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

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1. This is an appeal by Buzzi Unicem SpA ('Unicem') 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] The appellant was formed by a merger between Unicem SpA and Buzzi SpA. The appeal relates only to the contested judgment in so far as it determines the claims at first instance of the first of those companies.

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 Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EC Treaty (now, after amendment, Articles 81 EC and 82 EC).[3] As a result of those investigations, the Commission decided on 12 November 1991 to initiate a procedure[4] against Unicem, among other undertakings.[5]

— On 25 November 1991, the Commission sent the Statement of Objections to the 76 undertakings and associations of undertakings concerned; Unicem 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

2 — Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491.

3 — OJ, English Special Edition 1959-1962, p. 87.

4 — Cases IV/33.126 and 33.322 — Cement.

5 — Paragraphs 2 and 3 of the judgment.

6 — Paragraphs 3, 9 and 12 of the judgment.

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 Unicem had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) [9] by its anti-competitive conduct in participating:

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

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

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

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

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

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

7 — Paragraphs 4 to 6 of the judgment.

8 — OJ 1994 L 343, p. 1.

9 — Paragraph 22 of the judgment.

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

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

7. 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)).

— The Commission ordered Unicem 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 11 652 000 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. Unicem 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. Unicem claims in the appeal, by way of principal claim, that the Decision should be annulled in so far as it affects the appellant. In the alternative, it claims that the fine imposed on it should be annulled or reduced. In any event, it claims that the Commission should be ordered to pay the costs of the proceedings and, in addition, to reimburse to the appellant all the costs and interest incurred in providing the guarantee, in whole or in proportion to any reduction in the fine.

5. By way of a measure of organisation of procedure, notified to the applicants between 19 January and 2 February 1996,

the Court of First Instance requested the Commission to produce various documents, which it did on 29 February 1996, when it lodged: [10]

1. the Statement of Objections as notified to the undertakings concerned, now the applicants;

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

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

4. the boxes containing the documents supporting the Commission's conclusions in the Statement of Objections; and

5. the correspondence between the Commission and the applicant undertakings during the administrative procedure.

6. Two further measures of organisation of procedure were notified to the parties, the first on 2 October 1996 and the second on 18 and 19 June 1997, whereby the Court of First Instance took the necessary steps to enable the applicants to examine all the original documents in the file, with the exception of those containing business secrets or other confidential information and the Commission's internal documents. [11]

7. After providing them with copies of the whole file, the Court of First Instance invited the applicant undertakings and associations of undertakings to lodge a pleading specifying the documents to which they had not had access during the administrative procedure which could have affected their defence and to explain why in their view the outcome of the administrative procedure might have been different had they been given the opportunity to consult them. The pleading was to be accompanied by a copy of each document examined. All but one of the applicants [12] lodged observations. The Commission responded to all the applicants. [13]

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

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 judgment under appeal, the Court of First Instance upheld Unicem's application in part and:

'— annul[led] Article 1 of Decision 94/815 in so far as it found that the applicant [had] participated in the infringement before 9 September 1986 and after 3 April 1992;

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

— 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 and in so far as it found that the applicant [had] participated in the infringement before 9 September 1986;

— annul[led] Article 4(1) of Decision 94/815 in so far as it found that the applicant [had] participated in the infringement before 9 September 1986 and after 31 May 1987;

— annul[led] Article 4(2) of Decision 94/815 in so far as it 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 [14] 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 6 399 000;

— dismisse[d] the remainder of the application;

14 — This is an error on the part of the Court of First Instance. There is no reference to Unicem in Article 5 of the Decision.

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

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

9. In other words, the Court of First Instance held Unicem responsible for anti-competitive conduct in so far as it had participated:

(1) in the Cembureau agreement on non-transhipment to home markets in the market in grey cement (Article 1 of the Decision) from 9 September 1986 to 3 April 1992;

(2) from 9 September 1986 to 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;

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

(4) in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers (Article 4(3)(a) of the Decision), from 9 September 1986 to 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 — Procedure before the Court of Justice

10. Once the appeal had been lodged and the written procedure completed, the Court of Justice, in the exercise of its powers under Article 119 of the Rules of Procedure,[15] by order of 5 June 2002 dismissed the second, third, fourth and fifth heads of the second plea in law, the third,

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

sixth and eighth pleas in law, the first head of the ninth plea in law, the first, second, fourth and fifth parts of the 11th plea in law and the 16th, 17th, 19th, 20th and 21st pleas in law.

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

IV — The appeal

12. Unicem claims that the Court of Justice should set aside the contested judgment and annul the Decision upheld by the Court of First Instance in their entirety and order the Commission to pay the costs. Failing that, it claims that the amount of the fine should be reduced and, without being specific in that regard, that the Court of Justice should adopt the provisions which it deems appropriate or fair, without prejudice to all the measures which may assist it, both substantive and procedural.

13. In support of those claims, Unicem puts forward three groups of complaints.

(1) In the first group, which consists of eight pleas in law, it complains that there has been a breach of its rights of defence and, in relation to that alleged infringement, that certain legal rules were incorrectly applied by the Court of First Instance, and that the grounds of the judgment are incorrect and contradictory. Of this group, the second plea (second to fifth heads) and the third, sixth and eighth pleas were dismissed in the abovementioned order.

(2) The second category relates to the evidence of the Cembureau agreement and Unicem's participation in the agreement and in the measures adopted to implement it. These are the 9th and 13th pleas, in which the appellant accuses the Court of First Instance of having failed to observe certain legal rules and of having used defective reasoning and the Commission of having erred in assessing the documents in the file. The ninth plea (first head) and the 11th plea (first, second, fourth and fifth heads) were declared inadmissible.

(3) The third group is directed against the calculation of the fine imposed on the appellant. These are the 14th to 21st pleas, of which the 16th, 17th, 19th, 20th and 21st were dismissed.

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

1 — *The rights of the defence (first group of pleas)*

A — Access to the administrative file and the measure of organisation of procedure ordered by the Court of First Instance (first plea in law and paragraph (i) of the second plea in law)

(1) Arguments of the parties

(a) First plea in law [16]

15. Unicem maintains that the Court of First Instance erred in law in rejecting its complaints concerning the conduct of the administrative procedure, particularly as regards access to the fine. It further claims that the measure of organisation of procedure ordered was not a suitable means of making good the breach of the rights of defence by the Commission and that the Court of First Instance itself committed the same breach when it made annulment of the Decision conditional on proof that the documents to which access was not given would, had it been possible to consult them, have led to a different consequence. In the appellant's submission, the principle laid down by the Court of Justice in *Hercules Chemicals* v *Commission* was not observed. [17]

16. Unicem states that the breach of the parties' right to consult the incriminating evidence during the administrative procedure entails, if its guarantees of defence are threatened, the automatic annulment of the Decision. It maintains that the inability to use the documents at the time of the charge cannot be made good by their use during the judicial stage of the proceedings, when responsibility has already been determined and the undertakings on which fines were imposed are required to adduce evidence to disprove their guilt, or else the Court considers the decision irrelevant. In the appellant's view, that approach is an attack on the right to a proper defence and constitutes a manifest breach of the principle of the burden of evidence, which does not fall on the undertakings or associations on which fines were imposed but on the Commission.

16 — Plea A.1.1.1 in the appeal.

17 — Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235.

17. The Commission contends that the Court of First Instance did not arrange access to the file with the objective of making good any shortcomings in the administrative procedure. On the contrary, it merely ascertained whether the applicant's rights of defence had actually been harmed because certain documents were not made available to it, carefully examined the case-law referred to in the application and adjudicated accordingly.

18. The Commission disagrees with the appellant's interpretation of *Hercules Chemicals* v *Commission*. The assessment of the evidence is a matter for the Court of First Instance and, as a matter of principle, is not amenable to review. The Commission asserts that the Court of First Instance did not in any way reverse the burden of proof; it merely analysed whether the documents to which Unicem had referred could have served any purpose.

(b) Second plea in law, paragraph (i) [18]

19. Unicem maintains that the reasoning in paragraph 263 of the judgment is contradicted in the next paragraph, which clearly shows that the Court of First Instance's approach tended to reject alternative explanations. Whatever evidence the appellant might have adduced, it would not have been sufficient to call in question the Commission's assessment of its conduct, precisely because it was based on direct documentary evidence. That criterion rendered the probative value of the new exculpatory documents void *ab initio*.

20. The Commission contends that this plea is inadmissible, since it discusses the assessment of the facts made by the Court of First Instance, which did not take the approach of determining in advance to reject the evidence adduced by the appellants, since at paragraphs 1220 to 1225 of the judgment it examined in detail the documents identified by Unicem as relevant to its interests, to which it did not have access during the administrative procedure and evaluated their usefulness and their impact on any breach of the rights of defence.

21. The Commission approves the Court of First Instance's assertion that the documents which Unicem claimed would support its argument must have a close link with the accusations, which, because it did not exist, placed it outside the scope of the infringement found in the Decision. The assessment of whether or not that connection exists is a question of fact which falls to be determined by the Court of First Instance.

18 — Ground A.1.1.2.i of the application.

22. In its reply, Unicem maintains, with reference to *Hüls* v *Commission*, [19] that the pleas are admissible which, referring to the assessment of the evidence, are based on inadequate or contradictory reasoning.

(2) The lawfulness of the measure of organisation of procedure

23. In regard to access to the administrative file and the measure of organisation of procedure adopted by the Court of First Instance, the appellant raises three distinct but closely-linked questions. The first, and most important, impugns the legitimacy of those provisions and, more particular, their conformity with the case-law of the Court of Justice.

24. The second refers to the alleged reversal of the burden of proof inherent in the position adopted by the Court of First Instance on the direct documentary evidence.

25. The third, set out at point (i) of the pleas, complains of an internal contradiction in the grounds of the contested judgment.

26. 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, [20] 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.

27. In the judgment, the Court of First Instance analysed the documents indicated by the applicants and the observations submitted by them and, in Unicem's case, reached the decision set out at paragraph 19 of the operative part and at point 8 of this Opinion. The Court of First Instance proceeded according to the following principle: the applicants' rights of defence would have been infringed if there had been even a small chance that the outcome of the administrative procedure might have been different if they could have relied on the documents to which access had been denied. [21]

19 — Case C-199/92 P *Hüls* v *Commission* [1992] ECR I-4287.

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

21 — See paragraph 241 of the judgment. The Court of First Instance draws a distinction between those documents which have no objective link with any of the objections against the applicant, which are rejected *ab initio*, and those which have such a link, in which case it examines the way in which they provide information which might have led to a different outcome.

28. Unicem questions the work carried out by the Court of First Instance and claims that the above approach, on the one hand, is contrary to the case-law of the Court of Justice and, on the other, fails to recognise that once it was found that the rights of defence had been breached the Decision had to be annulled.

29. 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. [22]

30. 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]; [23] and that is the scope given to them by the case-law of the Court of Justice [24] and the Court of First Instance. [25] The European Court of Human Rights has extended the scope of the guarantees laid down in Article 6 of the European Convention on Human Rights to administrative proceedings of a disciplinary nature. [26]

The Charter of Fundamental Rights of the European Union [27] 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, [28] it also provides that every person has the right to be heard by the institutions

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

23 — 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 1963-1964, p. 47), in force on the dates on which the administrative procedure was conducted in the present case.

24 — See in particular, and among the most recent decisions, *Hercules Chemicals* v *Commission*, cited above, paragraph 75 et seq.

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

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

27 — OJ 2000 C 364, p. 1.

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

of the European Union before any individual measure which could affect him or her adversely is taken and the right to have access to his or her file. [29]

31. The right to consult the file is another tool at the service of the right of defence. [30] It is not an end in itself. [31] 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.

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

33. 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.

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

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

30 — 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.

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

35. 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.

36. 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]

37. There is nothing unlawful in the judicial proceedings. The access to the file provided by the Court of First Instance was 'equal' in procedural terms to the access which the relevant undertakings and associations should have had during the administrative procedure. It is true that, in the mean time, time did not stand still and, consequently, events occurred, some relevant to the outcome of the procedure and to the judgment, but none adversely affecting the rights of defence of the present appellant. Furthermore, for the purpose of determining the dispute, the Court of First Instance and the parties had at their disposal evidence which was previously unavailable to them, a fact which, as I have pointed out, is conducive to a correct decision.

38. In the Opinion which I delivered today in Case C-204/00 P *Aalborg Portland* v *Commission* [33] I stated that 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

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.

33 — Point 34.

the situation they would have been in if they had been able to rely on those documents in presenting their written and oral observations to the Commission. [34]

39. 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. [35] Where it considered that there had, it annulled the Decision. [36] 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.

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

(3) No unlawful reversal of the burden of proof

41. That approach does not entail a reversal of the burden of proof. That principle, which is of a procedural nature, is in the service of the fundamental right to the presumption of innocence, which is of a substantive nature, but they must not be confused.

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

34 — Paragraphs 78 and 79.

35 — This is the criterion recently employed by the Court of Justice in the *PVC II* judgment, cited above, paragraph 315 et seq., in particular paragraph 325.

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

43. Following its adoption, the Decision was the subject of proceedings brought by, inter alios, Unicem, which sought its annulment on the ground that it had been the victim of a breach of the rights of defence in so far as it had not had access to all the documents in the file and, in particular, to those which could have exonerated it. Under the principle of the burden of proof, it was for Unicem to show the presumptions of fact of that claim: first, that it had not been given access to all the documents used by the Commission in the proceedings and, second, that that fault had breached its rights of defence. That is precisely what the Court of First Instance asked it to do.

44. I shall put it another way: once the Commission had fulfilled its obligation, it was for the undertakings and associations concerned to rebut the incriminating evidence used, and in order to do so they were able to use all the means at their disposal, without any restriction whatsoever. In evaluating all that evidence, the Court of First Instance concluded that the exculpatory evidence did not contradict the facts obtained from the documents on which the Commission relied. Applying the judicial test set out at paragraphs 241 and 247 of the judgment, it 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 of the applicant undertakings and associations.

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

(4) No inconsistency between paragraphs 263 and 264 of the judgment

46. The contradiction between those passages of the judgment of which Unicem complains does not exist.

47. The Court of First Instance was aware that the Decision was not based on 'parallel conduct on the market',[37] and thereby deprived of potential the documents which could provide an alternative economic explanation for the conduct of the undertakings concerned.[38]

48. That context reveals the full import of the test used by the Court of First Instance, which consisted in restricting the range of

37 — Paragraph 264 of the judgment under appeal.

38 — See, generally, paragraphs 264 and 1116. For Unicem's particular case, see paragraphs 1220 to 1225.

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. [39] That is to say, the Court of First Instance was correct to apply the rule that there has been a breach of the applicants' rights of defence if, during the administrative procedure, they were denied access to evidence capable of contradicting the evidence used by the Commission, [40] 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.

49. One example is sufficient to illustrate the point. The Commission concluded from the direct documentary evidence [41] that anti-competitive agreements had been adopted at the meetings between European cement producers held on 14 January 1983 and 19 March and 7 November 1984. 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. [42]

50. If the Commission, relying on the documents in the file, concluded that Cembureau and its direct 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 the meetings of 19 March and 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 those meetings; or which, when it had been proved that the appellant had not attended the sessions, made clear that it was not involved in any measure implementing the agreement. [43]

51. 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 Unicem'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 1220 to 1225 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.

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

40 — See paragraph 263 of the judgment under appeal.

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

42 — See paragraph 247.

43 — See paragraphs 1416 and 1442 et seq. of the judgment.

52. In other words, the Commission inferred from certain evidence [44] that the undertakings and associations which it decided to penalise were responsible for the anti-competitive conduct defined in Articles 1 to 7 of the Decision. Unicem, in turn, sought to use certain documents, because they provided a different version of the facts, but the Commission prevented it from having access to them. The Court of First Instance, in the proper exercise of its jurisdiction and in the interest of the parties' rights of defence, restored the situation and made the entire file available to the applicants. After hearing their views on the matter, it held that the documents in question were not capable of providing a different interpretation of the events.

53. It is not certain that any document which they would have produced would have been insufficient to call the Commission's assessment in question, since the Court of First Instance followed the same practice in other cases, as in *Solvay* v *Commission* and *ICI* v *Commission*. [45]

54. 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'. [46] However, in another judgment of the same date, in another case of *ICI* v *Commission*, [47] 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. [48]

55. 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 *ICI* v *Commission* and in the present case. In the first two judgments, the Court reviewed a Commission decision imposing 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. [49] 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

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

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

46 — Paragraphs 98 and 108 respectively.

47 — Case T-37/91 [1995] ECR II-1901.

48 — See paragraphs 66 and 70.

49 — See paragraph 61 of *Solvay* v *Commission* and paragraph 71 of *ICI* v *Commission*.

conduct, it might have been capable of having an impact on the probative value of that indirect evidence. [50] Unicem's situation is different. Its involvement in the facts was established by the Commission from direct specific evidence, [51] the content of which was not called in question by the documents to which the appellant did not have access during the administrative stage.

56. In short, the pleas relating to breach of the rights of defence in so far as access to the administrative file was denied must be rejected as unfounded.

B — The national objections and the decision to drop them — Reference to other pleas (fourth and fifth pleas in law) [52]

57. The complaint which Unicem sets out in its fourth plea is the same as that put forward in the fifth part of the 10th plea; and the fifth plea refers to the same problem as the first part of the 12th plea. For that reason, I shall examine them both below.

C — Unicem's right not to incriminate itself (seventh plea in law) [53]

(1) Arguments of the parties

58. Unicem states that the Court of First Instance undermined its right not to incriminate itself and failed to follow the precedent set in *Orkem* v *Commission* [54] at paragraph 733 of the contested judgment, since the Commission cannot rely on the assertions of an accused undertaking which imply recognition of the infringement or use them as evidence of the unlawful conduct of another undertaking, on pain of infringing the principles of equality of arms and equality of defence.

59. The appellant further states that the Court of First Instance's assertion (paragraph 735 of the judgment) that the undertakings facing the proceedings, and particularly Cembureau, were not required to reply to a request for information under Article 11(1) of Regulation No 17 is irrelevant, because the information affecting it

50 — See paragraphs 98 and 108, respectively, of the judgments.
51 — See paragraphs 263 and 264 of the contested judgment.
52 — Pleas A.1.4 and A.1.5 of the appeal.
53 — Ground A.1.7 of the appeal.
54 — Case C-374/87 [1989] ECR 3283.

was not provided under that provision but under Article 14(2). On that point, it submits, the Court of First Instance's reasoning is incorrect.

60. The Commission believes that the Court of First Instance gave an exhaustive answer, observing, in essence, that any declaration by one party which does not incriminate it personally, but incriminates others, cannot be treated as self-incrimination. Furthermore, the answer to a question which an accused undertaking is free to answer is not an admission of facts. The grounds of the judgment under appeal is consistent with the Community case-law and the case-law of the European Court of Human Rights. The alternative proposed by Unicem leads to an absurd result: to the annulment of all evidence relating to the existence of an anti-competitive agreement.

(2) An unfounded complaint

61. The right not to incriminate oneself and not to plead guilty are instrumental guarantees of the generic right of defence, to which they give cover in their passive manifestation, and are closely linked to the principle of the presumption of innocence. They entitle the person concerned to remain inactive and place on the accuser the burden of refraining from any constraint or compulsion to state and confess, expressly or tacitly, his guilt. [55]

62. It is for that reason that 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of an infringement'. [56] However, there is nothing to prevent it from providing answers voluntarily.

63. And it is in that sense that the powers which Regulation No 17 confers on the Commission must be understood, powers which authorise the Commission to receive information for the undertakings being investigated, which are required to provide it, apart from information capable of incriminating them. The same applies to its investigative powers.

55 — As regards the substance of these rights, reference may be made to two important judgments of the European Court of Human Rights, namely the *John Murray v. the United Kingdom* judgment of 8 February 1996 (*Collection of judgments and decisions* 1996-I, paragraph 40 et seq., and the *Saunders v. the United Kingdom* judgment of 17 December 1996 (*Collection of judgments and decisions* 1996-VI), paragraph 67 et seq. The principle laid down in those two judgments has since been followed in, inter alia, the *I.J.L, G.M.R. and A.K.P.* judgment of 19 September 2000, the *Heaney and McGuinness v. Ireland* judgment of 21 December 2000 and the *J.B. v. Switzerland* judgment of 3 May 2001.

56 — *Orkem* v *Commission*, cited above, paragraph 35.

64. Evidence obtained in breach of those guarantees is not valid and, accordingly, cannot be used against the accused.

65. The foregoing considerations show that Unicem's complaint is unfounded.

66. At no point does the appellant claim that the information used against it was inferred from statements, whether by it or by others, made under pressure or that, as I have just stated, there is any obstacle to the use of information provided voluntarily.

67. Furthermore, as made clear at paragraph 733 of the contested judgment, the information used to impute the infringement to Unicem came not from that undertaking but from others. The right not to give self-incriminating evidence and the right not to admit guilt are, as I have pointed out, reflexive in nature: an accused cannot be forced to admit guilt, either expressly or by providing self-information which incriminates it. However, those rights do not give rise to any idea of reciprocity. There is nothing to prevent the use against an accused of statements made by another which, ultimately, cannot be used to the latter's detriment. [57]

68. The claim set out at point 58 of this Opinion reveals a double fault.

69. The first is of a dogmatic nature. The rights with which I am now dealing are fundamental guarantees recognised vis-à-vis the public authority which exercises the right to punish, whether in sanctionative administrative proceedings or in criminal proceedings. The purpose of the rights is to strike a balance where none exists: the public power versus citizens, which must be protected from abusive coercion. [58] They have nothing to do with the principle of equality of arms, which seeks to preserve the initial symmetry between litigants who are relying on their rights before an impartial third party which will decide the issue. Accordingly, there is nothing to prevent the statements of one accused from being used against another.

70. The second reason is of a practical nature. As the Commission observes, the applicant's argument would make it impossible to prove conduct such as that

57 — In a different context (the analysis of blood or urine), the European Court of Human Rights has made a finding which is relevant to the answer to be given to Unicem's argument: the right not to make self-incriminating statements does not extend to information which exists independently of the will of the accused (see paragraph 69 of the *Saunders v. the United Kingdom* judgment, cited above). Therefore, it affords no protection against information form third parties.

58 — See the *John Murray v. the United Kingdom* and the *Saunders v. the United Kingdom* judgments of the European Court of Human Rights, both cited above, paragraphs 45 and 68 respectively.

investigated in this case and lead to its going unpunished. The judgment in *Orkem* v *Commission* brings out the need to strike a balance since, when the effectiveness of the Commission's action is ensured, the rights of the undertakings subject to an investigation and, possibly, to a sanctionative procedure are preserved. That is the import of paragraphs 32 to 35 of that judgment.

71. Last, it is not true that the Court of First Instance made the error of which Unicem complains, since paragraph 735 of the judgment states that the information referred to originated in an investigation pursuant to Article 14(2) of Regulation No 17. Furthermore, even if it were true, it would be of no significance, because the evidence came not from Unicem but from Cembureau, which was free to reply to the questions put to it. Those two assertions, which are to be found at paragraph 735 of the contested judgment, are not denied by the appellant.

72. This plea, too, must therefore be rejected.

2 *The Cembureau agreement and Unicem's participation in the agreement and in the implementing measures (second group of pleas)*

73. In this part of its appeal, Unicem complains of faulty reasoning, infringement of rules of law and errors in the assessment of the evidence.

A — The existence and the nature of the Cembureau agreement (ninth plea in law)

74. Unicem divides this complaint into four parts, the first of which (incorrect assessment of the relevant market) was rejected as manifestly unfounded in the order of 5 June 2002.

(1) Incorrect assessment of the specific documentary evidence (ninth plea in law, second paragraph, first part) [59]

(a) Arguments of the parties

75. The appellant maintains that the documents cited by the Court of First Instance and put forward by the Commission in the administrative procedure do not show that it participated in the Cembureau agreement.

59 — Ground B.1.2 of the appeal (pp. 26 to 29 of the original Italian).

76. The Commission claims that this plea is inadmissible, on the ground that the appellant does not criticise the Court of First Instance for distorting the evidence but merely seeks a reconsideration of the evidence by the Court of Justice.

77. In Unicem's submission, none of the following documents shows that it participated in the agreement:

(i) The Blue Circle internal memoranda

78. These memoranda refer solely to imports into the United Kingdom, so, although they prove the existence of an anti-competitive agreement, its effects did not extend to the whole of Europe but only to certain States.

(ii) The statement of Mr Kalogeropoulos

79. In order to evaluate the statement made by Mr Kalogeropoulos at the meeting of the Board of Directors of Heracles, the Court of First Instance did not appreciate that it was necessary to verify the difficulties experienced by the undertaking. The reference to an agreement between European cement producers made no mention of Cembureau.

(iii) Cembureau's confession

80. This piece of evidence makes no reference to the appellant's participation in the cartel.

(iv) The letter convening the Head Delegates' meeting on 14 January 1983

81. This document refers to the need to put a stop to the negative consequences of cement imports, but the Court of First Instance failed to point out that the use of measures to be adopted to which it refers was that of exchanges between Belgium and the Netherlands, which were regulated by a protocol.

(v) The approval of the Cembureau agreement at the Head Delegates' meeting of 7 November 1984

82. The expression used by the Commission as evidence of the Cembureau agree-

ment ('secure a closed agreement among the largest European exporters') does not prove that it was already concluded but, rather, that it had not yet been adopted. Furthermore, as such, it could be inferred from that phrase that there was an agreement concluded by the major European cement producers, which did not include Unicem.

(b) A mere disagreement as to the facts

83. No matter how much Unicem seeks to demonstrate the contrary, its arguments do not go beyond the establishment of the facts of the case. They express a different way of evaluating the available documentary contributions which in some way show an arbitrary or illogical assessment of the evidence.

84. From that perspective, the plea is inadmissible. The Court of Justice can intervene in that regard only if, in the production of evidence, a provision or a general principle of Community law has been infringed or if, when the evidence was assessed, there was an infringement of the rules governing the burden of proof and the appraisal of evidence owing to the latter being illogical or arbitrary and therefore such as to distort the evidence. The Court of Justice can only repair an infringement of law by the Court of First Instance and never establish the facts, without prejudice to its jurisdiction to review their legal classification. [60]

85. 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, [61] 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. [62] Unicem, a direct member of Cembureau, did not attend either of the meetings, [63] but its inclusion

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

61 — Those described at recitals 18, 19 and 45. 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; 914 to 919, for the admission by Cembureau; 930 to 941, which refer to the letter convening the Head Delegates' meeting on 14 January 1983; and 1028 to 1046 concerning the meeting of 7 November 1984, at which the Cembureau agreement was confirmed.

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

63 — Although it did attend the meeting of 19 March 1984.

in the cartel, like that of the indirect members, was inferred from its participation in various implementing measures. [64]

86. That use of presumptive evidence is perfectly legitimate. [65] It consists in taking as proven certain incriminatory facts founded on conjecture based on logic and reason, and also on common sense and experience. For that purpose, it is necessary to proceed from certain proven events which make it possible, by means of a mental process consistent with the rules of human discretion, to succeed in demonstrating the facts.

87. That is the task carried out by the Court of First Instance. Proceeding from certain facts (the meetings were held, agreements were adopted at those meetings, Unicem participated in certain implementing measures), it found as proved that there was a cartel, in which Unicem was included. That idea is sensible and is adequately explained in the contested judgment.

64 — See paragraphs 1416, 1442, 3744, 3745 and 4243 to 4247 of the contested judgment.

65 — See Case C-49/92 P *Commission* v *Anic Partecipazioni* [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.

88. 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 misplaced.

(2) The supposed contradiction in the Court of First Instance's arguments concerning the existence of the Cembureau agreement (ninth plea in law, second paragraph, second part) [66]

(a) Arguments of the parties

89. Unicem refers to various passages in the judgment (paragraphs 996, 1048, 1049 and 4072) which make clear the contradictions, lack of precision and confusion on the part of the Court of First Instance.

90. The Commission contends that this plea is inadmissible because it does not state which passages of the judgment are insufficiently reasoned. The applicant is mixing up and confusing the Court of First Instance's observations with those of the Commission cited in the judgment. That is the case of paragraph 4072. In the other parts of the judgment to which this plea refers, no contradiction is apparent.

66 — Ground B.1.2 of the appeal (pp. 29 and 30 of the original Italian).

(b) No contradiction in the paragraphs of the judgment cited in the plea

91. I am unable to understand the Commission's argument concerning this complaint, since the paragraphs of the judgment which in Unicem's submission reveal contradictory reasoning are clearly identified in the appeal.

92. However, the discord of which the appellant complains does not exist. As in the previous plea and as on other occasions throughout the appeal, Unicem is again proposing a partial, unilateral and biased reading of the judgment.

93. The fact that intra-Community trade in cement was not discussed at the meetings held on 30 May 1983 or 10 June 1985 and that, therefore, there was no talk of dividing the national markets (paragraphs 996 and 1048 of the judgment) does not prove that the Cembureau agreement was not adopted at the meeting held on 14 January 1983 and then approved at the meetings held on 19 March and 7 November 1984 (paragraph 1049), as the Court of First Instance found after assessing the evidence adduced before it. Nor is there any confusion. The Court of First Instance found that some meetings (the three just referred to) had an unlawful objective and that others did not.

94. Paragraph 4072 of the judgment [67] is a literal transcription of passages of the Decision in which the subjective links expressed in the Decision to justify the classification of the Cembureau as a single and continuous agreement are analysed. In the Commission's submission, they are not words used by the Court of First Instance which can be put forward of contradictions in its reasoning or confusion in its arguments.

95. Unicem appears to be puzzled because the judgment (in fact the Commission) linked the bilateral situations to the 'unlawful' meetings and not to those at the meetings at which no anti-competitive agreement was involved. The mere manifestation of disconcertion, without further criticism, is not sufficient to call in question the legal correctness of the assessment made at paragraph 4072, in the exercise of the power to assess the evidence conferred on the Court of First Instance.

67 — 'Grounds for annulment of the contested decision', XII, A, 2.2.

(3) The classification of the Cembureau agreement as a single agreement (ninth plea in law, third paragraph) [68]

(a) Arguments of the parties

96. Unicem complains that the Court of First Instance classified the Cembureau principle as a 'single agreement'. It claims that this concept presupposes single, uninterrupted conduct, whereas the facts found in this case do not lead to 'single conduct' but to a 'single unlawful intent'. There was not a single, uninterrupted plan, because significant periods of time elapsed between the various meetings. According to the Community case-law, [69] the 14 months which intervened between the meetings of 14 January 1983 and 19 March 1984 preclude a single agreement.

97. The Commission imputes to the appellant a very 'expeditious' and erroneous reading of the contested judgment, paragraphs 1004 to 1027 of which refer to a series of matters indicated by what was decided and by various notes relating to the meetings. Those matters dispel any doubts: the meeting which took place in March 1984 was intended to be a continuation of the meeting held in January 1983. The judgment cited by Unicem has no relevance to this case.

(b) The concept of a single and continuous agreement and its application to the Cembureau agreement

98. Article 85 of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and, generally, concerted practices, including measures which implement or apply such agreements, decisions or concerted practices, when they are capable of affecting trade between Member States and have an anti-competitive object or effect. Consequently, infringement of that article may result from an isolated action, a series of acts and even continuous conduct. [70] The decisive thing is the existence of a common subjective element and of the same unlawful design which unites them. [71]

99. In principle, it is permissible to classify as a single and continuous infringement the series of activities taking place within a

68 — Ground B.1.2 of the appeal.

69 — The appellant cites Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441.

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

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

system of periodic meetings, with the common objective of not transhipping cement to home markets, in the furtherance of which those involved adopt, inter alia, measures to exchange price information and to persuade and exert pressure on importers who threaten the stability of the markets.

100. Against that background, it is irrelevant that, taken individually, any of the practices in question could constitute an autonomous infringement of Article 85 of the Treaty, [72] or that an undertaking has not cooperated in all the elements which go to make up the collusive practice, has played a minor role [73] or does not implement it. [74]

101. So, if a commercial company participates in an infringement of this type with practices of its own which seek to contribute to the common goal, it is responsible, for the time during which it does so, for the conduct of other economic operators involved in the 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'. [75]

102. 'Single agreement' and 'single unlawful intent' are not, as the appellant appears to understand, exclusive. The latter is a necessary precondition of the former. It is true that an unlawful objective may be pursued by various apparently unconnected types of conduct; but when to unicity of purpose is added the fact that all the isolated acts correspond to the same plan of action, it is permissible to speak of a single agreement which produces its effects continuously.

103. The judgment at first instance devotes paragraphs 4025 to 4417 to providing reasons for classifying the Cembureau principle as a single and continuous agreement and examines the participation of each of the undertakings.

104. Unicem does not dispute the reasons stated in the judgment, but it does not accept that it is possible to speak of conduct of such nature, because 14 months intervened between the first two Head Delegates' meetings.

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

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

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

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

105. Paragraphs 1004 to 1027 adequately explain the existence of the same purpose and of a link between the meeting of 14 January 1983, at which the Cembureau agreement was adopted, and the meeting of 19 March the following year, at which the agreement was confirmed. They refer to documents which prove that between the meetings the necessary continuity was present: the record of the Executive Committee meeting held on 9 November 1983, the memorandum for the chairman of the meeting of 19 March 1984, and the agenda and the notes on the meeting. Those documents are not disproved by the appellant, nor are the assessments of fact which the Court of First Instance made after evaluating them.

106. The judgment of the Court of First Instance [76] to which Unicem refers in the grounds for this plea does not contradict the foregoing evaluation, for the simple reason that it refers to a different set of facts, in so far as the Commission had failed to prove the continuous nature of the infringement.

107. On the basis of the foregoing reasoning, the ninth of the pleas put forward in the appeal should be rejected in its entirety.

B — The periodic exchanges of pricing information (10th plea in law) [77]

108. Unicem, which was found responsible for the conduct referred to in Article 2(2)(b) of the Decision, divides this plea into five heads, each of which alleges that the judgment contains defective reasoning.

(1) Arguments of the parties

(a) Illogical reasoning (first head)

109. The appellant maintains that the reasoning used in paragraph 1651 et seq. of the contested judgment to establish its responsibility for the infringement is illogical. It puts forward the following arguments: (a) if the information changed was public and could be obtained from various sources, how did it facilitate the implementation of the Cembureau agreement? (b) it leads to the paradox that an exchange of information would never be lawful, because there would always be undertakings which, happening to have such infor-

76 — *Dunlop Slazenger* v *Commission*, cited above.

77 — Ground B.2 of the appeal.

mation, would be capable of using it for spurious purposes; and (c) the fact that the information was used at the Head Delegates' meetings does not prove that it was connected, for anti-competitive purposes, with the meetings at which the lawful exchanges of information were verified.

110. Furthermore, the assertions made in the judgment on this point contradict a general principle of competition law, which requires that any infringement of Article 85 of the Treaty be based on the fact that the information exchanged must be regarded as business secrets.

111. The Commission replies that paragraphs 1651 and 1652 of the contested judgment do not constitute an assessment of the matter, since they reiterate the explanations provided in paragraphs 1639 to 1643 to attribute to the exchanges of information the nature of infringements of competition within the framework of the Cembureau agreement. After examining the documents referred to by the Commission, the Court of First Instance states at paragraph 1644 that the exchange of information represented a means of applying the agreement. According to paragraphs 1651 and 1652, in that context, the fact that the Italian undertakings considered it necessary to provide information available through another channel shows that they agreed with the decisions taken within the framework of the Cembureau principle.

(b) Defective reasoning concerning the lawfulness of the exchanges of information (second head)

112. At first instance, Unicem contended that, while it accepted that the information exchanged was sensitive, it could only be prohibited in an oligopolistic market, which was not the case in the cement sector. Now it states that the Court of First Instance did not properly evaluate that argument and understood the contrary: that, according to the appellant, the market was an oligopolistic market. The reasoning of the Court of First Instance is therefore wrong.

113. The Commission observes that the appellant is referring to an obvious clerical error which does not invalidate the finding of the Court of First Instance, at least in the Italian version of the judgment, in which it is stated that Unicem's idea that the exchanges of information had reinforced competition in the market is disproved in the observations set out in paragraphs 1630 to 1647.

114. Unicem replies that the clerical error, which was impossible to detect, infringes its right of defence, since it formulated the ground of appeal on the basis of the copy of the judgment served on it. Had a correct text been provided, it would have prepared its appeal differently. It goes on to state

that the Commission's answer (that the error does not invalidate the reasoning of the Court of First Instance) is irrelevant, since the reasoning of the judgment on this point is quite incomprehensible and contrary to Article 190 of the EC Treaty (now Article 253 EC).

115. In its rejoinder, the Commission claims that it fails to understand the way in which Unicem's right of defence was infringed by an inaccuracy which has no effect on the substance of its allegations, which were properly rejected by the Court of First Instance.

(c) Illogical reasoning concerning the ability of the exchanges to further the Cembureau agreement (third head)

116. Unicem criticises the judgment at first instance on the ground that it did not question the Commission's reason for concluding that some exchanges of information, which had been carried out since 1981, became, after 1984, measures to implement the Cembureau agreement. The Commission's reasoning contains no evidence, but only presumptions, and the Court of First Instance also fell into the same error.

117. Furthermore, in the appellant's submission, it, like Cementir and Italcementi, never exported cement to other Community markets, so that the theory advanced at paragraph 1725 of the judgment is not supported by any evidence. A similar objection may be raised in respect of paragraph 1726. What is more, the corollary reached by the Commission and the Court of First Instance does not, according to an extensive body of Community case-law, constitute the only plausible explanation for that conduct, but it represents a mere suspicion, with the same probative force as the explanations put forward in the requests by the undertakings on which penalties were imposed.

118. In the Commission's submission, paragraphs 1725 to 1727 of the judgment cannot be condemned as illogical.

(d) Circular reasoning (fourth head)

119. Unicem maintains that the Court of First Instance erred in regarding its participation in the exchanges of information on prices as proof that it was involved in the Cembureau agreement and its intervention in that cartel as evidence of its connivance in those exchanges (paragraph 1698 of the judgment).

120. The reasoning is obviously circular. Neither the Commission nor the Court of First Instance had adduced any evidence that the exchanges of information were unlawful in themselves. If such conduct is lawful and it was only sanctioned because it facilitated the application of the Cembureau agreement, it could not at the same time be used as evidence of the 'unicity' of the cartel.

121. The Commission observes that the appellant's claim is not consistent with the observations set out in the judgment which it contests. Paragraph 1698 states that Unicem's participation in the Cembureau agreement as from 9 September 1986 is established by the information set out at paragraphs 4243 and 4247, where it is stated that the appellant's intervention in the setting-up of the European Task Force and, subsequently, in the measures designed to prevent Calcestruzzi from importing cement from Greece, adopted within the framework of that agreement, represented the manifestation of its accession to the Cembureau principle. The Court of First Instance's reasoning is therefore not circular.

(e) Incorrect reasoning in regard to infringement of the principle of equal treatment (fourth plea in law and fifth head of the 10th plea in law)

122. Unicem states in the application that its right to equal treatment was infringed by the fact that the objections relating to periodic exchanges of price information were not raised against other Italian undertakings, in particular the Associazione Italiana Tecnico Economica del Cemento, or that, where they were, they were subsequently withdrawn by the decision to drop the 'national objections'.

123. The error of law made by the Court of First Instance is manifest, so that it is illogical that it ignored a consistent line of Community decisions condemning the conduct of the 'category' associations through which the information is exchanged.

124. The Commission refers to the order in *Unifruit Hellas* v *Commission*,[78] and contends that this plea is inadmissible as it fails to identify the paragraphs of the judgment called in question.

125. As regards the substance, the Commission observes that the contested judgment properly acknowledges that, although the association was not accused of the infringement referred to at Article 2(2) of the Decision, that cannot excuse Unicem, whose responsibility is not in doubt.[79]

78 — Order of 5 February 1997 in Case C-51/95 P *Unifruit Hellas* v *Commission* [1997] ECR I-727.

79 — The Commission cites Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Wood Pulp II* [1993] ECR I-1307, paragraph 146.

126. The applicant maintains that it is scarcely likely that the Commission did not identify the paragraphs of the judgment and that it considers this plea inadmissible, because they were indicated (1700 to 1702) in the reply.

(2) Unicem and the periodic exchanges of price information (first three heads of this plea)

127. The existence of the periodic exchanges of price information is an undisputed fact which, moreover, as an element of fact, cannot be discussed in an appeal. Nor is Unicem's participation between 9 September 1986 and 31 December 1988 [80] questioned. The decisive fact is that the Commission means that that practice, which had been in operation since 1981, constituted from 1984 a measure to apply the Cembureau agreement, because it facilitated its implementation. [81]

128. The Court of First Instance held that that inference was correct. It was based on certain fully proven and undisputed facts: (1) the Head Delegates' meetings at which concern for the marked fall in the level of certain prices was expressed and at which specific exchanges of information on prices took place; (2) the table headed 'Domestic prices', referred to at paragraph 1646 of the contested judgment, distributed at the Head Delegates' meeting of 30 May 1983; [82] and (3) the existence of the exchanges, in addition to their objective aptitude to indicate trends in the price differences between the countries in which the members of Cembureau were established, [83] and to provide information which enabled prices to be set at dissuasive levels. [84] The Court of First Instance concluded from those facts that the regular exchange of information, which had been practised for some time, was, following the adoption of the Cembureau agreement, placed at its disposal to facilitate the implementation of the agreement. [85]

129. In that context, the complaint which Unicem puts forward in the first section of the 10th plea loses all consistency. Paragraph 1651 of the judgment, which reproduces in part Recital 47, paragraph 14, second indent, of the Decision, is not to be read in isolation. The fact that the information was public does not mean that its dissemination by Unicem cannot have had

80 — See paragraphs 1698 and 4340 of the judgment.

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

82 — The judgment mistakenly states that this table was distributed at the meeting of 14 January 1983, but at recital 16, paragraph 5, the Decision refers to the meeting of 30 May 1983.

83 — See paragraph 1643 of the judgment.

84 — 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).

85 — See paragraphs 1644 to 1646 of the judgment.

as its object to collaborate in and — let it not be forgotten — 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. [86]

130. There is one aspect of the complaint which is inadmissible. I am referring to the passage where Unicem argues that the use of price information at the Head Delegates' meetings does not establish the existence of a relation of an anti-competitive nature with the meetings at which the lawful exchanges took place. That aspect of the plea attacks the evidence and, since the appellant merely disagrees with the assessment of the facts made by the Court of First Instance, it must be rejected without further ado.

131. It follows from the foregoing that the third head of this plea is also unfounded. Unicem claims that the Commission and the Court of First Instance concluded 'without any evidence', and on the basis of 'presumptions', that the exchanges of price information were used as from 1984 to facilitate the application of the Cembureau agreement. However, it hesitates to assimilate 'presumptions' to lack of evidence, so, as I have already observed at point 86 of this Opinion, presumptions are an appropriate technique for establishing facts. At point 128, I explained the process followed by the Court of First Instance in order to conclude that from that aspect the Decision is consistent with the law, so by this complaint the appellant does not disturb the correctness of the contested judgment.

132. Also in the third part, Unicem claims that the reasoning in paragraphs 1725 to 1727 of the judgment is illogical because it rejects its argument that because it did not export cement to other European countries its involvement in the exchange of information did not restrict competition. Once again, the appellant is proposing a partial, rather than a full, reading of the contested judgment. In those three passages, the Court of First Instance provided an adequate reply to Unicem. When it was established that the appellant had played a part in exchanges and it was inferred that, from 1984, they were placed at the service of the Cembureau agreement on non-transhipment to home markets (paragraph 1634 et seq.), the fact that the Italian producers did not export to other Member States did not show that they had no interest in the exchange as a means of applying the Cembureau principle. Read in this way, together with the other parts of the judgment which deal with the question, the reasoning in the judgment under appeal is not illogical and does not appear to be lacking in proof. The basic facts of the imputation were established and for that

86 — See point 134 of the Opinion which I delivered today in Case C-204/00 P *Aalborg Portland* v *Commission*. [2004] ECR I-133. See also paragraphs 1634 and 1638 of the judgment.

reason Unicem and the other Italian producers endeavoured to justify their conduct from a different point of view.

133. In the first part of this plea, the appellant asserts that a cardinal point of competition law is that any infringement of Article 85 of the Treaty 'must be based on the fact that the information exchanged is regarded as business secrets'. [87] However, that assertion, taken literally, is not true. Although, as a general rule, for there to be a contradiction between an agreement between competitors to exchange information and Article 85(1) of the Treaty the information exchanged must be a business secret, [88] there are exceptions and the situation examined in the contested judgment is one of them.

134. The exchange of price information was not censured by the Commission as autonomous anti-competitive conduct, but in so far as it facilitated the implementation of the Cembureau agreement. By allowing a producer to discourage a potential external customer from obtaining supplies, requiring it to pay a price which was unattractive by comparison with what it could obtain from undertakings in the Member State in which it had its principal place of business, the reciprocal provision of information on quantities which shaped the prices assisted the non-transhipment to home markets principle. [89] In those circumstances, it is irrelevant that the information exchanged was secret. The decisive factor is that it was capable of ensuring the Cembureau agreement, i.e. of influencing the market in cement and removing uncertainty. [90] The fact that something is general knowledge does not render it incapable of being used for anti-competitive purposes. The way in which it is disclosed, the manner in which it is made available, the time when the exchange takes place or the setting in which it is done may render illegal an agreement of that type which, in principle, because it concerns matters not classified as secret, should not compromise free competition.

135. The second head of the plea proceeds from an error. In the various versions of the judgment, paragraph 1680 states that 'Unicem... maintains that in a *non-oligopolistic* market', [91] with the exception of the Italian version, which refers to an oligopolistic market. Since the premiss which provides factual support for the plea is not true, the complaint is automatically unfounded.

87 — Penultimate paragraph of part B.2.1 of the appeal.

88 — See the *Commission's Seventh Report on Competition Policy*, Brussels-Luxembourg, April 1978, p. 23).

89 — See paragraph 1642 of the judgment.

90 — 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, paragraphs 173 to 175.

91 — Emphasis added.

136. I fail to understand how that fact may have infringed Unicem's right of defence, unless what concerns it is not the legal correctness of the judgment but the existence of lacunae and possible contradictions which allow it to construct artificial arguments to sustain its contention. Perhaps this way of understanding the function of the defence explains much about the pleas going to make up this second part of the appeal, which are based on prejudiced readings of the judgment of the Court of First Instance.

137. In the Opinion which I have delivered today in Case C-205/00 P *Irish Cement Limited*, I stated that the complaints which attack the reasoning are inappropriate, above all because of the insistency with which they are made. A judgment which takes up some 1 700 pages in the 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, reduces them to their essential elements and arranges them systematically, in order to provide an answer to all of them, may be open to some criticism, but not for failing to state reasons. On the assumption that the express answer to any individual argument may have been omitted and that the contrast of a specific point, taken out of context, with another passage in the judgment may reveal apparent contradictions, but specifically, because it constitutes a single, integrated document, the solution in many cases is implicit in the reasoning. [92] Those circumstances preclude any partial and biased reading of the judgment, no matter how understandable from the legitimate exercise of the right of defence.

138. The foregoing considerations are relevant because, even if the contradiction of which Unicem complains were real (which it is in the Italian version), the complaint would be unfounded. As the Commission correctly points out, paragraph 1680 of the judgment must be read with the others to which it relates, in particular with paragraphs 1639 to 1647, where the Court of First Instance states that in reality the exchanges had an anti-competitive purpose and effects. Even if the European market in cement was 'oligopolistic' (as stated in the Italian text of the contested judgment), Unicem's assessment of the pro-competition nature of the exchange of price information is refuted in those passages of the judgment of the Court of First Instance.

139. Accordingly, the first three heads of the 10th plea in law must be rejected as inadmissible and unfounded.

92 — See points 126 and 127 of that Opinion.

(3) Unicem's participation in the periodic exchanges of price information was not used as evidence of its involvement in the Cembureau agreement (fourth head)

140. Unicem, which was a direct member of Cembureau, did not attend the Head Delegates' meetings in 1983 and 1984 at which the Cembureau agreement was adopted and confirmed. [93] For that reason, the Court of First Instance considered whether, notwithstanding its absence, it consented to what was agreed through the implementation of measures applying the agreement. After carrying out that analysis, the Court of First Instance inferred that the appellant participated in the setting-up of the European Task Force (Article 4(1) of the Decision), [94] in the practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (Article 4(3)(a)), [95] and in the agreement aimed at preventing imports of Greek cement by Calcestruzzi (Article 4(3)(b)). [96] From its involvement in those three practices, first the Commission and then the Court of First Instance concluded that Unicem participated in the Cembureau agreement from 9 September 1986. [97]

141. However, the Court of First Instance never asserted that the appellant's participation in the exchanges of price information proved its accession to the agreement. [98] In other words, Unicem's cooperation in the implementing measures referred to at Article 4(1) and (3) of the Decision served to deem it part of the Cembureau agreement [99] and its incorporation in that agreement explains its involvement in the exchange of price information. [100] The circular reasoning of which Unicem complains therefore does not exist.

142. The fourth head of the 10th plea in law must therefore be rejected as well.

(4) The principle of equal treatment (fourth plea in law and fifth head of the 10th plea in law)

143. To declare this complaint inadmissible, in accordance with the Commission's submission, would display excessive formalism, which, if allowed, would risk impairing the right which permits Unicem to obtain an effective adjudication. It is true that in the appeal it did not state the passages of the judgment at which its

93 — See paragraphs 1412, 1439 and 1697 of the judgment at first instance.

94 — See paragraphs 2682 and 2683 of the judgment.

95 — See paragraphs 3252 and 3253 of the judgment.

96 — See paragraph 3396 of the judgment.

97 — See paragraphs 4244 and 4245 of the judgment.

98 — See paragraph 4246 of the judgment.

99 — See paragraphs 4103, 4104 and 4244 of the judgment.

100 — See paragraph 1698 of the judgment under appeal.

criticisms are addressed, [101] but the content of the plea allows the Court of Justice to identify them, although they are not referred to by number.

144. None the less, this head of the 10th plea in law is unfounded.

145. Meanwhile, Unicem attributes to the Court of First Instance assertions which are not to be found in the judgment, at no point in which is it stated that the applicant had not been able to show that the fact that the Associazione Italiana Tecnico Economica del Cemento had not been imputed with the same objection placed the applicant in a less favourable situation. The judgment merely recognised that this failure to impute the infringement did not reduce the rights of defence of Unicem, which, through that association, had been able to have access to documents which would have allowed it to explain itself effectively during the administrative procedure. [102] There was no requirement of *probatio diabolica*, therefore, but an assertion which was not contradicted nor called in question.

146. Nor did the Court of First Instance consider, as stated in the appeal, that the association was not held responsible because it merely transmitted the information provided by the cement producers. The judgment only states that the failure to impute the infringement to that group does not preclude Unicem's responsibility, which was 'properly established'. [103]

147. A party who puts forward a plea based on the principle of equal treatment must produce a valid point of comparison and show that the situation of each is similar, so that the difference in treatment reveals conduct which is discriminatory and can therefore be repudiated.

148. Furthermore, there is no equality in illegality, so that no one can claim that he should not have been held responsible for unlawful treatment on the sole ground that another person who should also have been held responsible was not.

149. The whole of the 10th plea in law should therefore be rejected.

101 — It did so later, in its reply.

102 — See paragraph 1702 of the judgment.

103 — Paragraph 1701 of the contested judgment.

C — Unicem's participation in the agreement on the setting-up of the Cembureau Task Force or European Task Force (11th plea in law, third head) [104]

150. The only part of this plea to survive the order of 5 June 2002 was the third head, whereby Unicem seeks to demonstrate the erroneous nature of the arguments used by the Court of First Instance to prove that the appellant was responsible for the infringement referred to at Article 4(1) of the Decision.

(1) Arguments of the parties

151. The appellant claims that the Court of First Instance based its assessment on the 'constituent elements' of the European Task Force and the 'proposal' made by Mr Albert, on the basis of which it considered that the appellant was aware that the Cembureau agreement and the concerted practices in which it had participated formed part of an overall strategy to eliminate imports.

152. The appellant emphasises that it could not have assisted in the setting-up of the European Task Force and that it did not attend the meeting of 9 September 1986; accordingly, it has not been shown that the appellant was aware that a single anti-competitive agreement had been adopted.

153. The same argument shows that it had not collaborated in the conduct described at Article 4(2) and (3) of the Decision.

154. The Commission has not replied to this plea.

(2) An unfounded plea

155. The Court of First Instance devotes paragraphs 3740 to 3745 of the judgment to rejecting Unicem's arguments and to finding that it participated in the single agreement relating to the European Task Force, relying on two pieces of evidence: the appellant's involvement in some of the constituent elements of the agreement [105] and the proposal that Mr Albert, one of its

104 — Ground B.3.3 of the appeal.

105 — Paragraph 3741 of the judgment.

employees, should be a member of two of the five working groups. [106]

156. So, the reasons which led the Court of Justice, in the order of 5 June 2002, [107] to reject the first two heads of this plea as manifestly unfounded indicate that the same solution should be adopted in respect of the third part, in which Unicem takes as its starting point a version of the facts which has been rejected as having no place in an appeal.

157. When the proposition from which the appellant embarks upon its approach has been disproved, the complaint is deprived of all substance.

158. There is nothing erroneous or illogical in recognising that Unicem was aware that it was acting within the framework of a joint strategy intended to eliminate imports into Western Europe, i.e in the agreement relating to the European Task Force, regard being had to its participation in various constituent elements of the agreement and to the participation of a member of its staff in two working subgroups, in which that staff member reported the efforts made in an action to apply the agreement. [108]

106 — Paragraph 3742 of the judgment at first instance.

107 — Paragraphs 143, 144, 159 and 160.

108 — See paragraphs 3741 and 3742 of the judgment.

D — The measures to defend the Italian market (12th plea in law)

159. In this plea, which is divided into six heads, Unicem discusses the Court of First Instance's analysis of the actions undertaken to prevent Calcestruzzi from being a customer of the Greek producers and to prevent imports of cement from the Hellenic Republic.

(1) The dropping of the national parts of the Statement of Objections (fifth plea in law and the first head and (one aspect of) point 1 of the third head of the 12th plea in law) [109]

(a) Arguments of the parties

160. Unicem maintains that the dropping of the national objections and the 're-exhumation' of certain contracts and agreements already examined by the Italian competition authority result in its being held responsible twice for the same act, contrary to the principle *ne bis in idem*.

109 — Pleas A.1.5, B.4.1 and B.4.3.1 of the appeal.

161. The Commission had used those agreements as evidence of the appellant's participation in the Cembureau agreement (Article 4(2)(b) of the Decision), finding that Italcementi, Cementir and Unicem were responsible for participating in an agreement relating to the contracts signed on 3 and 15 April 1987 and having as their aim the prevention of imports of Greek cement by Calcestruzzi.

162. The appellant goes on to state that the reasoning set out at paragraph 3386 of the judgment to justify the twofold examination of the national practices, without being convincing, is complicated and fallacious, since the contracts signed with Calcestruzzi were the object of a Community examination because of their intrinsic illegality, whereas both the Commission and the Court of First Instance used them to show that they were connected with the Cembureau agreement.

163. Unicem concludes from the foregoing that the reasons given in the judgment for the conclusion that there was no contradiction between the decision to drop 'the national parts' of the Statement of Objections and the assessment of the agreements with Calcestruzzi were incorrect.

164. The Commission states that this complaint is inadmissible because it seeks a full reconsideration of the arguments put forward by Unicem at first instance.

165. So far as the reference to incorrect reasoning is concerned, the Commission contends that the contradiction of which the appellant complains does not exist.

166. Nor are the assessments of the duration of the contracts between the Italian cement manufacturers and Calcestruzzi contradictory, regard being had to the fact that the period during which the agreement was in force was set at 3 April 1987, the date on which the contracts were signed, until 3 April 1992, the date on which they expired. The previous question has nothing to do with the dropping of the 'national objections', since, as stated at paragraphs 445 to 447 of the judgment under appeal, the international part of the Statement of Objections and the Decision refer clearly to the contracts from the aspect of an agreement which was prohibited because it obstructed Greek imports into Italy.

167. The Commission submits that the judgment explains exhaustively that Unicem's participation in the infringement referred to at Article 1 of the Decision lasted from 9 September 1986 until 3 April 1992, the date on which the agreement between the three Italian producers to prevent Greek imports came to an end.

(b) An admissible plea

168. The Commission is wrong to argue that this plea in law is inadmissible, since Unicem is not merely repeating the arguments put forward at first instance but is

criticising the judgment for having rejected them.

169. Thus, it claims that the Court of First Instance erred in law by failing to examine whether there had been an infringement of the principle *ne bis in idem* and by relying on contradictory reasoning. Accordingly, there is no misuse of the appeal.

(c) The *ne bis in idem* principle

170. That principle, [110] in order to protect the same legal rights, prevents a person from being punished repeatedly for the same unlawful conduct, since that duplication of penalties entails an unacceptable repetition in the exercise of the right to punish. [111]

171. There are three identities, therefore, which must be present in order for the principle to apply: the same facts, the same offender and a single legal right to be protected. [112]

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

173. The unity of the legal right to be protected is beyond doubt. The rules which guarantee free competition within the European Union do not allow a distinction to be drawn between separate areas, the Community area and the national areas, as though there were watertight compartments. Both sectors are concerned with the supervision of free and open competition in the common market, one contemplating it in its entirety and the other from its separate components, but the essence is the same. On this point, the national legislation must properly transpose the provisions set out in Articles 81 EC and 82 EC and, in order to implement them, by secondary legislation.

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

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

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

174. A reading of Articles 2 [113] and 3 of Italian Law No 287/1990 of 10 October 1990 on the protection of competition and the market [114] will reveal that Articles 81 EC and 82 EC are transcribed almost literally, the only difference being that the Italian law refers to the 'national market' instead of the 'Community market', but that difference, as I shall explain below, is adjectival and has no substantive character.

175. The Community authorities and the national authorities discharge a similar task and when they sanction anti-competitive conduct their aim is to protect a single legal right. There is a genuine concurrence of competencies in the same material scope for the purpose of attaining similar objectives and the way in which they are allocated has been outlined by the Court of Justice in the judgments which I described in footnote 110 of this Opinion.

176. In *Wilhelm*, cited above, the Court of Justice held that '[w]hereas Article 85 regards [collusive practices] in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it'. [115] In doing so, the Court was referring to this double perspective, one global and the other territorially limited, to which I referred a few lines ago. In the last supposition, when the collusive activity does not extend beyond the borders of a Member State, it does not for that reason cease to affect 'competition within the common market'. [116] The test of the territorial extent of the unlawful conduct is not substantive, but adjectival, since it does not affect the nature of the infringement, but only its intensity.

177. If those three identities are present, when conduct contrary to Article 81 EC has been investigated and sanctioned by the Commission, it cannot then be punished by the competent national competition authority, and vice versa. [117]

178. The solution whereby the second authority to become involved reduces the penalty owing to the amount of the fine imposed by the first authority, which was adopted by the Court of Justice in *Wilhelm*, does not satisfy the requirements of the principle *ne bis in idem*. That principle is not a procedural rule which operates as a

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

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

115 — Paragraph 3.

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

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

palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens. [118]

179. In reality, *Wilhelm* did not constitute an application of that principle, [119] since it involved 'two parallel proceedings pursuing different ends', [120] in other words, in which different assets or legal values were being protected. [121] The identity of protected objective required for the application of the *ne bis in idem* rule is absent. That judgment shows that, so far as the Community case-law is concerned, even where that principle does not apply and the double punishment is lawful, 'a general requirement of natural justice... demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed'. [122]

180. However, the third of the requisite identities, the objective, is absent. [123]

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

182. Unicem contests the earlier finding of the Court of First Instance, but it does not discuss it in the proper manner by raising it in an appeal, where the findings of fact made at first instance are not amenable to review on appeal.

183. In short, there was an agreement between the three Italian cement producers, the aim of which was to prevent Calces-

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

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

120 — Paragraph 11.

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

122 — Paragraph 11.

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

truzzi from continuing to import Greek cement, notably under the contract which it had concluded with Titan in 1986. That agreement, which was covered by the common purpose of the European Task Force of eliminating cement imports into Western Europe, required a supplementary measure which, moreover, was its ultimate objective. If the aim was for Calcestruzzi to cease importing cement from Greece and to start to obtain it from the Italian manufacturers, thus complying with the 'everyone stays at home' rule inherent in the Cembureau principle, it was essential to regulate the supply of cement to Calcestruzzi, which was the purpose of the contracts and agreements signed on 3 and 15 April 1987.

184. There were two separate practices: one with external significance, which sought to prevent imports of Greek cement by Calcestruzzi and the other being merely of national significance, namely the agreement between the three cement producers and Calcestruzzi itself. In the first, the parties responsible were Unicem, Italcementi and Cementir, since Calcestruzzi appeared as a victim, while in the second the four companies formed part of the agreement. The agreement between the three cement producers to bring pressure to bear on the party who later signed the contracts of supply is in itself an agreement which would attract a penalty. [124]

(d) Reasoning not contradictory

185. The national objection corresponding to Italy related to the contracts and agreements for the supply of cement signed by Unicem, Italcementi, Cementir and Calcestruzzi on 3 and 15 April 1987. Within the framework of those contracts, they set up a joint subsidiary called Società Italiana per le Promozioni ed Applicazioni del Calcestruzzo SpA (SIPAC). [125] By those agreements, the three producers undertook to meet all the cement requirements of the Calcestruzzi group and to apply the price reductions specified. For its part, Calcestruzzi undertook to channel half of the price reductions to the joint subsidiary, which was to invest the sums in ready-mixed concrete companies or related activities, and to obtain at least 80% of its

124 — Penalties can be imposed in respect of agreements whose purpose is to divide markets, irrespective of whether they then have the actual effect of restricting competition. In *Suiker Unie and Others* v *Commission*, cited above, the Court of Justice referred to agreements the object or effect whereof is to influence the market (paragraph 74; emphasis added). That principle is found today 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*, also cited above, paragraph 125.

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

cement requirements from Italcementi, Unicem and Cementir or from companies designated by them. If Calcestruzzi's cement purchases were less than 95% of its requirements, the manufacturers reserved the right to terminate the agreements. [126]

186. In the international part of the Statement of Objections, there is a reference to the two infringements connected with the measures to protect the Italian market adopted within the European Task Force or Cembureau Task Force. [127]

187. The first, and more general, measure, which is referred to at Article 4(3)(a) of the Decision, consists in the concerted practices designed to withdraw Calcestruzzi, then the major Italian supplier of ready-mixed concrete, as a customer from the Greek producers, and from Titan in particular. That infringement was imputed to the three Italian manufacturers, and also to the other participants in the cartel. [128]

188. The second, more specific, measure consisted in the agreement adopted by the three Italian manufacturers to prevent Calcestruzzi from importing cement from Greece. Its aim was to face up to a threat that 1.5 million tonnes of Greek cement would be imported by Calcestruzzi. [129] That infringement, which is referred to at Article 4(3)(b), was imputed only to the three Italian producers. [130]

189. The Court of First Instance linked the duration of that infringement to the period of validity of the contracts and agreements signed with Calcestruzzi. Once it has been shown that Unicem, [131] Italcementi and Cementir had agreed to prevent imports of Greek cement by Calcestruzzi, in the context of which they signed the contracts of supply with that company, there is nothing contradictory or illogical about the fact that the duration of that agreement was determined with reference to the validity of those agreements, which constitute their external expression. That is the meaning of paragraphs 3396 and 4340 and similar paragraphs of the judgment under appeal.

190. Nor is an assertion of that nature inconsistent with the reasoning in paragraph 4278 of the judgment under appeal. The Cembureau agreement on non-transhipment to home markets was a global

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

127 — On these infringements, see paragraph 3133 et seq. of the judgment.

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

129 — See recital 55, paragraph 2b, of the Decision.

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

131 — It will be recalled that the findings of fact made at first instance are not amenable to review on appeal.

anti-competitive agreement applied by most Community cement producers. All the undertakings on which penalties were imposed participated in its adoption or implementation or in one of the two practices, and did so by means which were more or less permanent. The fact that the three Italian producers continued to adhere to it until 3 April 1992, by which time the remaining manufacturers had ceased to apply it, only means that they extended it further than the other undertakings.

191. In short, the fifth plea and the first head of the 12th plea in law must be rejected as unfounded.

(2) Unicem's participation in the agreement to withdraw Calcestruzzi as a customer from the Greek producers — Article 4(3)(a) of the Decision — (second head of the 12th plea in law) [132]

(a) Arguments of the parties

192. Unicem disputes the assessment which the Court of First Instance made on this point of the documentary evidence (first head of the plea) and also the determination of the duration of the infringement (second head).

193. The Commission claims that this plea is inadmissible, since, on the one hand, it relates to the assessment of evidence by the Court of First Instance and, on the other hand, it is impossible to know the object of Unicem's criticism where it complains about the duration of the infringement. Furthermore, at paragraphs 3245 to 3254 of the contested judgment, the reasons for the applicant's participation in the agreement are correctly analysed.

194. Unicem replies that the Court of First Instance distorted the meaning of the notes on the meetings of 17 June and 4 September 1986; were that not so, the reasoning in paragraph 2683 of the judgment would be contradictory. It is not consistent with the duration attributed to the infringement.

(b) An unfounded plea which does not go beyond the assessment of the facts

195. However much Unicem seeks to demonstrate the contrary, by this complaint it disagrees with the Court of First Instance's evaluation of the documents before it.

132 — Ground B.4 of the appeal.

196. It is sufficient to read point 4.2 of the appeal together with the paragraphs of the judgment to which the Commission refers in its response to show that what Unicem is asking the Court of Justice to do is to uphold its version of the facts, which differs from that established by the Court of First Instance. From that aspect, the plea is inadmissible.

197. It is also unfounded, because the evidence was not distorted and the contradictory and incorrect reason of which the appellant complains does not exist.

198. Once again, Unicem is proposing a biased reading of the legal foundation of the contested judgment. It is true that at paragraphs 3245 to 3253 there is a reference to the meetings of 6 and 11 February 1987, which Unicem's representative, Mr Albert, did not attend, but the fact remains that there is also a reference to another meeting held on 9 September 1986, at which an account was given of the earlier meetings and their purpose, and also to the one held on 17 March 1987, when Mr Albert described the negotiations between the Italian cement producers and the Ferruzzi group, to which Calcestruzzi belonged. The telexes of 13 May 1987 and 2 September 1988 were also discussed. The reference to 'an agreement between Italian cement producers and the Ferruzzi group, which made it possible to avoid a threat of imports of cement which was perceived as disastrous for prices' [133] may possibly have been made only at the meeting of 11 February 1987, but that does not alter the situation. Even disregarding that meeting and the other one held during the same month, the Court of First Instance had sufficient evidence to state that 'the Commission was entitled to find... that Unicem had participated in the concerted practices designed to induce Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular'. [134]

199. Nor does the contradiction of which the appellant complains in its reply exist. The Court of First Instance did not take into consideration the meetings held between 17 June and 4 September 1986, as may be seen from a reading of paragraphs 3245 to 3253 of the judgment.

200. When it complains of the duration attributed to the infringement by the Court of First Instance, the appellant wrongly refers to the exchanges of information referred to at Article 2 of the Decision. The Commission takes advantage of that error to claim that the plea is inadmissible. However, the wording of the part of the appeal which refers to Article 4(3)(a) of the Decision shows that Unicem is directing the complaint against the part of the reasoning

133 — Paragraph 3248 of the judgment under appeal.
134 — Paragraph 3252 of the judgment.

in the judgment in which the period of its participation in the facts is determined, so that that aspect of the plea is not inadmissible.

201. None the less, it must be rejected. At Article 4(3)(a) of the Decision, the Commission gives 17 June 1986 as the starting point of the infringement, whereas the Court of First Instance postpones it in Unicem's case until 9 September 1986, the date on which the meeting between the Head Delegates and the representatives of the European Task Force took place in Baden-Baden. The date on which the infringement ceased was given as 15 March 1987 [135] by a simple error on the Commission's part, since the meeting was held not on that date but two days later, but the mistake could not be corrected by the Court of First Instance without risk of incongruence and of adversely affecting the applicant's position.

202. Consequently, this complaint must be rejected as inadmissible and unfounded.

135 — See recitals 27, paragraphs 3 and 5, and 55, paragraph 1, of the Decision.

(3) The agreement relating to the contracts and agreements signed in April 1987 with Calcestruzzi (Article 4(3)(b) of the Decision)

(a) Arguments of the parties

(i) Evidence of Unicem's participation (12th plea in law, third head, point 2) [136]

203. Unicem criticises paragraph 3353 of the judgment of the Court of First Instance for failing to prove that those attending the meeting held by the European Task Force on 17 March 1987 were actually aware of the agreement, that it was approved by the appellant and also of a plan and a common action.

204. It reiterates that at the meeting of 17 March 1987 at which only purely lawful issues were dealt with, its representative, Mr Albert, merely stated, when questioned by those attending, that the agreement with Ferruzzi, i.e. with Calcestruzzi, had not yet been concluded.

136 — Ground B.4.3.2 of the appeal.

205. The Commission contends that there is evidence of the existence of the agreement and refers to paragraphs 3348 to 3386 of the judgment under appeal.

(ii) The obligation to notify the agreements with Calcestruzzi (12th plea in law, third head, point 3) [137]

206. Unicem claims that the Court of First Instance erred in interpreting Article 4(2) of Regulation No 17 by maintaining that the agreements and contracts signed with Calcestruzzi should be notified to the Commission, since that provision exempts agreements whose subject-matter is not imports and exports, even though they indirectly affect their flows.

207. The Commission is unable to identify the passage in the application in which Unicem put forward the former complaint and therefore classifies it as a new question, which is inadmissible in an appeal. It further states that the agreements signed with Calcestruzzi are not protected by Article 4(2) of Regulation No 17, because they prevented imports into Italy of a significant quantity of Greek cement.

208. In its reply, Unicem acknowledges that it did not raise the question before the Court of First Instance, but it takes the view that it may be examined of the Court's own motion, as it is a matter of public policy.

(iii) The duration of the infringement (12th plea in law, third head, point 4) [138]

209. According to the appellant, the Court of First Instance contradicts itself with the reasoning at paragraph 4278 of the contested judgment when it states that the infringement referred to at Article 4(3)(b) of the Decision lasted until 3 April 1992.

210. The Commission sees no inconsistency in the wording of the judgment. The Cembureau agreement on non-transhipment to home markets was observed by the three Italian producers until 3 April 1992, which does not presuppose that other European cement manufacturers applied the agreement until that date.

137 — Ground B.4.3.3 of the appeal.

138 — Ground B.4.3.4 of the appeal.

(b) Unicem's participation

211. Unicem again claims to confer on the Court of Justice a terrain which is prohibited to it, namely the evaluation of evidence, using the device of taking a passage in the contested judgment out of context. It appears that the existence of the agreement referred to in Article 4(3)(b) of the Decision and the evidence of Unicem's participation is evident only in paragraph 3353 of the judgment, when, in reality, 39 paragraphs are devoted to it.

212. Unicem 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, [139] so that the findings set out in paragraphs 3356, 3360, 3361, 3367, 3372, 3377 and similar paragraphs cannot be classified as unfounded.

213. The fact that the appellant did not attend the meeting of the European Task Force held on 11 February 1987 is irrelevant. The infringement referred to in Article 4(3)(b) of the Decision is not an agreement with a European dimension, since only the three Italian manufacturers subscribed to it. In other words, the contracts and agreements signed on 3 and 15 April 1987 are an application of the agreement reached by Cementir, Italcementi and Unicem, the purpose of which was to prevent a threat of the import of 1.5 million tonnes of Greek cement by Calcestruzzi, [140] which was reported at the meetings of the European Task Force held on 11 February and 17 March 1987. [141] In that context, the appellant's arguments lose all their force, because the agreement described in recital 55, paragraph 2, of the Decision was not adopted within that group and, consequently, it is of no relevance that the appellant did not attend a meeting at which the agreement was not reached, although its existence was mentioned.

214. Whatever Unicem's considerations regarding what was discussed at the meeting of 17 March 1987 may be, the truth is that information on the state of the negotiations with Ferruzzi was provided during the course of that meeting. [142] The evaluation of that fact made in paragraph 3353 et seq. of the judgment, in conjunction with the further evidence available to the Court of First Instance, does not display the defects which might justify its being reviewed on appeal and Unicem's complaint is therefore inadmissible on this point.

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

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

141 — See paragraphs 3286 and 3345 of the judgment.

142 — See recital 27, paragraph 5, of the Decision.

(c) The obligation to notify the agreements

215. Unicem admits that it did not raise the question at first instance. The discussion which it now seeks to open is therefore inadmissible. The jurisdiction of the Court of Justice in an appeal is limited, according to Articles 113(2) and 116(1) of the Rules of Procedure, to reviewing the points of law in the solution adopted by the Court of First Instance in response to the pleas put forward by the parties and it cannot extend the subject-matter of the dispute. [143]

216. It is true that the point relating to notification of the contracts signed with Calcestruzzi was raised by Italcementi and was answered at paragraphs 3380 to 3384 of the contested judgment. However, the proceedings brought by Unicem and by Italcementi were separate and were joined only for the purposes of the judgment. For that reason, Unicem cannot absorb Italcementi's request in order to criticise the judgment at first instance.

217. For the remainder, the controversy over the interpretation of Article 4(2) of Regulation No 17 is not a matter of public policy, a concept which is reserved to matters which, owing to their importance to the public interest, are not left to the discretion of the parties or of the Court and must be examined as a preliminary issue even though they have not been raised by the parties.

218. Under Article 4(2) of Regulation No 17, agreements to which the only parties are undertakings from one Member State and which '*do not relate* [144] to either imports or to exports between Member States' are exempt from the requirement to be notified. The wording of that provision renders Unicem's argument nugatory and shows that the Court of First Instance was correct. In order to be exempt, it is not necessary for the practice to have as its object imports and exports, it is sufficient that it has an effect on those external transactions. Therefore, the conduct described in Article 4(3)(b) of the Decision is an agreement relating to the contracts and agreements signed with Calcestruzzi, which continued to supply cement to that undertaking and thus made it cease to import cement from Greece.

219. Accordingly, Unicem's claim cannot be accepted on this point.

143 — Among the most recent decisions of the Court of Justice, see the order of 14 December 2001 in Case C-404/01 P(R) *Commission* v *Euroalliages and Others* [2001] ECR I-10367, paragraph 53.

144 — Emphasis added.

(d) The duration of the infringement — Reference to other pleas

220. By complaining of a contradiction in the reasoning stated in the judgment concerning the duration of this infringement, Unicem is reproducing a complaint which it has already formulated in the first head of this (the 12th) plea and for that reason I refer to the considerations which I set out at points 185 to 190 above.

(4) The connection between the measures for the defence of the Italian market with the European Task Force and between that agreement and the Cembureau principle (12th plea in law, third head, point 1 (the second aspect) and fourth head) [145]

(a) Arguments of the parties

(i) The connection between the measures and the European Task Force agreement

221. Unicem asserts that the Court of First Instance erred in classifying the agreement relating to the contracts and agreements signed with Calcestruzzi as a measure implementing the agreement on the European Task Force. It submits that those contracts and agreements do not endeavour to protect the Italian market in cement or to block imports from Greece but to prevent Calcestruzzi from buying in that country. Proof may be seen in the fact that while the contracts were in force Greek imports increased considerably.

222. The Commission contends that this plea is inadmissible, on the ground that it entails a reconsideration of the evidence, and unfounded, since it proposes a partial reading of the judgment under appeal, which contains neither contradictions nor errors.

(ii) The link between the European Task Force and the Cembureau principle

223. Unicem states that the Court of First Instance used as evidence of its participation in the global Cembureau agreement: (a) its involvement in the adoption of the agreement on the setting-up of the European Task Force; (b) its involvement in the measures for the protection of the Italian market; (c) Mr Albert's membership of certain working subgroups; and (d) the presence at the meeting held on 17 March 1987. If it was not present when the agreement to set up the European Task Force was formed, if there was no connection between the measures for the protection of the Italian market and the European Task Force and if the appoint-

145 — Grounds B.4.3.1 and B.4.4 of the appeal.

ment of Mr Albert, and the attendance at the meeting in question, prove nothing, it is impossible to speak of the same anti-competitive purpose or of the 'unicity' of the Cembureau agreement.

224. The Commission contends that the plea is inadmissible, because it relates to the facts; notwithstanding the foregoing, the contested judgment contains material which indicates the connection between the measures adopted by Unicem and the Cembureau agreement.

(b) More on the idea of the Cembureau principle as a 'single and continuous agreement' — Reference to other pleas

225. This plea in law appears to be manifestly inadmissible. The reflections on the evidential value of the elements of fact taken into consideration by the Court of First Instance for the purpose of finding that the appellant was involved in the setting-up of the European Task Force, and of establishing the link between the measures for the protection of the Italian market with that agreement, have no place in this appeal and have already been answered in this Opinion.

226. Unicem acknowledges that the contracts and agreements which it signed with Calcestruzzi tended to prevent that undertaking from importing cement from Greece, but it denies that it was thus attempting to protect the Italian market and to block imports from Greece. That argument is contradictory, because by those agreements it was attempting to provide Calcestruzzi with the cement which it would not receive following the suspension of the contract between it and the Greek producer Titan, a measure which, owing to its quantity (1.5 million tonnes), would have proved disastrous for prices in Italy, according to the handwritten record of the meeting which the European Task Force held on 11 February 1987. [146] It was clearly intended to protect price stability in the Italian market, which was threatened by the mass imports which could come from Greece.

227. That assertion is not contradicted by the fact that imports of Greek cement increased during the years when the contracts with Calcestruzzi were in force, because, as the Court of First Instance adequately points out, Calcestruzzi suspended the deliveries of cement agreed with Titan and because an agreement contrary to free competition is in itself unlawful, even if in practice it does not succeed in restricting it. [147]

146 — See recital 27, paragraph 5, of the Decision.

147 — See paragraphs 3372 and 3373 of the contested judgment.

228. So, there were valid reasons to classify the agreement relating to the contracts and agreements with Calcestruzzi as one more step in the strategy intended to 'eliminate imports into Western Europe and, in particular, to prevent imports of Greek cement into the Member States' [148] and, according to paragraphs 3701 to 3706 of the judgment, to take all the practices described in Article 4 of the Decision as part of a single and continuous agreement.

229. With those premisses, there was nothing to prevent the Court of First Instance from considering that those practices, the adoption of the Cembureau agreement and its confirmation, and the periodic exchange of price information, when it was proved that they had as their common objective non-transhipment to home markets, constituted a 'single and continuous agreement'. That is consistent with the case-law of the Court of Justice, to which I have referred at points 98 to 102 above, which is correctly applied in paragraphs 4025 to 4417 of the judgment at first instance.

230. In accordance with the foregoing considerations, I propose that the Court of Justice should reject, either as inadmissible or as unfounded, the various heads of Unicem's 12th plea in law which were not rejected in the order of 5 June 2002.

E — Unicem's participation in the single and continuous Cembureau agreement (13th plea in law)

231. By this plea, which consists of four heads, the appellant discusses the findings of the Court of First Instance relating to its involvement in the global Cembureau agreement.

(1) The objective element (first head) [149]

(a) Arguments of the parties

232. Unicem refutes the findings of the Court of First Instance because: (1) the periodic exchanges of price information were lawful and did not facilitate the implementation of the Cembureau agree-

148 — See recital 53, paragraph 9, of the Decision.

149 — Ground B.5.1 of the appeal.

ment; (2) it did not participate in the conclusion of the agreement on the setting-up of the European Task Force; and (3) it has not been proved that there is a link between the two agreements relating to Titan or the contracts with Calcestruzzi, on the one hand, and the European Task Force and Cembureau on the other.

233. The Commission contends that the appellant is criticising the evaluation of facts by the Court of First Instance concerning Unicem's position, which cannot be reviewed by the Court of Justice.

(b) Reiteration of arguments — References to other pleas

234. In this first head of the 12th plea in law, Unicem is repeating complaints which it has already set out.

235. My proposals, in each case that the appellant's pleas be rejected, are to be found in various points of this Opinion. Thus, as regards the exchanges of price information, reference should be made to points 127 to 149. As regards Unicem's participation in the setting-up of the European Task Force, reference should be made to points 155 to 158. Last, my thoughts on the connection between the measures for the protection of the Italian market and the European Task Force and Cembureau agreements are set out in points 225 to 229.

(2) The subjective element (second head)

(a) Arguments of the parties

236. The appellant sets this head out in four points.

(i) The error consisting in taking Unicem to be a direct member of Cembureau

237. Unicem sees an inconsistency in the wording of the judgment at first instance in so far as it included the appellant as a direct member of Cembureau and, at the same time, assimilated it to the indirect members. It is not a direct member because it was not involved in any of the Head Delegates' meetings. On the other hand, there are no grounds for relying on its status as an associate in the first tier to reinforce the evidence of its participation in the Cembureau agreement.

238. The Commission reiterates that Unicem is disputing the facts of the case and states that the classification of 'direct member' designates the undertakings and associations which form part of Cembureau. However, in spite of being included in that group, Unicem was in a singular position, because it was not involved in any of the Head Delegates' meetings.

239. In its reply, Unicem states that it is not discussing its formal position in Cembureau but the lack of sufficient reasoning when it comes to showing the subjective element, i.e. its knowledge on the anti-competitive purpose of the agreement and the measures adopted to implement it. The Commission contends that the presence of this subjective element was proved in the contested judgment.

(ii) The illogical nature of the assertion that Unicem 'necessarily had to know'

240. In the appellant's submission, the mere fact of belonging to an association does not prove knowledge of the illegality of an agreement adopted within it. So far as the other direct members of Cembureau were concerned, the Court of First Instance inferred their knowledge of the unlawful practice from their presence at the meetings at which the agreement was adopted and not from the fact that they belonged to the group.

241. The Commission contends that this plea should be declared inadmissible because it relates to the facts and because the contested judgment contained adequate reasoning to support the finding that the indirect members and, a fortiori, the direct members were aware of the nature of the agreement.

(iii) The defective reasoning and the inappropriate nature in regard to Unicem of the criteria used for the indirect members

242. Unicem claims that the Court of First Instance provided no explanation that it knowingly applied the anti-competitive agreement. So far as the indirect members were concerned, it took account of the fact that the associations to which they belonged attended the meetings of the Head Delegates of Cembureau at which the agreement was adopted and confirmed, whereas Unicem was not represented either directly or indirectly. Its assimilation to the indirect members is incorrect in so far as it refers to the mental element.

243. The Commission states that the appellant is proposing a partial reading of the judgment, in which the Court of First Instance accepts and analyses the singular position which the appellant occupied.

(iv) Other material used by the Court of First Instance

244. Unicem criticises the other material used by the Court of First Instance to prove that it was aware of the unlawful nature of the agreement. The meetings with undertakings which attended the Head Delegates' meetings do not prove that it was aware of the existence of the Cembureau agreement. Its contacts with Italcementi

and Cementir, within the meaning of the agreement relating to Calcestruzzi, do not prove that it was aware that it was adhering to the global agreement. Finally, the telex of 13 May 1987 does not prove anything either.

245. The Commission believes that this complaint is inadmissible, because it concerns the evaluation of evidence and because the appellant provides no evidence capable of showing that the arguments of the Court of First Instance are incorrect.

(b) The assessment of Unicem's singular position in the Cembureau agreement

246. Inadmissibility, which the Commission repeats like a catchphrase, does not apply here, since Unicem is calling in question not the facts established by the Court of First Instance but the legal assessment and the reasons supporting the finding that it participated in the so-called single and continuous Cembureau agreement.

247. None the less, Unicem's complaints are unfounded.

248. In its reply, the appellant corrects its initial position and does not refute its classification as a direct member of Cembureau, because that status is determined not by involvement in a greater or lesser number of meetings of Head Delegates of the association but by the formal condition of member. [150]

249. However, Unicem was in a singular position in the agreement, since, although a direct member, it did not attend any of the Head Delegates' meetings at which the anti-competitive agreement was adopted and confirmed, so, in order to prove its participation in the infringement, the Court of First Instance uses the same procedural principle as it applied to the undertakings and associations of undertakings called 'indirect members' (because they were represented by the associations to which they belonged). In order to show responsibility on the part of this category of transgressors, it examined their participation in one or more of the measures adopted to implement the agreement.

250. Accordingly, it is not true that the Court of First Instance only considered Unicem's condition as a direct member of

150 — See recital 15, paragraph 2, of the Decision.

Cembureau in order to confirm that it was aware of the existence and unlawful nature of the agreement.

251. The appellant was involved in various implementing measures, in particular, in the setting-up of the European Task Force, in the pressure brought to bear on Calcestruzzi and in the agreement whereby Calcestruzzi ceased to import Greek cement, and the Court of First Instance therefore concluded that it was aware of the existence of the global agreement and of its unlawful nature, because:

(1) it was a direct member of Cembureau; [151]

(2) by eliminating imports of cement into Western Europe, the European Task Force and the measures for the protection of the Italian market pursued the same objective of non-transhipment to home markets as the Cembureau agreement; [152]

(3) in connection with the setting-up of the European Task Force, it maintained direct contacts with representatives of undertakings and associations who were present at the meetings at which the Cembureau principle was adopted and confirmed; [153]

(4) Italcementi and Cementir, with which the appellant agreed to ensure that Calcestruzzi would cease to import cement from Greece, are direct members of the association, represented at those meetings or at some of them; [154] and

(5) a different inference cannot be drawn from the terms of the telex which Italcementi sent to Titan on 13 May 1987 in connection with the meeting convened for 24 May next in Luxembourg between the three Italian producers and Titan itself, which took place after the general assembly of Cembureau. [155]

252. As may be seen, Unicem's assertion that its involvement in the global agreement came about by virtue of its position as a direct member of Cembureau is a long way from reality.

151 — See paragraph 4104 of the contested judgment.

152 — See paragraph 4104, in conjunction with paragraphs 4050 to 4502.

153 — See the first part of paragraph 4105.

154 — Second part of paragraph 4105 of the judgment.

155 — See paragraph 4106 of the judgment.

253. Nor is it true that it was deemed responsible, like other members of Cembureau, because it had been 'indirectly' represented at the meetings of 14 January 1983 and 19 March and 7 November 1987, through associations to which it did not belong. First, it is not true that such members were responsible on that basis; they would also have been found responsible because they had been involved in one or a number of the measures adopted to implement the agreement. Nor can it be said that Unicem's involvement was inferred, without due consideration, with the same criteria as those used for the indirect members of Cembureau. For proof, all that is required is to read paragraphs 4102 to 4106, which I have just analysed a few lines above, and 4243 to 4247. The special and singular examination which the appellant claims in this plea was carried out in the contested judgment.

254. I am not going to repeat that evidence based on indicia is lawful and that it is capable of reversing the presumption of innocence. Suffice it to say that in the present case the Court of First Instance made adequate use of that means to take some facts as proven. On the basis of certain unchallenged facts (contacts with undertakings which attended the Head Delegates' meetings, participation in the setting-up of the European Task Force, involvement with Italcementi and Cementir in the measures adopted to protect the Italian market and in the content of the telex of 13 May 1987), it formed the conviction that Unicem was aware of the existence of a global agreement and that its involvement in specific practices and agreements contributed to the attainment of its objectives.

255. On the contrary, the isolated analysis of each item of evidence weighed up to propose an alternative evaluation, bringing out any inconsistencies between the various documents, has no place here. That approach ignores the procedure whereby courts establish the facts of the case on the basis of the evidence adduced, which entails an assessment of the wealth of documentary evidence in its entirety and of the interrelation between the various individual items of evidence.

256. Nor does the internal contradiction of which the appellant complains exist. It is true that, according to paragraph 4112 of the judgment under appeal, within the framework of the Franco-Italian concerted practices, Unicem's contacts with undertakings which participated in the Cembureau agreement do not show that it was aware of the existence of the agreement. However, there are two matters which distinguish Unicem's situation from Buzzi's [156] and which, consequently, eliminate the apparent contradiction. Unicem did not attend the Head Delegates' meetings, although it was a direct member of Cembureau; Buzzi neither attended the meetings nor was a member, either direct or indirect,

156 — It will be recalled that the appellant undertaking came into being as a result of the merger between Unicem and Buzzi, which acted individually in the administrative procedure and in the proceedings at first instance.

of the group. Furthermore, the documents used by the Commission to show that the Franco-Italian concerted practices and the Cembureau agreement pursued the same objective gave no indication that Buzzi was aware of the agreement, although, as we have seen, there were such indications in Unicem's case.

(3) The reasons (third head)

(a) Arguments of the parties

257. The appellant describes the Commission's reasoning in respect of the participation of the undertakings in the Cembureau agreement as circular, because it concludes that certain means, themselves lawful, of its connection with the agreement are unlawful and because it relies, in turn, on the carrying-out of those practices in order to prove the existence of the global agreement on non-transhipment to home markets. The Court of First Instance, it is alleged, made the same mistake in basing the appellant's accession to the Cembureau agreement on its involvement in various implementing measures (the appellant refers to paragraphs 1442 and 4066 of the judgment), while in other (unspecified) parts of the judgment its involvement depends on that very accession to the Cembureau principle.

258. The Commission contends that this plea is inadmissible as it fails to identify precisely the parts of the judgment which it is challenging, whereas the basis used is consistent.

259. In its reply, Unicem states that the passages of the judgment which it criticises are perfectly described, as may be seen from the fact that the Commission defended itself on the substance. It cites, by way of example, paragraph 1698.

(b) The non-existence of circular reasoning — Further reference to other pleas

260. In the appeal, Unicem does not provide details of the passages of the judgment alleged to contain circular reasoning. Later, in the reply, in response to the Commission's objection of illegality, Unicem challenges all the paragraphs dealing with its involvement in the measures adopted to implement the Cembureau agreement, citing, by way of example, paragraph 1698, concerning the periodic exchanges of price information. In reality, that reference does not make good the initial defect.

261. More significant is another point on which the appellant is silent. In setting out the grounds for this plea, Unicem complains that the Court of First Instance inferred its involvement in the implementing measures from its accession to the Cembureau agreement, but does not refer to any part of the judgment on the matter — and the reason why it does not do so is that none exists. The Court of First Instance did not explain the applicant's involvement in the anti-competitive practice on the basis of its membership of Cembureau. [157]

262. As regards the appellant's reference to paragraph 1698, I have already stated at points 140 and 141 of this Opinion that it is irrelevant, and rejected the allegation of circular reasoning, because the Court of First Instance did not use the appellant's intervention in the exchange of price information as evidence of its participation in the Cembureau agreement, or vice versa.

(4) The duration of the infringement (fourth head)

(a) Arguments of the parties

263. Unicem maintains that there is no proof that it participated in the infringement described in Article 4(1) of the Decision before 17 March 1987, so that the possible duration of that infringement is limited to the period between that date and 31 May 1988.

264. In so far as it refers to the infringement of Article 4(3)(b) of the Decision, the appellant maintains that the date of 3 April 1992 is incorrect. In paragraph 4278 of the contested judgment, the Court of First Instance accepts that the fact that the agreement relating to Calcestruzzi was in force until that date does not mean that the Cembureau agreement prevailed until then. In the absence of specific documentary evidence, the final point of that infringement should also be set at 31 December 1988.

265. The Commission contends that this plea, as well as being inadmissible, since it relates to the assessment of the evidence, is unfounded. As regards the agreement on the setting-up of the European Task Force, it refers to what it stated in the answer to the 11th plea, fifth head, which was declared inadmissible in the order of 5 June 2002.

(b) An inadmissible plea and a further reference to other pleas

266. The Court of Justice rejected as manifestly inadmissible Unicem's claims con-

157 — See paragraphs 2678 to 2683 of the judgment, concerning the appellant's involvement of the European Task Force. On its participation in the pressure brought to bear on Calcestruzzi, reference should be made to paragraphs 3246 to 3253. Last, as regards the agreement with Italcementi and Cementir intended to ensure that Calcestruzzi ceased to import cement from Greece, the explanations of the Court of First Instance are to be found in paragraph 3350 et seq.

cerning the time during which the infringement defined in Article 4(1) of the Decision was in force and, accordingly, the fourth head of the 13th plea should be declared inadmissible for the same reason. I therefore refer to paragraph 167, in conjunction with paragraphs 159 and 160, of the order of 5 June 2002.

267. On the other hand, I have already considered the duration of the infringement described in Article 4(3)(b) of the Decision in points 189 and 190 of this Opinion, where I analysed the lack of substance of Unicem's complaint.

268. The 13th plea in law in the appeal should therefore be rejected as inadmissible in part and unfounded in part.

3 — *The fine (third group of pleas in law)*

269. The appellant devotes the 14th to the 21st pleas in law in the appeal to criticising the Court of First Instance's analysis of the fine imposed by the Commission. Of those pleas, only the 14th, 15th and 18th survived until the oral stage; the other five were rejected in the abovementioned order of 5 June 2002.

A — Arguments of the parties

(1) A single fine in respect of the various infringements (14th plea in law)

270. Unicem claims that the confirmation in the judgment at first instance of the Commission Decision, in which a single penalty is imposed for participation in the single Cembureau agreement, is contrary to Article 15(2) of Regulation No 17 and infringes the principles of proportionality and equal treatment.

271. The Commission does not find at first instance a complaint like the one which Unicem now raises. In that case, the plea is inadmissible as it raises a new issue. In accordance with the case-law, the imposition of a single fine is consistent with that provision, because the various infringements formed part of a strategy which was coherent in its entirety.

272. The appellant states in its reply that at first instance it made clear that it was questioning the imposition of a single fine and argued that the principles of equal treatment and proportionality required that account be taken of the gravity of the infringements and the different roles played by each undertaking. The question of a new plea does not arise.

(2) A single fine irrespective of the number and gravity of the infringements (15th plea in law)

273. Unicem complains that the Court of First Instance reduced the fine imposed on it solely in proportion to the reduction of the time of its participation in the Cembureau agreement. It should also have been appreciated that it was not involved in other infringements sanctioned in the Decision, and account should have been taken of its absence from the meetings at which the agreement was adopted and of its marginal involvement in the implementing measures.

274. The Commission proposes that these complaints should be declared inadmissible on the ground that they relate to the facts and because they are unfounded, since, in its view, the Court of First Instance correctly weighed up the position in respect of Unicem and the Cembureau agreement.

(3) Incorrect calculation of the fine in relation to the incorrect nature of the duration of the infringement (18th plea in law)

275. So far as Unicem is concerned, the penalty should be calculated in proportion to a much shorter infringement period than that indicated in the judgment under appeal, lasting from 17 March 1987 to 31 December 1988.

276. The Commission refers to what it stated in regard to the period during which the infringements were in force.

B — The amount of the fine and the duration of the infringement — A plea which is not autonomous

277. It should be pointed out that the determination of the amount of the fine in proportion to the duration of Unicem's involvement in the Cembureau agreement is ancillary to the pleas in which it discusses the period of its cooperation in the various infringements and, consequently, in the global agreement; it should, accordingly, meet the same fate as they did and be rejected.

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

278. 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.

279. In the Decision, two distinct markets are envisaged, the market in grey cement and the market in white cement. As regards the first of these, Article 1 imputes the adoption of the Cembureau agreement, whereby agreement was reached on non-transhipment to home markets and the regulation of cement transfers from one country to another. Articles 2 to 6 cover bilateral or multilateral conduct designed to implement or facilitate the implementation of that 'single and continuous' agreement or to remove potential obstacles to its effectiveness, such as, for example, the so-called 'Greek threat'. Article 7 refers to anti-competitive conduct on the market in white cement.

280. The Commission imposed separate penalties for infringements relating to each market. [158]

281. As regards the market in grey cement, the only market in which anti-competitive conduct was imputed to Unicem, the Commission decided not to penalise each individual type of conduct but to impose an overall fine on each undertaking, since the Cembureau agreement and all the measures implementing it were connected. [159] That approach is legitimate and is based on the Commission's power to adopt a single decision covering several infringements. [160]

282. 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 used to confirm the participation of each of them. Thus, as regards Unicem, it concluded that it acceded, as a member of Cembureau, to the agreement or principle of not transhipping to home markets at the time when it was agreed and approved and that it also participated in the measures and arrangements agreed to supplement it and/or assist in its application. [161]

283. '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. [162]

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

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

160 — See *Suiker Unie and Others* v *Commission*, cited above, 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.

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

162 — 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).

284. In accordance with its previous approach, the Commission identified two groups of undertakings and associations: first, those which participated in the Cembureau agreement through accession to it and/or application of the measures and arrangements having direct effects on home markets, whose responsibility was classified as greater; and, second, the other undertakings, which were less interventionist and whose responsibility was therefore lesser. [163]

285. 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 Unicem 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. [164]

286. In the second category, the Commission also distinguished between three levels of responsibility: (1) the undertakings which had participated only in the measures implementing the Cembureau agreement that were designed to channel production surpluses to non-member countries; (2) those which, although they had taken part in the measures designed directly to protect home markets, had tried to avoid implementing the Cembureau principle; and (3) Ciments luxembourgeois 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 put any implementing measure into effect. [165]

287. 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. [166]

288. The Court of First Instance upheld Unicem's application in part because, in calculating the fine which it imposed on it, the Commission considered that it had participated in the Cembureau cartel for 122 months, whereas the evidence before the Court showed that the actual duration of its participation was 67 months [167] and,

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

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

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

166 — 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.

167 — See paragraphs 4807 to 4814 of the judgment, specifically the eighth indent of paragraph 4814.

for that reason, the Court reduced the amount of the fine in proportion. [168]

289. It is this approach that in the appellant's submission constitutes an infringement of Article 15(2) of Regulation No 17 and of the principles of equal treatment and proportionality in the imposition of fines.

290. As thus submitted, the plea in law is inadmissible, as it reiterates the arguments set out in the application at first instance which were answered at paragraphs 4965 to 4969 of the contested judgment, which refer to paragraphs 4753 to 4766. Unicem says nothing new in this plea which was not discussed and determined before the Court of First Instance. It takes advantage of the fact that the Court of First Instance applied the same criterion in setting the fines as the Commission had to reproduce a discussion which in reality criticises not the contested judgment but the Decision.

D — Satisfaction of the principles of proportionality and equal treatment

291. These complaints are also unfounded.

292. 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 is at the same time exemplary.

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

294. 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. [169]

168 — See paragraph 4815 and the eighth indent of paragraph 19 of the operative part of the judgment under appeal.

169 — 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 order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54.

295. 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. [170]

296. 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.

297. 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.

298. 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, [171] it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each of them. [172] 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 precludes those in a different situation from being punished with a similar penalty.

299. 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.

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

170 — 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).

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

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

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.

301. 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.

302. Thus, Unicem's suggestion that other undertakings which were also included in the group bearing greater responsibility participated in the cartel to a more intensive degree 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. [173] In competition matters, the degree of culpability determines the penalty but is not a criterion for the setting of the fine. [174]

303. For the same reason, the fact that the Court of First Instance annulled certain provisions of the Decision, on the ground that Unicem's contribution to the practices described therein was not proved, does not necessarily make it appropriate to reduce the fine imposed, since the decisive factor was participation and continuous adherence to the Cembureau principle in the form of involvement in one or more of the measures implementing that principle designed directly to protect home markets. [175]

304. It is therefore irrelevant that the Court of First Instance, and before it the Commission, erred in classifying Unicem in the first subgroup of the first category of undertakings, when, because it did not take part in the conclusion of the Cembureau agreement, it should have been in the third

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

174 — 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 judgment in *Ferriere Nord* v *Commission*, also cited above, paragraph 32).

175 — See paragraphs 4975 and 4976 of the judgment.

group. As the respondent institution observes, for the purpose of imposing penalties, the decisive factor is that an undertaking comes within one or the other category, since the purpose in dividing each category into three groups was purely systematic, since all the undertakings in one category, no matter in which subdivision they were placed, intended to ensure non-transhipment to home markets, with the same intensity. In the case of those placed in the first category, through accession to the Cembureau agreement and application of certain implementing measures, they had direct effects tending to partition those markets. [176]

305. Nor is there a breach of the principle of equal treatment if the yardstick employed is the companies in the group bearing 'less responsibility'. The reasons stated by the Commission, and approved by the Court of First Instance, [177] for distinguishing the two categories of undertakings satisfy an objective and reasonable criterion, as does the effect of the conduct on competition and, in particular, on the partitioning of home markets. Thus, the practices referred to in Articles 2, 3 and 4 of the Decision, in so far as they were aimed at the direct protection of those markets, were deemed most serious, while those described in Articles 5 and 6, which 'had less direct effects', [178] were classified as less serious.

306. Consequently, if the criteria used by the Commission are consistent with the principles governing the imposition of fines, the reduction made by the Court of First Instance, because it followed the same rules, also satisfied them.

307. Regard being had to the foregoing considerations, the 14th and 15th pleas must be rejected as inadmissible and unfounded.

308. As all the pleas declared admissible must be rejected, the appeal must be dismissed in its entirety.

V — Costs

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

176 — See paragraphs 4952 and 4966 of the judgment.

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

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

VI — Conclusion

310. In accordance with the foregoing reflections, I propose that the Court should:

(1) reject in their entirety the pleas put forward in the appeal brought by Buzzi Unicem SpA which were not dismissed in the order of 5 June 2002;

(2) uphold the contested judgment in so far as it refers to that undertaking;

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