JUDGMENT OF THE COURT
17 OCTOBER 1972[1]

Vereeniging van Cementhandelaren v Commission of the European Communities[2]

Case 8/72

Summary

1. *Community administration — Authorization to sign — Permissibility (Provisional Rules of Procedure of the Commission, Article 27)*

2. *Competition — Cartels — Price-fixing — Target prices — Clauses restricting other trading conditions — Interference with competition within the Common Market (EEC Treaty, Article 85)*

3. *Competition — Purely national cartel — Effects throughout the territory of a Member State — Influence on trade between Member States — Incompatibility with the Treaty (EEC Treaty, Article 85)*

1. An authorization to sign constitutes a measure concerning the internal organization of the services of the Commission in accordance with Article 27 of the Provisional Rules of Procedure adopted under Article 7 of the Treaty of 8 April 1965 establishing a single Council and a single Commission.

2. The fixing of prices, even those which merely constitute a target, affects competition because such target prices enable all the participants in a cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.

3. An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production.

In Case 8/72

VEREENIGING VAN CEMENTHANDELAREN (Cement Dealers' Association) having its registered office in Amsterdam, represented by J. J. A. Ellis and B. H. ter Kuile,

1 — Language of the Case: Dutch.
2 — CMLR.

Advocates of the Hoge Raad of the Netherlands, with an address for service in Luxembourg at the Chambers of Jacques Loesch, Advocate, 2 rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. van der Esch, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of Decision IV/324 of the Commission of 16 December 1971 concerning a proceeding under Article 85 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore (Rapporteur), Presidents of Chambers, A. M. Donner and H. Kutscher, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

On 4 April 1928 the Vereeniging van Cementhandelaren (Cement Dealers' Association) (hereinafter referred to as the VCH) was formed with its registered office in Amsterdam.
According to its constitution, the object of the VCH is to defend, especially by making agreements, the interests of its members on the Netherlands cement market, both generally and with regard to manufacturers.

On 30 October 1962, pursuant to Article 5(1) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959–1962, p. 87), the VCH notified or caused to be notified to the Commission of the European Communities, a series of agreements and decisions concerning the sale of cement in the Netherlands.
On 17 December 1965 several amendments and additions to the said agreements and decisions were notified to the Commission.

As a result of various communications sent, especially on 29 September 1967, 9 September 1968 and 4 February 1969, by the VCH to the Commission, the latter examined whether the following instruments, agreements and decisions were in accordance with Article 85 of the EEC Treaty:

— the constitution of the VCH;

— the Algemene Bepalingen en Prijsvoorschriften (General and Price Provisions) of the VCH, including the Algemene Koop- en Verkoopvoorwaarden 1955 FGB-RBB, Federatie van Vereenigingen van Groothandelaren in Bouwstoffen-Stichting Raad van Bestuur Bouwbedrijf (General Conditions of Purchase and Sali laid down in 1955 by the Federation of Associations of Builders' Merchants and the Directorate for the Building Industry, mentioned in Paragraph III, Article 10 of the General Provisions and themselves including the Aanvullende Koop- en Verkoopvoorwaarden (Supplementary Conditions of Purchase and Sale);

— Prijsblad I–VI (Price Lists I to VI) of 1 January 1969;

— Huishoudelijk Reglement (Internal Regulations);

— Arbitrage Reglement (Arbitration Rules);

— Reglement voor Disciplinaire Rechtspraak (Disciplinary Rules).

On 26 January 1970, the Commission, pursuant to Article 2(1) of Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), informed the VCH of the objections raised against it.
The VCH submitted its observations to the Commission by letter of 29 May 1970.
On 22 October 1970, the Commission put several additional questions to the VCH to which the VCH replied by letter of 16 November 1970.
On 17 March 1971, in accordance with Article 19(1) of Regulation No 17 and with Article 7 *et seq.* of Regulation No 99/63, the Commission gave the VCH the opportunity to put forward orally its point of view regarding the objections raised against it.
On 20 October 1971, the Commission, in accordance with Article 10 of Regulation No 17, sought the opinion of the Advisory Committee on Restrictive Practices and Monopolies.
By Decision IV/324 of 16 December 1971 concerning a proceeding under Article 85 of the EEC Treaty (OJ 1972 No L 13, p. 34), notified to the VCH on 20 December 1971, the Commission

1. found that the Algemene Bepalingen en Prijsvoorschriften der VCH (General and Price Provisions) including the Prijsbladen (Price Lists) I-VI referred to in Paragraph III, Article 5 of those Provisions and the Algemene Koop- en Verkoopvoorwaarden 1955 FGB-RBB (General Conditions of Purchase and Sale) referred to in Paragraph III, Article 10 including also the Aanvullende Koop- en Verkoopvoorwaarden van de VCH (Supplementary Conditions of Purchase and Sale) contravene Article 85(1) of the EEC Treaty;

2. rejected the application for exemption under Article 85(3) submitted by the VCH in respect of the rules referred to above;

3. ordered the VCH immediately to bring to an end the infringement which had been found.

II — Procedure

The originating application, which referred to the decision of the Commission of 16 December 1971, was entered at the Court Registry on 21 February 1972.
The written procedure followed the normal course.
The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the

oral procedure without any preparatory inquiry.
The applicant however lodged certain supplementary documents.
The parties presented oral argument at the hearing on 14 July 1972.
The Advocate-General delivered his opinion at the hearing on 21 September 1972.

III — Conclusions of the parties

The *applicant* claims that the Court should:

— annul the decision of the Commission of 16 December 1971;

— order all other measures which it considers appropriate;

— order the defendant to pay the costs.

The *defendant* contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs, even if the contested decision is annulled.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Subject-matter of the dispute*

The VCH decided on 7 December 1971 to abolish the system of imposed prices for supplies of cement in quantities of less than 100 tonnes. Since that decision was made only a few days before the Commission adopted the decision contested in the present application, a new situation was created which the parties analyse as follows:
The *applicant* maintains that the market situation has made resale price maintenance impossible with regard to supplies of quantities of less than 100 tonnes, especially because confirmations of orders by dealers were no longer sent to the VCH and that it had become impossible to exercise genuine control over prices.
Since the Commission considered that the combination of imposed prices (for supplies of less than 100 tonnes) and of target prices (for supplies of larger quantities) is incompatible with Article 85 of the EEC Treaty because of the effect of imposed prices on target prices, the abolition of the system of imposed prices prevents the contested decision from being upheld.
As the VCH could not know the date on which the Commission would adopt its decision, there is no ground for complaint that it did not given notice before that date of the abolition of the criticized rules. This fact alone cannot justify ordering the VCH to pay the costs of the present proceedings.
The *defendant* points out that the VCH gave up the fixing of imposed prices for quantities of less than 100 tonnes because it realized that it was incompatible with the Treaty.
The present case has not, however, become purposeless on that account. The contested decision refers also to the system of target prices and standard conditions of sale for supplies of quantities exceeding 100 tonnes. That system constitutes in itself an independent infringement of competition, incompatible with Article 85.
The only consequence of the partial abolition of the criticized agreements is that the contested decision applies henceforth exclusively to the system of target prices and standard conditions of sale for supplies of quantities exceeding 100 tonnes.
Since the applicant failed to bring important information to its notice in good time, the defendant is of the opinion that if the Court nevertheless comes to the conclusion that the contested decision has become invalid with regard to its provisions concerning supplies of quantities exceeding 100 tonnes, the applicant should in any case be ordered to pay the costs.

B — *Infringement of essential procedural requirements*

The applicant points out that under

Article 2(1) of Regulation No 99/63 it is for the Commission to inform undertakings and associations of undertakings in writing of the objections raised against them. The 'notification of objections' of 26 January 1970 was in the present case signed not by the Commission but by the Director-General for Competition, by delegation. Neither the Treaty nor the regulations applicable in this sphere authorize such delegation. The 'notification of objections' sets out, in a manner which binds the administration, the framework of the administrative procedure with regard to cartels; as it is more than merely a measure for the preparation or implementation of acts of the Commission, it cannot be delegated.

The *defendant* replies that the notification of objections in no way constitutes the final outcome of the procedure with regard to cartels, nor, consequently, an ultimate expression of the intention of the Commission producing for the persons concerned binding legal effects.

Further, the drawing up and communication of the 'statement of objections' in no way require a formal decision by the Commission itself. That is why the Commission gave its member responsible for competition authority to set out the objections and had them formally communicated by the Director-General for Competition.

C — *Inadequacy of the statement of reasons upon which the decision is based*

The *applicant* emphasizes that the contested rules, which were laid down by an association of undertakings of a single Member State, apply only on a national level, concern neither imports nor exports and make no distinction between national products and imported products. Therefore the question arises whether the jurisdiction of the Commission extends to such rules. In such a case the Commission should at least show, by means of a detailed statement of reasons upon which the decision is based, that the legal presumption capable of justifying an exemption from notification does not apply.

(a) The General Conditions of Sale and Purchase of the VCH were laid down by the Federation of Associations of Builders' Merchants and by the Directorate for the Building Industry. They were, on several occasions, declared applicable to the trade in building materials, both by the most varied associations of builders' merchants, especially the VCH, and by all the contractors in the Netherlands. They are comparable to the general conditions which are lodged in respect of many sectors of industry and commerce. They have no binding force, but must as from the date on which they are declared applicable be observed in their entirety.

From the point of view of competition these conditions are completely neutral. They concern especially offers and confirmations, various taxes, delivery and risks, acceptance of supplies and complaints, delivery periods, quality, return of goods, *force majeure*, reservation of title, payment, derogation clauses and the settlement of disputes. The Commission has undoubtedly disregarded their real nature.

The Commission, in order to satisfy the requirements of Article 190 of the Treaty, should either have confined itself to stating precisely in the operative part of the contested decision the infringement said to be constituted by certain general or supplementary provisions contained in the rules of the VCH, or should have specified in the recitals of its decision the reasons why it considers that the General Conditions of Purchase and Sale cannot be dissociated from the other rules laid down by the VCH.

However it appears from Article 1 of the contested decision that the infringement of Article 85 of the Treaty was established in a general manner and with regard to all the rules of the VCH, considered as a whole. The Commission has not given a sufficient statement of reasons for the need to extend the declaration of prohibition and nullity to the General Conditions of Purchase and Sale, when it was not apparent that these conditions by themselves caused an infringement of the provisions of Article 85(1).

(b) Furthermore in view of the finding that the rules of the VCH may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the Common Market, it should be stated that the reasons given in the recitals of the contested decision, in particular in paragraph (17), are not stated sufficiently or clearly.

The *defendant* for its part makes the following observations:

(a) The contested agreements are contained in the General and Price Provisions of the VCH. The specific agreements concerning prices and conditions of sale are laid down in the Prijsbladen (Price Lists) and the Supplementary Conditions of Purchase and Sale. The General Provisions refer continually to the latter documents so that they may be considered together to form a whole. It is therefore perfectly normal for Article 1 of the contested decision merely to mention those documents, since the recitals thereof are devoted more especially to an examination of the contents of certain parts of that body of agreements.
It is practically impossible to isolate the prohibited agreements. The situation held to be incompatible with Article 85 (1) follows from the combined action of all the clauses of the agreement and from its general effect.
The General Conditions of Purchase and Sale are not at all neutral from the point of view of competition. Of the 13 conditions laid down, 8 have an effect on the rights and duties of a purchaser of cement and hence on the consideration for the supplies. Although they are usual business conditions they cannot be separated from the main agreements.
The statement of the reasons upon which the contested decision is based shows clearly which agreements are more especially incompatible with Article 85(1). Because a cartel is involved which is based upon a large number of agreements limiting competition which are complementary to one another the operative part of the decision may merely give the names of all those agreements which have been chosen by those concerned themselves.

(b) More generally, it needs only a perusal of the recitals of the contested decision to ascertain that the reasons relied on in support of the operative part fully satisfy the requirements laid down by the Court with regard to the statement of the reasons upon which decisions are based.

D — *Infringement of the Treaty*

1. *Economic background to the dispute*

The *applicant* maintains that the main competitive factor in the distribution of cement on the market is not price competition but competition in services to customers. For consumers cement is a product closely connected with brand names. The relatively small changes in the prices charged on the market are not enough in themselves to break the 'historical links' holding a consumer to a particular brand or to a certain type of cement. The risk involved in using defective cement for building generally restrains the consumer from letting himself be enticed by small differences in price into favouring a cheaper product with which he is not sufficiently familiar. Furthermore the cost of cement represents only a fraction of the total cost of a building project. Not only is there little elasticity of demand for cement but relatively small variations in price are not sufficient to alter trade patterns at the distribution stage.
Furthermore, since it is produced in large quantities by a capital-intensive industry, cement encounters at the production stage price competition which is as weak as at the distribution stage.
As principally loose cement is involved, the delivery of a high quality product made promptly to the desired place as well as the granting of credit and similar services to customers are of great importance. A trader's facilities for storing cement play for example a more important part than a variation in prices.
The *defendant* emphasizes that the agreements made within the VCH constitute a

cartel between traders on the prices and conditions of sale applied to the trade in which goods are offered for sale in bulk and reveal few differences in quality. The number of grades according to quality is also small and corresponds to standards which differ little from country to country. The only competition from the economic point of view is therefore that of price; differences in price, even small, may be a decisive factor for purchasers.
Furthermore fixed investments play a leading part in the cement trade and give rise to high fixed costs. The result of this is, at the production stage, incentive to use existing capacity to the full and as long as possible and, if there is a fall in demand, to sell part of the production at less remunerative prices. A depression stimulates in a competitive system competition in prices at the production stage as well as at the marketing stage.
There is no doubt that the opportunities for competition are not limited exclusively to prices. The quality of the product, the speed and regularity of deliveries and loyalty to a specific brand also play a part. But where the services given are on a par in these spheres differences in price have an unquestionable influence on customer behaviour.
Price competition must furthermore increase as a result of the recent prohibition by the Commission of the joint-selling agency for the Benelux countries set up by the German cement manufacturers.

2. *Influence on trade between Member States*

(a) The proportion of imports in the total consumption of cement in the Netherlands

The *applicant* points out that the contested rules apply without distinction to home-produced cement and to the imported product. They are concerned exclusively with trade carried on entirely in the national territory. The importation of cement into the Netherlands is entirely free.

In these circumstances, it matters little in relation to Article 85(1) of the EEC Treaty that the obligations imposed by the VCH relate to a product of which a third comes from other Member States. This quantitative criterion cannot be used as an independent factor. In order to determine whether trade between Member States is liable to be affected, the quantity of imports, in the absence of other information concerning economic data and the market situation, is irrelevant. On the other hand it is essential that imports of cement into the Netherlands from other Member States should not encounter obstacles or distortions caused by private law.
The *defendant* mentions that the total figure for sales of cement by the VCH represents approximately two-thirds of the consumption of cement of the Netherlands. One-third of such consumption is accounted for by imported cement. If it is accepted that at least three-quarters of sales concern quantities exceeding 100 tonnes, the agreements which are still applicable at present concern, as a percentage, at least 16.5% of Netherlands cement sales. Taking account of the threshold of 5% which the Commission applied in its communication of 27 May 1970 concerning agreements of minor importance, it is clear that the system of target prices must still come entirely under Article 85(1). The principle of the unity of the market requires in fact that the direction and volume of trade patterns within the Community should be determined by supply and demand as expressed by the individual decisions which producers, traders and consumers consider they should take.

(b) The coordination of pricing policies

In the view of the *applicant*, the competition exerted by producers and dealers not affiliated to the VCH compels dealers who are members of the association constantly to adjust their prices to market conditions, since such adjustment is mostly of a regional nature.
Furthermore it has to be accepted that in practice target prices are not adhered to.
This competition on the market, contrary to the contention of the Commission,

prevents the members of the VCH from coordinating their pricing policies on the internal market. Another obstacle to this is the fact that all traders, whether or not affiliated to the VCH, agree to different prices for the purchase of the cement which they order, which leads to differences in selling prices and divergences from the target prices of the VCH.

It is therefore incorrect that the obligations imposed in respect of prices by the VCH prevent effective competition between manufacturers.

According to the *defendant* the fact that target prices are not observed in practice is irrelevant. The possible malfunctioning of a cartel cannot serve as a criterion for deciding whether or not it falls within Article 85(1). The Commission must assume that the parties to a cartel abide by their agreements, especially when the agreement in question is, as in the present case, worded in a particularly imperative manner and when compliance with its terms is strictly supervised.

Furthermore it must be borne in mind that Article 85(1) merely requires, for its application, that agreements 'may' affect trade between Member States. The agreements made within the framework of the VCH comply fully with this condition.

(c) Influence on trade patterns

The *applicant* points out that competing producers and non-members control approximately a third of the market and that they import freely. Since the rules of the VCH do not impede imports of cement, members and non-members alike may import freely at entirely free purchase prices. In view of the great shortage of cement in the Netherlands it is impossible to expect this product to be exported in appreciable quantities.

It does not appear therefore that the restrictions on competition imposed by the VCH are liable to exert an influence on trade patterns within the common market or cause a distortion of those patterns.

The Commission forgets that at the distribution stage producers are directly in competition with traders and that there is strong competition between members of the VCH and non-members as regards both home-produced cement and freely imported cement.

According to the *defendant*, the fact that the agreements of the VCH do not concern imports of cement is irrelevant in the present case: here again, in order for Article 85(1) to be applicable it is enough that the agreements 'may' affect trade between Member States.

The existence of a network of traders who are not affiliated to the VCH in no way nullifies the adverse effects of the contested rules on trade between Member States.

The mere fact that producers in other Member States who seek to put their own commercial policy into effect on the Netherlands market are compelled to use the much smaller network of 'outsiders' affects trade between Member States. Although the cartel created by the VCH does not totally bar the way to a large proportion of Netherlands consumers, it nevertheless makes access to them more difficult.

(d) The foreign producers' share of the market

According to the *applicant* in order to be able to judge the price elasticity of the demand for cement in the Netherlands, it is necessary to distinguish between, on the one hand, consumption in large quantities (building projects), which are bought at the target prices and, on the other, consumption in small quantities (individuals; the 'do-it-yourself' market), which are generally bought at the imposed prices.

The demand for cement ordered in large quantities is not elastic, since a reduction in the selling price does not bring with it a proportionate increase in demand.

With regard to supplies of quantities exceeding 100 tonnes, which represent by far the largest part of the market, the VCH has laid down no requirement in respect of prices. These supplies are governed merely by target prices, from which there are considerable departures. The argument of the Commission that the absence of imposed prices resulted in an increase in consumer demand for Belgian

or German cement cannot in any case be accepted as regards the demand for large quantities of cement.
The *defendant* considers that in order to contest the argument that trade between Member States is affected appreciably it is impossible to call in aid the small price elasticity of the demand for cement. Differences between prices determine immediately for a consumer the place where he obtains supplies. That fact, which has no effect on the total consumption of cement, on the other hand influences trade patterns.

(e) Obstacles to the creation and expansion of undertakings and to imports

The *applicant* counters the Commission's argument that the rules laid down by the VCH are an obstacle to the creation and expansion of commercial undertakings with the statement that the number and size of the undertakings is irrelevant with regard to the question whether it is possible to satisfy the demand for cement on the market adequately and effectively. It is unimportant with regard to the efficiency of the part played on the market by trading undertakings whether they are numerous or whether they are large or small.
Furthermore, even if the effect of the rules of the VCH is to divert the cement from the channel it is naturally intended to follow in competition between manufacturers and dealers, that is unimportant for the purposes of deciding whether trade between Member States may be 'affected'. Since they are rules which are concerned exclusively with trade transacted entirely within national frontiers and do not relate to imports they are not such as to impede the latter.
The *defendant* is of the opinion that a cartel between traders the effect of which is to make penetration of the national market more difficult than it would be in the absence of such a cartel comes under Article 85(1). The action of restricting the entry and development of new participants in the market constitutes a clear obstacle to the efforts both of suppliers established in other Member States and of consumers wishing to obtain supplies outside their own country.
It is therefore impossible to dissociate the question of the trade channels used by products in a specific country from a problem of the influence exerted on trade between Member States. The degree of competition at the marketing stage inevitably and directly influences the intensity of the supply and demand for products from other Member States. The latter, in its turn and in the nature of things, influences trade between Member States. The VCH has not seriously contested the restriction on the opportunities for competition between its members and the resulting obstacles to the creation and the development of commercial cement undertakings as a result of a certain number of supplementary agreements and in particular the agreement imposing the obligation to supply cement intended for resale only to members of the VCH. This prohibition, in conjunction with other additional obligations, is intended to prevent real price competition.

3. *Influence on competition within the common market*

The *applicant* complains that the Commission wrongly considered that the target prices recommended by the VCH to its members had the object or effect of restricting competition in a manner equivalent to concerted practices and to the fixing of a compulsory minimum price.

(a) The target prices of the VCH are not in fact adhered to by its members because of the competition on the market from non-members. With regard to packed cement variations of up to 12% below the target price have been recorded and with regard to loose cement, variations of up to 4.5%.

(b) In any case, the Commission has misunderstood the nature of target prices. Traders affiliated to the VCH adjust their selling prices according to local competition on a regional basis. Moreover, the various traders individually purchase cement at different prices. This means that the 'floor' price indicated by the VCH

(the duty to sell only at a profit) involves for the trader in question a different price in each case which depends mainly on the level of the purchase price. The meaning of the legal duty to use the target prices as a standard and a guide is quite different from that attached to it by the Commission. It is, in fact, an open system of calculating the cost price with an individual 'floor' price dependent upon the purchase price of the distributor in each transaction.

The result of this system is that it is still in the interest of foreign undertakings to offer their products at low prices on the Netherlands market. The low prices of imported cement are such as to exert their influence throughout the whole distribution sector. Producers and traders, both national and foreign, can offer cheap cement both to members of the VCH and to traders who are non-members or even directly to consumers. As the rules of the VCH include no exclusive dealing clauses, the members of the VCH may obtain supplies of cheap cement from foreign undertakings. That cheap product may be sold below the target price, as the very concept of target price indicates. The members of the VCH may not resell the cement at a price lower than a minimum which is fixed at 1% above the individual purchase price for each transaction, that price may clearly differ from one case to another and from one undertaking to another.

These exclusively national rules draw no distinction between home-produced cement and imported cement. Their purpose is only to forestall any dumping on the national market or to prevent cement from being used as a loss-leader when it is sold together with other building materials.

It is conceivable that traders do not or at least do not fully pass on to the consumer the benefit of a price advantage which they have made. Even in such a case a producer may consider offering his product in large quantities at low prices, while traders have to be careful to resell this cement cheaply in order to prevent the accumulation of large stocks. The trader has in any case an interest in purchasing cheaply. It is for him to decide freely to permit this more favourable price to be passed on wholly or partially when the cement is resold. The buying public can make its influence felt in that respect.

(c) The contested decision also wrongly regarded the prohibition on members of the VCH from supplying traders with a quantity of cement larger than required for a particular job as a restriction on competition. In fact it is a means of maintaining the guarantee of quality which binds all members of the VCH by ensuring adequate stocks.

In the same way it is impossible to describe as a restriction on competition the duty of the members of the VCH to transfer to the new undertaking, if it changes its legal form, all the obligations binding upon them by virtue of the decisions of the VCH.

The *defendant* emphasizes that this submission raises the fundamental question whether the Commission has properly concluded that a cartel relating to target prices which is supplemented by binding provisions concerning conditions of sale has as its object or effect the restriction of competition.

(a) In order to answer that question it is necessary to consider the economic scope of the target prices referred to in the present case.

The target prices of the VCH are based on an agreement made between the traders who are parties to the cartel. They are fixed by means of a majority decision which is binding upon all the members. They are therefore in no way target prices such as those used by producers which are used as recommended prices for the subsequent marketing stage and do not actually involve any duty either in fact or in law.

The fixing of target prices by the VCH is intended to restrict competition and results in such a restriction in every case. Traders who are party to the agreement have a legal duty towards the other parties thereto to use these target prices as a basis and to make their decisions with reference thereto. This constitutes a clear restriction on the freedom of the parties to the agreement to fix their selling prices themselves in complete independence. Such a restriction on free-

dom unquestionably comes within the provisions of Article 85(1)(a).
It follows from the General Price Provisions of the VCH that the starting point for any specific transaction cannot be the price which the trader fixes himself in the light of his own judgment of the market situation and of the relationship between the forces of supply and demand but, on the contrary, the target price fixed by the cartel.
The fact that this restriction is mitigated by the opportunity of selling at a lower price does not change the situation at all. The price trend imposed on the market by the target price is not altered because of this and that trend continues to have as its object or effect the restriction of competition. There is an agreement to endeavour to attain the agreed target prices jointly and individually. The fact that every variation from the target price does not constitute a formal breach of the provisions of the cartel does not rescind the agreement as such or the related objective of a restriction on competition.
Further, the provision that a demonstrable profit must be made is an obstacle to the adjustment of prices. The members of the cartel may not sell 'at a loss' in order to keep a customer. That prohibition eliminates the pressure which consumers may exert on prices at the final stage in a system of free competition and constitutes *per se* a restriction on competition.

(b) The fact that the target prices cannot always be adhered to is of little importance: it is impossible to acknowledge that the imperfect achievement of a cartel is of decisive importance in evaluating the validity of the agreements which constitute it.
The mere existence of target prices restricts competition between the parties to the cartel and leads foreign suppliers rightly to doubt whether any reduction in prices can result in an increase in their sales. The respective shares of the market of the parties to the cartel are stabilizing. Interpenetration of the market is prevented and the consumer at the final stage is deprived of the advantages which normally follow from the abolition of customs barriers.

(c) The prohibition on the members of the VCH from supplying to building undertakings quantities of cement greater than those necessary for the site in question also hinders the development of trade of a competitive nature. This prohibition prevents not only block orders but also the creation of a stock intended for resale.
The object of the duty imposed on the members of the VCH, where cement is supplied to dealers who are not members of the VCH, to make them subject to the main agreements restricting competition which are in force within the VCH, the duty not to set up subsidiaries or depots without a special authorization and the duty of the members of the VCH to obtain prior authorization to make alterations to their undertaking, especially as regards sale or hire is to make the main agreements as effective as possible. These supplementary agreements throw into relief the infringement of Article 85(1) contained in the main agreements.

Grounds of judgment

1 By an application entered at the Court Registry on 21 February 1972 the Vereeniging van Cementhandelaren (Netherlands Cement Dealers' Association) requested the annulment of the decision of 16 December 1971 (OJ 1972, L 13, p. 34) by which the Commission found that a body of decisions of the applicant association was incompatible with Article 85(1) of the Treaty establishing the European Economic Community, rejected the application for exemption made by the same association under Article 85(3) and ordered the applicant immediately to bring to an end the infringement established.

2 The applicant has pleaded grounds relating to the subject-matter of the decision, the infringement of essential procedural requirements, the infringement of provisions of the Treaty and the inadequacy of the statement of reasons upon which the decision is based.

The subject-matter of the contested decision

3 The applicant claims that before the decision of 16 December 1971 it had already on 7 December 1971, completely abolished the system of 'imposed prices' for supplies of cement in quantities of less than 100 tonnes.

4 Because of the connexion between that system and the fixing of 'target prices' for supplies of cement of 100 tonnes or more, the decision is said to have become purposeless.

5 The contested decision was taken against the internal rules of the applicant association which were notified by the latter for the purposes of the application of Article 85(3), and were the subject-matter of the notification of objections and of the administrative procedure.

6 At the time when it abolished imposed prices for supplies of less than 100 tonnes, the applicant knew that, as the procedure had ended, a decision of the Commission was imminent.

7 It should have informed the Commission immediately of the alteration to its internal rules so that the Commission could, if necessary, draw from this the appropriate conclusions.

8 In those circumstances, the applicant cannot rely on that alteration, which was made on its own initiative, to call in question the decision of the Commission.

9 The complaint must therefore be dismissed.

The infringement of essential procedural requirements

10 The applicant maintains that the notification of objections referred to in Article 2 of Regulation No 99/63 of the Commission was defective because it was signed not by a Member of the Commission, but the Director-General for Competition by delegation.

11 It is not in dispute that the Director-General for Competition merely signed the notification of objections which the Member of the Commission responsible for competition matters had previously approved in the exercise of the powers which the Commission had delegated to him.

12 That official therefore acted not under a delegation of powers, but merely under an authorization to sign which he had received from the Member of the Commission.

13 Such an authorization constitutes a measure concerning the internal organization of the services of the Commission, in accordance with Article 27 of the Provisional Rules of Procedure adopted under Article 7 of the Treaty of 8 April 1965 establishing a single Council and a single Commission.

14 The submission based, in opposition to the contested decision, on an alleged formal defect in the notification of objections cannot therefore be upheld.

The substance of the case

(a) *Adverse effect on competition within the Common Market*

15 The applicant maintains that after the abolition of the system of 'imported prices', which was applied only to a small proportion of transactions, there remains only a system of 'target prices'.

16 According to the applicant these target prices, moreover, rarely adhered to in practice, far from constituting a constraint on members, in fact only represent a basis of calculation which leaves largely untouched the freedom for each of the members of the association to calculate its prices in accordance with the facts of each individual transaction.

17 In any case since the variations in production prices are slight in the sector in question, competition is said to be exerted mainly over other factors of the transactions, such as product quality and services to the customer.

18 Article 85(1) of the Treaty expressly identifies agreements which 'directly or indirectly fix ... selling prices or any other trading conditions' as incompatible with the Common Market.

19 If a system of imposed selling prices is clearly in conflict with that provision, the system of 'target prices' is equally so.

20 It cannot in fact be supposed that the clauses of the agreement concerning the determination of 'target prices' are meaningless.

21 In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.

22 This prediction is all the more reliable because the obligation to make a demonstrable profit in every case is limited to the provisions concerning 'target prices' and those provisions must in addition be considered within the framework of the internal rules of the applicant association as a whole which are characterized by strict discipline in conjunction with inspections and penalties.

23 Apart from the fixing of prices properly so-called, the agreement to which the contested decision relates contains in addition a body of restrictive clauses concerning other trading conditions.

24 This applies especially to clauses the object of which is to prevent the sale of cement to traders other than members of the association or resellers approved by the association, to prevent the creation of stocks of cement by third parties who are not subject to the discipline of the association, to limit strictly the commercial benefits which may be granted to purchasers and to prevent any services being provided for customers which fall outside the framework of what is regarded as 'normal'.

25 Thus an examination of all the rules to which the contested decision relates shows these to be a coherent and strictly organized system the object of which is to restrict competition between the members of the association.

(b) *Influence on trade between Member States*

26 According to the applicant association, the Community nonetheless has no jurisdiction to appraise the cartel to which the contested decision relates because it is a purely national cartel, limited to the territory of the Netherlands, which does not apply in any way to imports or exports and which consequently has no influence over the patterns of trade between Member States.

27 In this respect, it emphasizes more especially the fact that the total production of cement in the Netherlands far from satisfies the needs of the Netherlands economy and leaves a substantial need for imports, that furthermore there is, apart from its members, a large number of cement sellers not affiliated to it and that therefore there is no danger of intra-Community trade being affected.

28 According to Article 85(1) all agreements which have as their object or effect the prevention, restriction or distortion of competition are incompatible with the Treaty once they may affect trade between Member States.

29 An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production.

30 In particular, the provisions of the agreement which are mutually binding on the members of the applicant association and the prohibition by the association on all sales to resellers who are not authorized by it make it more difficult for producers or sellers from other Member States to be active in or penetrate the Netherlands market.

31 It appears therefore that the objection based on the fact that trade between Member States is not capable of being affected by the decision of the applicant association must be rejected.

32 It follows from the foregoing that the complaints based on an alleged infringement of the rules of the Treaty must be dismissed.

Inadequacy of the statement of reasons upon which the decision is based

33 The applicant also raises the complaint that the statement of reasons upon which the contested decision is based is inadequate.

34 This criticism relates in essence to the fact that, although the operative part of the decision concerns a body of rules comprising the General and Pricing Provisions (Algemene Bepalingen en Prijsvoorschriften der VCH), Price Lists I-VI (Prijsbladen I-VI), the General Conditions of Purchase and Sale (Algemene Koop- en Verkoopvoorwaarden 1955 FGB-RBB) and the Supplementary Conditions of Purchase and Sale (Aanvullende Koop- en Verkoopvoorwaarden van de VCH), it is impossible to identify from the statement of reasons, which expressly refers to the first of these documents, the reasons why the Commission also objected to the 'General Conditions' and the 'Supplementary Conditions of Purchase and Sale'.

35 Although it is true that the 'General Conditions' and the 'Supplementary Conditions of Purchase and Sale' include common commercial clauses, which in themselves are unconnected with the subject-matter of the cartel, none the less several provisions are capable of assisting the functioning of the latter.

36 Furthermore the 'General and Pricing Provisions', in which the main provisions found to be contrary to the competition rules of the Treaty are concentrated, contain an express reference to the said 'General Conditions' and 'Supplementary Conditions of Purchase and Sale'.

37 It therefore seems normal for the Commission to have referred in the operative part of its decision to all the measures which, according to the intention of the applicant itself, are intended to form a coherent whole.

38 In its statement of the reasons for the decision the Commission expressly singled out from all the measures referred to those provisions which are not in conformity with the requirements of Article 85(1).

39 It will be for the applicant, when it revises its internal rules in order to make them conform to the Community's rules on competition, to determine which clauses must be eliminated as contrary to the Treaty and those which may remain.

40 Consequently the complaint based on the inadequacy of the reasons for the decision must be dismissed.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party must bear the costs.

42 The applicant has failed in its submissions.

43 It must accordingly be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 85, 173 and 190;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Lecourt Monaco Pescatore

Donner Kutscher

Delivered in open court in Luxembourg on 17 October 1972.

A. Van Houtte
Registrar

R. Lecourt
President