is in my view incorrect.

141 — See paragraphs 4399 and 4400 of the contested judgment.

142 — See Article 1(2) of Regulation No 2988/74.

143 — The investigations took place between April 1989 and July 1990.

226. The 'turnover achieved' as a reference for the fixing of fines is used to assess the size and economic strength of the undertakings, [144] in order to ensure that the penalty is proportionate to the undertaking's size on the product market in respect of which the infringement was committed. Such is the import of Article 15(2) of Regulation No 17. [145] It is necessary, therefore, to have regard to the influence which the undertaking concerned has in the market owing to its size and its economic power. [146]

227. Cementir's complaint concerning whether the cost of transporting the cement or the cost of the bags in which it is supplied form an integral part of the sale is to no avail. The decisive factor is that they form part of the movements and of the traffic of the company and must therefore be taken into consideration for the purpose of gauging the size and capacity of the undertaking.

228. Last, the complaint alleging inequality which the appellant puts forward in this point is merely rhetorical. Anyone who complains of discriminatory treatment must be able to prove it by providing a factor for comparison. Cementir has not done so either at first instance or on appeal.

229. In the light of what I have said, the four heads of the sixth plea in law which were not dismissed in the order of 5 June 2002 must be rejected.

230. Since all the pleas in law declared admissible must be rejected, the appeal must be dismissed in its entirety.

V — Costs

231. As the Commission has applied for costs, Cementir must be ordered to pay the costs of this appeal, pursuant to the first paragraph of Article 122 read in conjunction with the first subparagraph of Article 69(2) of the Rules of Procedure of the Court of Justice.

144 — See *Sarrió* v *Commission*, cited above, paragraph 86.

145 — See *Musique diffusion française and Others* v *Commission*, cited above, paragraph 119. See also Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 61.

146 — See *Musique diffusion française and Others* v *Commission*, cited above, paragraphs 120 and 121. Reference may also be made to *Commission* v *Anic*, cited above, paragraph 164, and *Hüls* v *Commission*, cited above, paragraph 195.

VI — Conclusion

232. In accordance with the foregoing reflections, I propose that the Court of Justice should:

(1) reject in their entirety the pleas in law put forward by Cementir — Cementerie del Tirreno SpA that were not dismissed in the order of 5 June 2002;

(2) uphold the judgment of 15 March 2000 of the Fourth Chamber, Extended Composition, of the Court of First Instance in 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* in so far as it refers to the appellant;

(3) order the appellant to pay the costs of this appeal.