JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

15 March 2000 *

In Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95,

T-25/95

Cimenteries CBR SA, a company incorporated under Belgian law, established in Brussels, represented by Michel Waelbroeck, Alexandre Vandencasteele, Denis Waelbroeck and, initially, also by Olivier Speltdoorn, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

T-26/95

Cembureau — Association Européenne du Ciment, an association constituted under Belgian law, established in Brussels, represented by Julian Ellison, Solicitor, and Mark Clough, Barrister, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-30/95

Fédération de l'Industrie Cimentière Belge ASBL, an association constituted under Belgian law, established in Brussels, represented by Onno Willem Brouwer, of the Amsterdam Bar, and Frédéric P. Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

T-31/95

Eerste Nederlandse Cementindustrie NV (ENCI), a company incorporated under Netherlands law, established in 's-Hertogenbosch, Netherlands, represented by Mark B.W. Biesheuvel, of the Hague Bar, and T. Martijn Snoep, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Alex Bonn and Alex Schmitt, 7 Val Sainte-Croix,

T-32/95

Vereniging Nederlandse Cementindustrie (VNC), an association constituted under Netherlands law, established in 's-Hertogenbosch, Netherlands, represented by Piet A. Wackie Eysten, of the

* Languages of the cases: Spanish, Danish, German, Greek, English, French, Italian, Dutch and Portuguese.

Hague Bar, and T. Martijn Snoep, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Alex Bonn and Alex Schmitt, 7 Val Sainte-Croix,

T-34/95

Ciments Luxembourgeois SA, a company incorporated under Luxembourg law, established in Esch-sur-Alzette, Luxembourg, represented by Joachim Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-35/95

Dyckerhoff AG, a company incorporated under German law, established in Wiesbaden, Germany, represented by Claus Tessin and Frank Montag, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-36/95

Syndicat National de l'Industrie Cimentière (SFIC), an association constituted under French law, established in Paris, represented by Edouard Didier and Jean-Claude Rivalland, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Katia Manhaeve, 56-58 Rue Charles Martel,

T-37/95

Vicat SA, a company incorporated under French law, established in Paris, represented by Edouard Didier and Jean-Claude Rivalland, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Katia Manhaeve, 56-58 Rue Charles Martel,

T-38/95

Groupe Origny SA, a company incorporated under French law, established in Paris, successor to Cedest SA, represented by Xavier de Roux and Marie-Pia Hutin, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

T-39/95

Ciments Français SA, a company incorporated under French law, established in Paris, represented by Antoine Winckler, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

T-42/95

Heidelberger Zement AG, a company incorporated under German law, established in Heidelberg, Germany, represented by Rainer Bechtold, Rechtsanwalt, Stuttgart, and Hans-

Jörg Niemeyer, Rechtsanwalt, Stuttgart and Brussels, with an address for service in Luxembourg at the Chambers of Loesch & Wolter, 11 Rue Goethe,

T-43/95

Lafarge Coppée SA, a company incorporated under French law, established in Paris, represented by Henry Lesguillons, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

T-44/95

Aalborg Portland A/S, a company incorporated under Danish law, established in Aalborg, Denmark, represented by Karen Dyekjær-Hansen and Katja Hoegh, Copenhagen, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-45/95

Alsen AG, formerly Alsen-Breitenburg Zement- und Kalkwerke GmbH, a company incorporated under German law, established in Hamburg, Germany, represented by Karlheinz Moosecker and Martin Klusmann, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

T-46/95

Alsen AG, formerly Nordcement AG, a company incorporated under German law, established in Hamburg, Germany, represented by Karlheinz Moosecker and Martin Klusmann, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

T-48/95

Bundesverband der Deutschen Zementindustrie eV, a registered association constituted under German law, established in Cologne, Germany, represented by Jochen Burrichter, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-50/95

Unicem SpA, a company incorporated under Italian law, established in Turin, Italy, represented by Franzo Grande Stevens and Andrea Gandini, of the Turin Bar, GianDomenico Magrone and Cristoforo Osti, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

T-51/95

Fratelli Buzzi SpA, a company incorporated under Italian law, established in Casale Monferrato, Italy, represented by Guido Brosio, Carlo Pavesio and Nicola Ceraolo, of the Turin Bar, Claudia Crescenzi and Silvia D'Alberti, of the Rome Bar, with an address for service in Luxembourg at the Chambers of René Faltz, 6 Rue Heinrich Heine,

T-52/95

Compañia Valenciana de Cementos Portland SA, a company incorporated under Spanish law, established in Madrid, represented by Santiago Martínez Lage and Jaime Pérez-Bustamante

Köster, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-53/95

The Rugby Group plc, a company incorporated under English law, established in Rugby, United Kingdom, represented by Lynda Martin Alegi, Solicitor, London, and Jacques Bourgeois, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

T-54/95

British Cement Association, an association constituted under English law, established in Berkshire, United Kingdom, represented initially by Kenneth Parker QC, Robert Tudway and Dorcas Rogers, Solicitors, London, subsequently solely by Kenneth Parker QC and Robert Tudway, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

T-55/95

Asland SA, a company incorporated under Spanish law, established in Barcelona, Spain, represented initially by Antonio Creus Carreras and Xavier Ruiz Calzado, of the Barcelona Bar, and Antonio Hierro Hernández Mora, of the Madrid Bar, and, subsequently, Creus Carreras, Hierro Hernández-Mora and Marta Ventura Arasanz, of the Barcelona Bar, Cuatrecasas Chambers, 78 Avenue d'Auderghem, Brussels,

T-56/95

Castle Cement Ltd, a company incorporated under English law, established in Birmingham, United Kingdom, represented by Nicholas Forwood QC, John Cook, Geert Goeteyn and Trevor Soames, Solicitors, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

T-57/95

Heracles General Cement Company SA, a company incorporated under Greek law, established in Athens, represented by Kostas Loukopoulos, Sotirios Felios and Irini Gortsila, of the Athens Bar, and Sebastian Farr and Ciaran Walker, Solicitors, with an address for service in Luxembourg at the Chambers of Jos Stoffel, 8 Rue Willy Goergen,

T-58/95

Corporación Uniland SA, a company incorporated under Spanish law, established in Barcelona, Spain, represented by Luis de Carlos Bertrán and Edurne Navarro Varona, of the Barcelona Bar, with an address for service in Luxembourg at the Chambers of Alex Bonn and Alex Schmitt, 7 Val Sainte-Croix,

T-59/95

Agrupación de Fabricantes de Cemento de España (Oficemen), an association constituted under Spanish law, established in Madrid, represented initially by Jaime Folguera Crespo and Ramón

Vidal Puig, of the Madrid Bar, subsequently solely by Folguera Crespo, with an address for service in Luxembourg at the Chambers of Alex Bonn and Alex Schmitt, 7 Val Sainte-Croix,

T-60/95

Irish Cement Ltd, a company incorporated under Irish law, established in Dublin, represented initially by John D. Cooke, SC, and, subsequently, by Paul Sreenan, SC, instructed by Gerrard, Scallan and O'Brien, Solicitors, Dublin, with an address for service in Luxembourg at the Chambers of Faltz & Associés, 6 Rue Heinrich Heine,

T-61/95

Cimpor — Cimentos de Portugal SA, a company incorporated under Portuguese law, established in Lisbon, represented by Carlos Botelho Moniz, Teresa Mendes, Amadeu Brandão Colaço and Adelino Duarte, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-62/95

SECIL — Companhia Geral de Cal e Cimento SA, a company incorporated under Portuguese law, established in Outão, Setúbal, Portugal, represented by Nuno Mimoso Ruiz, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-63/95

Associação Técnica da Indústria de Cimento (ATIC), an association constituted under Portuguese law, established in Lisbon, represented by Mário João Marques Mendes, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

T-64/95

Titan Cement Company SA, a company incorporated under Greek law, established in Athens, represented by Ian S. Forrester QC, of the Scots Bar, and Aristotelis N. Kaplanidis, of the Thessaloniki Bar, with an address for service in Luxembourg at the Chambers of Tom Loesch, 11 Rue Goethe,

T-65/95

Italcementi — Fabbriche Riunite Cemento SpA, a company incorporated under Italian law, established in Bergamo, Italy, represented by André Faures, of the Brussels Bar, Cesare Lanciani, of the Milan Bar, Alberto Predieri, of the Florence Bar, Mario Siragusa, of the Rome Bar, Francesca Maria Moretti, of the Bologna Bar, and Giulio Cesare Rizza, of the Syracuse Bar,

with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

T-68/95

Holderbank Financière Glarus AG, a company incorporated under Swiss law, established in Jona, Switzerland, represented by Cornelis Canenbley and Michael Esser-Wellié, Rechtsanwälte, Düsseldorf, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

T-69/95

Hornos Ibéricos Alba SA (Hisalba), a company incorporated under Spanish law, established in Madrid, represented by Michael Schütte, Rechtsanwalt, Berlin, Luis Suaréz de Lezo Mantilla, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Alex Bonn, 7 Val Sainte-Croix,

T-70/95

Aker RGI ASA, a company incorporated under Norwegian law, established in Oslo, represented by Nicholas Forwood QC, John Cook, Geert Goeteyn and Trevor Soames, Solicitors, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8–10 Rue Mathias Hardt,

T-71/95

Scancem (publ) AB, formerly EUROC AB, a company incorporated under Swedish law, established in Malmö, Sweden, represented by Nicholas Forwood QC, John Cook, Geert Goeteyn and Trevor Soames, Solicitors, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

T-87/95

Cementir — Cementerie del Tirreno SpA, a company incorporated under Italian law, established in Rome, represented by Gian Michele Roberti and Antonio Tizzano, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert 1er,

T-88/95

Blue Circle Industries plc, a company incorporated under English law, established in London, represented initially by Jeremy Lever QC, Nicholas Green and Jessica Simor, Barristers, Laura Carstensen and Sarah Vaughan, Solicitors, and, subsequently, by Nicholas Green, Jessica Simor,

Laura Carstensen and Marc Israel, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 2 Place Winston Churchill,

T-103/95

Enosi Tsimentoviomichanion Ellados, an association constituted under Greek law, established in Athens, represented by Ioannis Georgakakis and Maria Golfinopoulou, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Tom Loesch, 11 Rue Goethe,

and

T-104/95

Tsimenta Chalkidos AE, a company incorporated under Greek law, established in Athens, represented by Panagiotis Marinou Bernitsas, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Philippe Dupont, 8–10 Rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented by Richard Lyal (in all the cases), Julian Currall (in Case T-26/95), Wouter Wils (in Cases T-31/95 and T-32/95), Norbert Lorenz (initially in Cases T-34/95, T-35/95, T-42/95, T-45/95, T-46/95, T-48/95 and T-68/95), Hans Peter Hartvig (in Case T-44/95), Klaus Wiedner (replacing Norbert Lorenz in Cases T-34/95, T-35/95, T-42/95, T-45/95, T-46/95, T-48/95 and T-68/95), Francisco Enrique González-Díaz (initially in Cases T-52/95, T-55/95, T-58/95, T-59/95 and T-69/95), Francisco de Sousa Fialho (in Cases T-61/95, T-62/95 and T-63/95), Theofanis Christoforou (in Cases T-103/95 and T-104/95), of its Legal Service, and Rosemary Caudwell (in Cases T-53/95 and T-60/95), a national civil servant on secondment to the Commission, acting as Agents, assisted by Marc van der Woude and Jean-Jo Evrard, of the Brussels Bar (in Cases T-25/95 and T-30/95), Bertrand Wägenbaur, Rechtsanwalt, Cologne and Brussels (in Case T-34/95), Alexander Böhlke, Rechtsanwalt, Frankfurt am Main and Brussels (in Cases T-35/95 and T-42/95), Nicole Coutrelis, of the Paris Bar (in Cases T-36/95, T-37/95, T-38/95, T-39/95 and T-43/95), Alberto Dal Ferro, of the Vicenza Bar (in Cases T-50/95, T-51/95, T-65/95 and T-87/95), Renzo Maria Morresi, of the Bologna Bar (in Cases T-50/95, T-51/95, T-65/95 and T-87/95), José Rivas Andrés, of the Madrid Bar (in Cases T-52/95, T-55/95, T-58/95, T-59/95 and T-69/95), David Lloyd Jones, Barrister (in Cases T-54/95 and T-88/95), Scott Crosby, Solicitor (in Cases T-56/95, T-70/95 and T-71/95), and Leonard Hawkes, Solicitor (in Cases T-57/95 and T-64/95), Victor Refega Fernandes, of the Lisbon Bar (in Cases T-61/95, T-62/95 and T-63/95), Rainer M. Bierwagen, of the Brussels Bar (in Case T-68/95), Mark Brealey, Barrister (in Case T-88/95), and Alkiviadis Oikonomou, of the Athens Bar (in Cases T-103/95 and T-104/95), with an

address for service in Luxembourg at the Office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment in whole or in part of Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J. Azizi and M. Jaeger, Judges,

Registrar: I. Maselis, Legal Secretary,

having regard to the written procedure and further to the hearings which took place on 16 September 1998 (in Cases T-26/95, T-36/95, T-37/95 and T-38/95), 18 September 1998 (in Cases T-39/95, T-43/95, T-70/95 and T-71/95), 23 September 1998 (in Cases T-53/95, T-54/95, T-56/95 and T-88/95), 25 September 1998 (in Cases T-57/95, T-64/95, T-103/95 and T-104/95), 30 September 1998 (in Cases T-50/95, T-51/95, T-65/95 and T-87/95), 2 October 1998 (T-61/95, T-62/95 and T-63/95), 7 October 1998 (in Cases T-55/95, T-58/95 and T-59/95), 9 October 1998 (in Cases T-31/95, T-32/95, T-52/95 and T-69/95), 14 October 1998 (in Cases T-25/95, T-30/95, T-44/95 and T-60/95), 16 October 1998 (in Cases T-35/95, T-45/95, T-46/95 and T-48/95) and 21 October 1998 (in Cases T-34/95, T-42/95 and T-68/95),

gives the following

Judgment

The facts

1 The present cases concern Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1, hereinafter 'the contested decision') which imposed fines on 42 undertakings and associations of undertakings operating in the grey and white cement sector, for infringing Article 85(1) of the EC Treaty (now Article 81(1) EC).

2 From April 1989 to July 1990, the Commission carried out investigations into European cement producers and trade associations in the sector pursuant to Article 14(2) and (3) of Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17'). It also sent them requests for information pursuant to Article 11 thereof. Finally, it sent to Cembureau — European Cement Association ('Cembureau') a statement of objections relating to a proceeding under Article 15(1) of Regulation No 17.

3 On 12 November 1991 the Commission initiated the administrative procedure and adopted its objections by virtue of Article 3(1) of Regulation No 17. On 25 November 1991 it sent the Statement of Objections ('SO') provided for by Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47) to the 76 undertakings and associations of undertakings concerned. The SO draws a basic distinction between two types of objectionable practices, namely practices at international level (Part I, Chapters 1 and 2; Part II, Section A, Chapters 10, 11 and 12, and Sections B and C) and practices at national level (Part I, Chapters 3 to 9; Part II, Section A, Chapters 13 to 19).

4 The full text of the SO, which is contained in a single document, was not sent to each of the undertakings and associations of undertakings involved in the proceeding. The chapters relating to practices engaged in at international level were sent to 61 undertakings and associations of

undertakings, while 15 Italian undertakings did not receive that part since they had not participated in any international body. The chapters relating to practices at national level were sent only to the undertakings and associations of undertakings established in the Member State in question.

5 The full index of the SO, and a list of all the documents itemised under file numbers IV/33.126, IV/33.322 and IV/27.997 specifying which documents were accessible to each addressee (hereinafter 'the List'), were sent to each addressee of the SO. Each addressee was able to gain access, at the Commission's premises, to the documents in the three abovementioned files on the basis of the List and the references to accessibility in that list. The Commission also sent to them a set of copies of documents from those files. On 9 July 1992, the record of the meeting of the European Task Force held on 19 August 1986 (referred to in recital 25, paragraph 14, of the contested decision) was sent by the Commission to all the undertakings and associations of undertakings to which the international section of the SO was addressed and they were asked to make known any comments they might have on that document, which had come to the Commission's knowledge through the replies to the SO submitted by Aker RGI ASA (formerly known as Aker A/S, also referred to as 'Aker' in the contested decision, hereinafter referred to as 'Aker') and Scancem (publ) AB (formerly known as EUROC AB, also referred to as 'EUROC' in the contested decision, hereinafter referred to as 'EUROC').

6 After having had access to the Commission's files, a number of those undertakings asked the Commission for a copy of the chapters that were omitted from the SO sent to them and for access to the whole of the file, except for internal or confidential documents. The Commission refused to accede to that request.

7 On 12 February 1992, Cimenteries CBR SA (also referred to as 'CBR' in the contested decision, hereinafter 'CBR'), Blue Circle Industries plc (hereinafter 'Blue Circle'), Syndicat National de l'Industrie Cimentière (SFIC) (formerly Syndicat National des Fabricants de Ciments et de Chaux, also referred to as 'Syndicat Français de l'Industrie Cimentière' or 'SFIC' in the contested decision, hereinafter 'SFIC'), Eerste Nederlandse Cementindustrie NV (ENCI) (also referred to as 'ENCI' in the contested decision, hereinafter 'ENCI'), Vereniging Nederlandse Cementindustrie (VNC) (also referred to as 'VNC' in the contested decision, hereinafter 'VNC') and the Fédération de l'Industrie Cimentière Belge ASBL (also referred to as 'Fédération de l'Industrie Cimentière' or 'FIC' in the contested decision, hereinafter 'FIC'), brought actions before the Court of First Instance seeking annulment of the Commission's refusal to send the documents requested (Cases T-10/92, T-11/92, T-12/92, T-14/92 and T-15/92) and, in proceedings for interim measures, sought the suspension of the procedure initiated against them by the Commission (T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R and T-15/92 R).

8 By order of 23 March 1992 in Joined Cases T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R and T-15/92 R *Cimenteries CBR and Others* v *Commission* [1992] ECR II-1571, the President of the Court of First Instance dismissed the applications for interim measures and extended until 27 and 31 March 1992 respectively the deadlines for the applicants in those proceedings to reply to the SO.

9 By 31 March 1992 all the applicants in the present proceedings had submitted observations on the SO sent to them by the Commission.

10 By order of 11 September 1992, Case T-14/92 *ENCI and Vereniging Nederlandse Cementindustrie* v *Commission* (not published in the European Court Reports) was removed from the register of the Court of First Instance following the withdrawal of the applicants. Pending judgment in the other actions still before the Court, the Commission suspended the oral hearing to be held after receipt of the replies to the SO.

11 By judgment of 18 December 1992 in Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, the Court of First Instance dismissed those actions as inadmissible.

12 By letter dated 5 February 1993, the Hearing Officer invited the undertakings and associations of undertakings to which the SO had been sent to attend the hearings to be held from 1 March to 1 April 1993. Those hearings were divided into three series of sessions: one on the cement market, which all the undertakings and associations of undertakings were able to attend; one on the international part of the SO, which only those undertakings and associations of undertakings which received that part of the SO were able to attend; and one on each of the national chapters, which the undertakings and associations of undertakings of the relevant Member State were able to attend separately. In the notice of summons the Commission stipulated that if an undertaking wished to put forward its arguments privately it should indicate precisely the relevant parts of the SO and the relevant business secrets within the meaning of Articles 19 to 21 of Regulation No 17.

13 In February 1993, a number of undertakings and associations of undertakings, including Blue Circle and Groupe Origny SA (successor to Cedest SA since 1 January 1994, also referred to as 'Cedest' in the contested decision, referred to hereinafter as 'Cedest') informed the Commission that they did not wish to avail themselves of the opportunity of putting forward their arguments orally on the objections raised against them.

14 On 23 September 1993, following examination of the written replies to the SO and the explanations put forward orally at the hearings in March 1993, the Commission decided to drop the objections relating to the international part of the SO (Part I, Chapters 1 and 2; Part II, Section A, Chapters 10, 11 and 12, and Sections B and C) as against 12 German undertakings and 6 Spanish undertakings and, consequently, to terminate the proceeding initiated on 12 November 1991 against them. It also decided to drop, as against the other addressees of the SO, the objections relating to the national agreements and concerted practices (SO, Part I, Chapters 3 to 9; Part II, Section A, Chapters 13 to 19), and, consequently, to terminate the proceeding initiated on 12 November 1991 in respect of those objections.

15 On 27 September 1993, it informed all the undertakings and associations of undertakings involved of its decision to drop the objections relating to the national agreements and concerted practices. Accordingly, it informed them that the '... indications contained under letter (c) in Part II (Applicability of Article 15(2) of Regulation No 17/62) in point 93(b) of the statement of objections regarding "the fact that it is impossible to separate the national agreements, decisions and concerted practices from the European ones, since both form an inseparable whole" are now purposeless and will not be taken into consideration during the procedure which will follow its usual course for all remaining chapters of the statement of objections addressed to you'.

16 On 5 October 1994, the Commission consulted the Advisory Committee on Restrictive Practices and Dominant Positions. It consulted it again on 23 November 1994.

17 On 30 November 1994, it adopted the contested decision in which it drew a distinction between two markets, the grey cement market and the white cement market. The 42 undertakings and associations of undertakings to which that decision was addressed are all referred to in the decision's passages dealing with the grey cement market (recitals 6, 8 to 37, 42 to 60, 64 and 65, and Articles 1 to 6, 8 and 9). Only six undertakings to which the contested decision was addressed are also referred to in its passages on the white cement market (recitals 7, 38 to 41, 42, 43, 61 to 63 and 65, and Articles 7, 8 and 10).

18 So far as concerns the grey cement market, the contested decision finds that there existed a general agreement which was designed to ensure non-transhipment to home markets and the regulation of transfers of cement from one country to another. That agreement was allegedly concluded in Paris on 14 January 1983, during a meeting of the representatives of European cement producers which are members of Cembureau. The contested decision finds, in Article 1, that the agreement ('the Cembureau agreement') existed and that all the undertakings and associations of undertakings to which the contested decision was addressed participated in it, contrary to the prohibition laid down in Article 85(1) of the Treaty. The Commission is of the view that the Cembureau agreement is a single and continuous agreement (contested decision, recital 46), in that it was implemented in the framework of bilateral or multilateral agreements and concerted practices. The existence of those agreements and concerted practices as well as the participation in them by various undertakings and associations of undertakings is found in Articles 2 to 6 of the contested decision.

19 The contested decision thus finds that there were agreements and concerted practices between Cembureau and its members concerning the exchange of information designed to facilitate the implementation of the Cembureau agreement (recitals 16, 17 and 47 and Article 2(1) and (2)). It also finds that there were specific cross-border agreements, relating to Franco-Italian relations (recitals 20 and 48 and Article 3(1)(a), (b) and (c)), Hispano-Portuguese relations (recitals 21 and 49, and Article 3(2)) and to Franco-German relations (recitals 22 and 50, and Article 3(3)(a) and (b)). It sets out the collusion which allegedly took place between several European producers as a reaction to imports of Greek cement and clinker into the Member States of the Community in the mid-1980s, which gave rise to the setting up of a group known as the European Task Force ('ETF'); the setting up of a 'Joint Trading Company' (also referred

to hereinafter as 'Interciment'); the adoption of measures to defend the Italian market; and the adoption of measures for the purchase of quantities of cement or clinker likely to destabilise the market ('persuasive measures' or 'carrot actions') (recitals 24 to 29 and 53 to 57, and Article 4(1), (2), (3)(a) and (b), and (4)(a) to (h)). Finally, it alleges that a number of undertakings and associations of undertakings participated in concerted practices contrary to Article 85(1) of the Treaty in the framework of two committees set up by the trade in order to discuss export problems: the European Cement Export Committee ('ECEC') and the European Export Policy Committee ('EPC') (recitals 30 to 37 and 58 to 60, and Articles 5 and 6).

20 Article 9 of the contested decision imposes a fine on each of the 42 undertakings and associations of undertakings to which it was sent, on the ground that they had participated in the infringement referred to in Article 1, that infringement having been implemented by the conduct referred to in Articles 2 to 6. The amounts of the fines thus imposed range from ECU 40 000 to ECU 32 492 000, totalling ECU 242 420 000.

21 So far as concerns the white cement market, the contested decision finds that six undertakings participated in the commission of various infringements in the framework of the White Cement Committee, a committee made up of the European white cement producers who export their products ('WCC') (recitals 38 to 41 and 61 to 63, and Article 7). Article 10 imposes fines on the six undertakings ranging from ECU 554 000 to ECU 1 088 000, totalling ECU 5 546 000.

22 The contested decision contains the following provisions:

'Article 1

Cembureau — The European Cement Association, the Fédération de l'Industrie Cimentière ASBL, SA Cimenteries CBR, Aalborg Portland A/S, the Syndicat Français de l'Industrie Cimentière, Lafarge Coppée SA, Société des Ciments Français SA, Vicat SA, Cedest SA, the Bundesverband der Deutschen Zementindustrie, Heidelberger Zement AG, Dyckerhoff AG, Alsen-Breitenburg Zement- und Kalkwerke GmbH, Nordcement AG, the Association of the Greek Cement Industry, Titan Cement Company SA, Heracles General Cement Company, Halkis Cement Company SA, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA, Cementir — Cementerie del Tirreno SpA, SA des Ciments Luxembourgeois, the Vereniging Nederlandse Cementindustrie, Eerste Nederlandse Cement Industrie NV, the British Cement Association, Blue Circle Industries plc, Rugby Group plc and Castle Cement Ltd, from 14 January 1983, Fratelli Buzzi SpA from 11 May 1983, ATIC — Associação Tecnica da Industria do Cimento, Cimpor — Cimentos de Portugal SA, SECIL — Companhia Geral de Cal e Cimento SA, Agrupación de Fabricantes de Cementos de España — Oficemen, Asland SA, Corporación Uniland SA, Hispacement SA, Hornos Ibéricos Alba SA and Compañia Valenciana de Cementos Portland SA, from 1 January 1986, Holderbank Financière Glar[u]s

SA, from 28 May 1986, and Aker A/S and EUROC AB, from 9 June 1986, infringed the provisions of Article 85(1) of the EC Treaty by participating in an agreement designed to ensure non-transhipment to home markets and to regulate cement transfers from one country to another.

Article 2

1. Cembureau — The European Cement Association, the Fédération de l'Industrie Cimentière ASBL, Aalborg Portland A/S, the Syndicat Français de l'Industrie Cimentière, the Bundesverband der Deutschen Zementindustrie, the Association of the Greek Cement Industry, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA, Cementir — Cementerie del Tirreno SpA, SA des Ciments Luxembourgeois, the Vereniging Nederlandse Cement-Industrie and the British Cement Association, from 14 January 1983 to 14 April 1986, and ATIC — Associação Tecnica da Industria do Cimento and Agrupación de Fabricantes de Cementos de España — Oficemen, from 1 January 1986 to 14 April 1986, infringed the provisions of Article 85(1) of the EC Treaty by participating in agreements on the exchange of price information, designed to facilitate the implementation of the agreement referred to in Article 1, at the Cembureau Head Delegates and Executive Committee meetings.

2. Cembureau — The European Cement Association, the Fédération de l'Industrie Cimentière ASBL, Aalborg Portland A/S, the Syndicat Français de l'Industrie Cimentière, the Bundesverband der Deutschen Zementindustrie, the Association of the Greek Cement Industry, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA, Cementir — Cementerie del Tirreno SpA, SA des Ciments Luxembourgeois, the Vereniging Nederlandse Cement-Industrie and the British Cement Association, from 1 January 1984 to 31 December 1988, and ATIC — Associação Tecnica da Industria do Cimento and Agrupación de Fabricantes de Cementos de España — Oficemen, from 1 January 1986 to 31 December 1988, infringed the provisions of Article 85(1) of the EC Treaty by participating in concerted practices designed to facilitate the implementation of the agreement referred to in Article 1 and relating to:

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

(b) the circulation of information on the Danish and Irish producers' individual price lists, on the trade price lists in force in Greece, Italy and Portugal, and on the average prices charged in Germany, France, Spain and the United Kingdom.

Article 3

1. (a) Lafarge Coppée SA and Fratelli Buzzi SpA infringed, from 26 November 1988 to 31 December 1988, the provisions of Article 85(1) of the EC Treaty by participating in a concerted practice involving the sharing of the market in southern France and the restriction of their autonomy of conduct with regard to production sources.

(b) Société de Ciments Français SA and Fratelli Buzzi SpA infringed, from 17 March 1988 to 31 December 1988, the provisions of Article 85(1) of the EC Treaty by participating in a concerted practice involving information on current prices and a forecast of price increases, with a view to the restriction of their autonomy of conduct.

(c) Vicat SA and Fratelli Buzzi SpA infringed, from 11 May 1983 to 31 December 1988, the provisions of Article 85(1) of the EC Treaty by participating in a concerted practice involving the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France.

2. Agrupación de Fabricantes de Cementos de España — Oficemen, Cimpor — Cimentos de Portugal SA, SECIL — Companhia Geral de Cal e Cimento SA infringed the provisions of Article 85(1) of the EC Treaty from 1 January 1986 to 24 April 1989 by participating in an agreement on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets.

3. (a) The Syndicat Français de l'Industrie Cimentière, Lafarge Coppée SA, Société de Ciments Français SA, Cedest SA, the Bundesverband der Deutschen Zementindustrie, Dyckerhoff AG and Heidelberger Zement AG infringed the provisions of Article 85(1) of the EC Treaty from 23 June 1982 to at least 30 September 1989 by participating in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France.

(b) The Syndicat Français de l'Industrie Cimentière and the Bundesverband der Deutschen Zementindustrie infringed the provisions of Article 85(1) of the EC Treaty from 1 January 1985 to 30 September 1989 by participating in a concerted practice involving the exchange of information designed to monitor compliance with the quantitative restrictions on exports between France and Germany and to monitor the destination of such exports in terms of the various German Länder.

Article 4

1. Cembureau — The European Cement Association, the Holderbank Financière Glar[u]s SA group, Blue Circle Industries plc, Agrupación de Fabricantes de Cementos de España — Oficemen, Asland SA, Corporación Uniland SA, Hispacement SA, the Syndicat Français de l'Industrie Cimentière, Lafarge Coppée SA, Société de Ciments Français SA, the Bundesverband der Deutschen Zementindustrie, Dyckerhoff AG, Heidelberger Zement AG, SA Cimenteries CBR, Aker A/S and EUROC AB, Aalborg Portland A/S, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA and Cementir — Cementerie del Tirreno SpA infringed the provisions of Article 85(1) of the EC Treaty as from 28 May 1986 by participating in the agreement on the setting-up of the Cembureau Task Force or European Task Force.

2. The Holderbank Financière Glar[u]s SA group, Blue Circle Industries plc, Agrupación de Fabricantes de Cementos de España — Oficemen, Asland SA, Corporación Uniland SA, Hispacement SA, the Syndicat Français de l'Industrie Cimentière, Lafarge Coppée SA, Société de Ciments Français SA, the Bundesverband der Deutschen Zementindustrie, Dyckerhoff AG, Heidelberger Zement AG, Aker A/S and EUROC AB, SA Cimenteries CBR, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA and Cementir — Cementerie del Tirreno SpA infringed the provisions of Article 85(1) of the EC Treaty from 9 June 1986 to 26 March 1993 by participating 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.

3. (a) Cembureau — The European Cement Association, the Holderbank Financière Glar[u]s SA group, Blue Circle Industries plc, Agrupación de Fabricantes de Cementos de España — Oficemen, Asland SA, Corporación Uniland SA, Hispacement SA, the Syndicat Français de l'Industrie Cimentière, Lafarge Coppée SA, Société de Ciments Français SA, the Bundesverband der Deutschen Zementindustrie, Dyckerhoff AG, Heidelberger Zement AG, SA Cimenteries CBR, Aker A/S and EUROC AB, Aalborg Portland A/S, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA and Cementir — Cementerie del Tirreno SpA infringed the provisions of Article 85(1) of the EC Treaty from 17 June 1986 to 15 March 1987 by participating in concerted practices designed to withdraw Calcestruzzi SpA as a customer from the Greek producers, and from Titan in particular.

(b) Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA and Cementir — Cementerie del Tirreno SpA infringed the provisions of Article 85(1) of the EC Treaty from 3 April 1987 to 3 April 1992 by participating 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 SpA.

4. The following undertakings infringed the provisions of Article 85(1) of the EC Treaty by participating in agreements and concerted practices designed to deflect the Greek production surplus and to curb Greek cement imports into the Member States, and in particular:

(a) Blue Circle Industries plc, Castle Cement Ltd and Rugby Group plc, from 16 June 1986 to 5 September 1986, by participating in a concerted practice designed to prevent and/or reduce Greek cement imports into the United Kingdom;

(b) Blue Circle Industries plc and Titan Cement Company SA, from 4 July 1986 to 31 December 1989, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan Cement Company SA to the United States and Nigeria and to prevent direct sales of such products by Titan Cement Company SA on the European markets;

(c) the Holderbank Financière Glar[u]s SA group and Titan Cement Company SA, from 19 June 1986 to 31 December 1990, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan Cement Company SA to the United States and Africa and to prevent direct sales of such products by Titan Cement Company SA on the European markets;

(d) the Holderbank Financière Glar[u]s SA group and Heracles General Cement Company, from 9 May 1986 to 31 December 1990, by participating in an agreement designed to prevent direct sales of cement by Heracles General Cement Company on the European markets and to deflect quantities of cement and clinker produced by Heracles General Cement Company to other markets;

(e) Lafarge Coppée SA and Titan Cement Company SA, from 22 July 1986 to 31 December 1991, by participating in an agreement designed to deflect quantities of clinker produced by Titan Cement Company SA to Canada and to prevent direct sales by Titan Cement Company SA on the European markets;

(f) Lafarge Coppée SA and Heracles General Cement Company, from 1 June 1988 to 15 June 1991, by participating in an agreement designed to deflect quantities of cement and clinker produced by Heracles General Cement Company outside Europe and to prevent direct sales of such products by Heracles General Cement Company on the European markets;

(g) SA Cimenteries CBR, Heracles General Cement Company and Titan Cement Company SA, from 4 May 1988 to 31 December 1990, by participating in a concerted practice

relating to supplies, through UMAR — Union Maritima Internacional SA, of clinker intended for the companies SA Cimenteries CBR and Eerste Nederlandse Cement Industrie NV in Belgium and the Netherlands and designed to prevent direct sales by the two Greek producers on the European markets;

(h) Aker A/S and EUROC AB and Titan Cement Company SA, from 28 January 1987 to 31 December 1990, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan Cement Company SA to Africa, the United States and the Bahamas and to prevent direct sales of such products by Titan Cement Company SA on the European markets.

Article 5

The Fédération de l'Industrie Cimentière, Aalborg Portland A/S, the Syndicat Français de l'Industrie Cimentière, Dyckerhoff AG, Alsen-Breitenburg Zement- und Kalkwerke GmbH, Nordcement AG, the Association of the Greek Cement Industry, Irish Cement Ltd, Italcementi — Fabbriche Riunite Cemento SpA, Unicem SpA, Cementir — Cementerie del Tirreno SpA and Eerste Nederlandse Cement Industrie NV, from 14 March 1984 to 22 September 1989, and Castle Cement Ltd, ATIC — Associação Técnica da Industria do Cimento and Agrupación de Fabricantes de Cementos de España — Oficemen, from 1 January 1986 to 22 September 1989, infringed the provisions of Article 85(1) of the Treaty by participating, within the framework of the ECEC, in concerted practices relating to the exchange of information, the supply and demand situation in the importing third countries, the export prices chargeable, the import situation in the member countries and the supply and demand situation on the home markets and designed to prevent incursions by competitors on respective national markets in the Community.

Article 6

Lafarge Coppée SA, Titan Cement Company SA, Heracles General Cement Company and Halkis Cement Company SA, from 1 July 1981 to 19 May 1989, Société de Ciments Français SA, from 1 July 1981 to 17 February 1989, Blue Circle Industries plc, from 1 July 1981 to 12 October 1987, and Hispacement SA, Hornos Ibéricos Alba SA, Compañia Valenciana de Cementos Portland SA and its subsidiary Cementos del Mar SA, from 1 January 1986 to 19 May 1989, infringed the provisions of Article 85(1) of the EC Treaty by participating, within the framework of the EPC, in a continuous concerted practice involving the examination of the situation on Community markets, the sharing of third-country markets, the setting of prices for products intended for overseas export, the exchange of individualised data on export availabilities and on actual exports to third countries and designed to prevent incursions by competitors on respective national markets in the Community.

Article 7

Italcementi — Fabbriche Riunite Cemento SpA, Dyckerhoff AG, Lafarge Coppée SA, Société de Ciment Français SA and SA Cimenteries CBR, from 6 May 1982 to 26 May 1988, and Compañia Valenciana de Cementos Portland SA, from 1 January 1986 to 26 May 1988, infringed the provisions of Article 85(1) of the EC Treaty by participating, within the framework of the WCC, in the concerted practice and agreement relating to non-transhipment to home markets, in the continuous concerted practice relating to the channelling of production surpluses for export to third countries, and in a continuous concerted practice relating to exchanges of information on the production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual undertakings.

Article 8

The undertakings specified in Articles 1 to 7 shall forthwith bring the infringements referred to in those Articles to an end (if they have not already done so) and shall henceforth refrain, in relation to the markets for grey cement and white cement, from any agreement or concerted practice which may have the same or similar object, including any exchange of confidential commercial information designed to monitor the performance of any express or tacit agreement or any concerted practice involving the sharing of markets in the Community.

Article 9

The following fines are hereby imposed on the associations and undertakings concerned, in respect of the infringement found in Article 1, which was put into effect, in particular, by the conduct set out in Articles 2 to 6:

1.	Cembureau — The European Cement Association: a fine of	ECU 100 000
2.	Holderbank Financière Glar[u]s SA: a fine of	ECU 5 331 000
3.	Aker A/S: a fine of	ECU 40 000
4.	EUROC AB: a fine of	ECU 40 000
5.	Bundesverband der Deutschen Zementindustrie: a fine of	ECU 100 000
6.	Alsen-Breitenburg Zement- und Kalkwerke GmbH: a fine of	ECU 3 841 000

7.	Dyckerhoff AG: a fine of	ECU 12 296 000
8.	Heidelberger Zement AG: a fine of	ECU 15 652 000
9.	Nordcement AG: a fine of	ECU 1 850 000
10.	Fédération de l'Industrie Cimentière: a fine of	ECU 100 000
11.	SA Cimenteries CBR: a fine of	ECU 7 196 000
12.	Aalborg Portland A/S: a fine of	ECU 4 008 000
13.	Agrupación de Fabricantes de Cementos de España — Oficemen: a fine of	ECU 70 000
14.	Asland SA: a fine of	ECU 5 337 000
15.	Hispacement SA: a fine of	ECU 102 000
16.	Hornos Ibéricos Alba SA: a fine of	ECU 1 784 000
17.	Corporación Uniland SA: a fine of	ECU 1 971 000
18.	Compañia Valenciana de Cementos Portland SA: a fine of	ECU 1 312 000
19.	Syndicat Français de l'Industrie Cimentière: a fine of	ECU 100 000
20.	Cedest SA: a fine of	ECU 2 522 000
21.	Société des Ciments Français SA: a fine of	ECU 24 716 000
22.	Lafarge Coppée SA: a fine of	ECU 22 872 000
23.	Vicat SA: a fine of	ECU 8 272 000
24.	Association of the Greek Cement Industry: a fine of	ECU 100 000
25.	Halkis Cement Company SA: a fine of	ECU 1 856 000
26.	Heracles General Cement Company: a fine of	ECU 5 748 000
27.	Titan Cement Company SA: a fine of	ECU 5 625 000
28.	Irish Cement Ltd: a fine of	ECU 3 524 000
29.	Fratelli Buzzi SpA: a fine of	ECU 3 652 000
30.	Cementir — Cementerie del Tirreno SpA: a fine of	ECU 8 248 000
31.	Italcementi — Fabbriche Riunite Cemento SpA: a fine of	ECU 32 492 000
32.	Unicem SpA: a fine of	ECU 11 652 000
33.	SA des Ciments Luxembourgeois: a fine of	ECU 1 052 000
34.	Vereniging Nederlandse Cementindustrie: a fine of	ECU 100 000
35.	Eerste Nederlandse Cementindustrie NV: a fine of	ECU 7 316 000
36.	ATIC — Associação Técnica da Indústria do Cimento: a fine of	ECU 70 000
37.	Cimpor — Cimentos de Portugal SA: a fine of	ECU 9 324 000
38.	SECIL — Companhia Geral de Cal e Cimento SA: a fine of	ECU 3 017 000
39.	British Cement Association: a fine of	ECU 100 000
40.	Blue Circle Industries plc: a fine of	ECU 15 824 000
41.	Castle Cement Ltd: a fine of	ECU 7 964 000
42.	The Rugby Group plc: a fine of	ECU 5 144 000

Article 10

The following fines are hereby imposed on the undertakings named herein in respect of the infringements found in Article 7:

1.	Italcementi — Fabbriche Riunite Cemento SpA: a fine of	ECU 1 088 000
2.	Dyckerhoff AG: a fine of	ECU 988 000

3.	Lafarge Coppée SA: a fine of	ECU 1 028 000
4.	Société des Ciments Français SA: a fine of	ECU 1 052 000
5.	SA Cimenteries CBR: a fine of	ECU 836 000
6.	Compañia Valenciana de Cementos Portland SA: a fine of	ECU 554 000

Article 11

The fines imposed in Articles 9 and 10 shall be paid within three months of the date of notification of this Decision to the following bank account ...

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3.5 percentage points, i.e. 9.25%.

Article 12

This Decision is addressed to ...'

Procedure

23 On 13 January 1995, Ciments Français SA (also referred to as 'Société des Ciments Français SA', 'Ciments Français' and 'SCF' in the contested decision, hereinafter 'Ciments Français') advised the Commission of a clerical error in the calculation of the fine imposed on it in respect of the grey cement market. On 6 February 1995, it became concerned at the fact that that error had been repeated in the second notification of the contested decision. On 17 February 1995, the Commission informed it of its decision of 13 February 1995 to reject its request for rectification of the amount of the fine.

24 On 6 February 1995, Castle Cement Ltd (hereinafter 'Castle'), Aker and EUROC asked the Member of the Commission responsible for competition policy whether the Commission would pay interest on the amounts already paid pending the outcome of the appeal if the fine were

annulled in whole or in part. Following receipt of the second notification in February 1995, they requested the Commission on 13 February 1995 to confirm what consequences that second notification would have as regards the fine or the lodging of a bank guarantee. They received no reply to their questions concerning the payment of interest.

25 By separate applications lodged at the Court Registry between 14 February 1995 and 12 April 1995, CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Ciments Luxembourgeois SA (also known as 'SA des Ciments Luxembourgeois' and 'Ciments Luxembourgeois' in the contested decision, hereinafter 'Ciments Luxembourgeois') (T-34/95), Dyckerhoff AG (formerly Dyckerhoff Zement GmbH, hereinafter 'Dyckerhoff') (T-35/95), SFIC (T-36/95), Vicat SA (hereinafter 'Vicat') (T-37/95), Cedest (T-38/95), Ciments français (T-39/95), Heidelberger Zement AG (hereinafter 'Heidelberger') (T-42/95), Lafarge Coppée (also referred to as 'Lafarge Coppée SA' and 'Lafarge Coppée' and 'Lafarge' in the contested decision, hereinafter 'Lafarge') (T-43/95), Aalborg Portland A/S (hereinafter 'Aalborg') (T-44/95), Alsen AG (formerly Alsen-Breitenburg Zement- und Kalkwerke GmbH, also referred to as 'Alsen-Breitenburg' in the contested decision, hereinafter 'Alsen-Breitenburg') (T-45/95), Alsen AG (formerly Nordcement AG, also referred to as 'Nordcement' in the contested decision, hereinafter 'Nordcement') (T-46/95), Bundesverband der Deutschen Zementindustrie eV (also referred to as 'Bundesverband' and 'BDZ' in the contested decision, hereinafter 'BDZ') (T-48/95), Unicem SpA (hereinafter 'Unicem') (T-50/95), Fratelli Buzzi SpA (hereinafter 'Buzzi') (T-51/95), Compañia Valenciana de Cementos Portland SA (hereinafter 'Valenciana') (T-52/95), The Rugby Group plc (also referred to as 'Rugby' in the contested decision, hereinafter 'Rugby') (T-53/95), British Cement Association (hereinafter 'BCA') (T-54/95), Asland SA (hereinafter 'Asland') (T-55/95), Castle (T-56/95), Heracles General Cement Company SA (also referred to as 'Heracles' in the contested decision, hereinafter 'Heracles') (T-57/95), Corporación Uniland SA (hereinafter 'Uniland') (T-58/95), Agrupación de Fabricantes de Cemento de España (Oficemen) (also referred to as 'Oficemen' in the contested decision, hereinafter 'Oficemen') (T-59/95), Irish Cement Ltd (hereinafter 'Irish Cement') (T-60/95), Cimpor — Cimentos de Portugal SA (hereinafter 'Cimpor') (T-61/95), SECIL — Companhia Geral de Cal e Cimento SA (hereinafter 'SECIL') (T-62/95), ATIC — Associação Técnica da Indústria de Cimento (hereinafter 'ATIC') (T-63/95), Titan Cement Company SA (also referred to as 'Titan' in the contested decision, hereinafter 'Titan') (T-64/95), Italcementi — Fabbriche Riunite Cemento SpA (hereinafter 'Italcementi') (T-65/95), Holderbank Financière Glarus AG (also referred to as 'Holderbank Financière Glar[u]s SA' in the contested decision, hereinafter 'Holderbank') (T-68/95), Hornos Ibéricos Alba SA (Hisalba) (also referred to as 'Hornos Ibéricos' and 'Hisalba' in the contested decision, hereinafter 'Hornos Ibéricos') (T-69/95), Aker (T-70/95), EUROC (T-71/95), Cementir — Cementerie del Tirreno SpA (hereinafter 'Cementir') (T-87/95), Blue Circle (T-88/95), Enosi Tsimentoviomichanion Ellados (formerly Association of the Greek Cement Industry, referred to as such in the contested decision, hereinafter 'AGCI') (T-103/95) and Tsimenta Chalkidos AE (formerly Halkis Cement Company, also referred to as 'Halkis' in the contested decision, hereinafter 'Halkis') (T-104/95) brought the present actions.

26 By application lodged at the Court Registry on 17 May 1995, Halkis brought an application under Articles 185 and 186 of the EC Treaty for interim measures seeking suspension of the operation of the contested decision in so far as it required it to pay a fine. By order of the President of the Court of First Instance of 11 August 1995 in Case T-104/95 R *Tsimenta Chalkidos* v *Commission* [1995] ECR II-2235, that application was dismissed.

27 By application lodged at the Court Registry on 10 May 1995, Cementir brought a second action seeking specifically the annulment of the contested decision in so far as it fixes, in Article 9, the amount of the fine imposed on it (Case T-116/95). By order of 10 June 1998, the Court of First Instance (Fourth Chamber, Extended Composition) declared that action inadmissible (Case T-116/95 *Cementir* v *Commission* [1998] ECR II-2261).

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure in all the present cases without any preparatory inquiry. However, as a measure of organisation of the procedure, it asked the parties to produce a number of documents and to reply in writing to a number of questions. The parties complied.

29 The parties presented oral argument and replied to the questions put by the Court of First Instance at the hearings on 16, 18, 23, 25 and 30 September 1998, and on 2, 7, 9, 14, 16 and 21 October 1998.

Forms of order sought

30 CBR (T-25/95) claims that the Court should:

— annul Articles 1, 4, 7, 8, 9 and 10 of the contested decision;

— in the alternative, annul or at least reduce the fines imposed on it;

— order the Commission to pay the costs.

31 Cembureau (T-26/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— order the Commission to pay the costs; and

— order any measures of inquiry that it may consider necessary.

32 FIC (T-30/95) claims that the Court should:

— annul Articles 1, 2, 5, 8 and 9 of the contested decision in so far as they concern it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

33 ENCI (T-31/95) claims that the Court should:

— annul the contested decision, at least in so far as it concerns it;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs, together with interest on the fine wrongly paid.

34 VNC (T-32/95) claims that the Court should:

— annul the contested decision, at least in so far as it concerns it;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs, together with interest on the fine wrongly paid.

35 Ciments Luxembourgeois (T-34/95) claims that the Court should:

— annul, in so far as they concern it, Article 1, Article 2(1) and (2) and Article 9 of the contested decision;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs.

36 Dyckerhoff (T-35/95) claims that the Court should:

— annul, in so far as they concern it, Article 1, Article 3(3)(a), Article 4(1), (2), and 3(a), and Articles 5, 7, 8, 9 and 10 of the contested decision;

— in the alternative, reduce the fines imposed on it;

— order the Commission to pay the costs.

37 SFIC (T-36/95) claims that the Court should:

— question the Commission and, if necessary, the Advisory Committee as to the nature and extent of the information which was available and which was provided to the members of that committee, in particular in relation to the amount of the fines envisaged;

— question the Commission as to the validity of the deliberation of the college of its members, in particular with regard to the conditions under which the latter were granted access or informed as to the arguments relied upon in defence by the applicant and the other addressees of the SO;

— find that the Advisory Committee was not in a position to rule in full knowledge of the facts;

— find that the principle of collegiality of the Commission was not observed;

— annul in whole or in part Articles 1, 2, 3(3), 4(1) and (2), 5 and 9 of the contested decision in so far as those articles concern the applicant;

— order the Commission to pay the costs.

38 Vicat (T-37/95) claims that the Court should:

— annul Articles 1, 3(1)(c), and 9 of the contested decision, in so far as those articles concern it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

39 Cedest (T-38/95) claims that the Court should:

— annul in whole or in part Articles 1, 3(3)(a) and 9, point 20, of the contested decision, in so far as those articles concern it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

40 Ciments Français (T-39/95) claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the fines imposed on it;

— order the Commission to pay the costs.

41 Heidelberger (T-42/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

42 Lafarge (T-43/95) claims that the Court should:

— annul the contested decision or, at the very least, Article 1, Article 3(1)(a), Article 3(3)(a), Article 4(1), (2) and (3)(a), Article 4(4)(e) and (f), and Articles 6 and 7 thereof;

— in the alternative, annul or, at the very least, reduce the fines imposed on it;

— adopt any appropriate measure;

— order the Commission to pay the costs.

43 Aalborg (T-44/95) claims that the Court should:

— annul Articles 1, 2, 4(1) and (3)(a), 5, 8 and 12 of the contested decision, in so far as those articles concern it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

44 Alsen-Breitenburg (T-45/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

45 Nordcement (T-46/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul or at least reduce the fine imposed on it;

— order the Commission to pay the costs.

46 BDZ (T-48/95) claims that the Court should:

— annul Article 1, Article 2, Article 3(3), Article 4(1), (2) and (3)(a) and Article 9(5) of the contested decision;

— order the Commission to pay the costs.

47 Unicem (T-50/95) claims that the Court should:

— annul the contested decision, at least in so far as it concerns it;

— in the alternative, annul or reduce the fine imposed on it;

— order the defendant to pay the costs and to reimburse to the applicant the expenses and interest incurred in providing a guarantee either wholly or in respect of the amount by which the fine is reduced.

48 Buzzi (T-51/95) claims that the Court should:

— annul in whole or in part the contested decision in so far as it concerns it;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs;

— order the Commission to reimburse the whole of the costs incurred by it during the administrative procedure;

— order the Commission to reimburse the whole of the costs incurred in lodging a security for the payment of the fine imposed;

— authorise it to summon Franco Buzzi, its managing director, to appear before the Court.

49 Valenciana (T-52/95) claims that the Court should:

— annul in whole or in part the contested decision, in so far as it concerns it;

— in the alternative, reduce the fines imposed on it;

— order the Commission to pay the costs.

50 Rugby (T-53/95) claims that the Court should:

— annul Articles 1, 2, 4, 8, and 9 of the contested decision, in so far as they concern it;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

51 BCA (T-54/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— order the Commission to pay the costs.

52 Asland (T-55/95) claims that the Court should:

— annul in whole or in part the contested decision;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs, including the costs and interest incurred in lodging a security or for the possible payment in full or in part of the fine.

53 Castle (T-56/95) claims that the Court should:

— annul in whole or in part the contested decision in so far as it concerns it;

— annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

54 Heracles (T-57/95) claims that the Court should:

— annul the contested decision;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to produce all internal notes, memoranda and draft documents prepared by Members of the Commission or officials of the Commission, minutes of the Commission's meetings and opinions of the Advisory Committee, meetings relating to

— the dissemination of the applicant's defence, as set out in its Response to the SO and minutes of the oral hearing, within the Commission and the Advisory Committee, in languages other than the original Greek version;

— the calculation of the applicant's fine, in particular the Commission's draft Decisions presented to the Advisory Committee, in which it is understood but cannot be proven by the applicant, that the following paragraph appears (which does not appear in the contested decision): 'Account should be taken of the Greek producers' argument that they were constrained by circumstances to sign the contracts with certain European producers on the sale of cement and clinker. Consequently, the Commission considers that it should not impose fines on Titan and Heracles in respect of the agreements and concerted practices relating to the purchases of Greek cement and clinker referred to in point 56';

— order that the Commission pay the costs.

55 Uniland (T-58/95) claims that the Court should:

— annul at the very least Articles 1, 4(1), 4(2) and 4(3)(a) and 9 of the contested decision;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs, including the costs arising from the lodging and maintenance of the security for the fine.

56 Oficemen (T-59/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul at least Articles 1, 2, 3(2), 4(1), 4(2), 4(3)(a), 5 and 9 thereof in so far as they concern it;

— in the further alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs, including the expenses of lodging and maintaining the security for the fine.

57 In its reply, Oficemen (T-59/95) further asks the Court to call on the Commission to disclose all documents relating to the correspondence and the reports included in its case file in order to ascertain whether the mandatory formality that the Commission seek the opinion of the Advisory Committee, as required by Regulation No 17, was duly complied with.

58 Irish Cement (T-60/95) claims that the Court should:

— annul the contested decision;

— annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

59 Cimpor (T-61/95) claims that the Court should:

— annul the contested decision in so far as it concerns it and, accordingly, annul the fine imposed upon it;

— in the alternative, reduce that fine;

— order the Commission to pay the costs;

— order any necessary measures of inquiry.

60 SECIL (T-62/95) claims that the Court should:

— annul the contested decision in so far as it concerns it and, accordingly, annul the fine imposed upon it;

— in the alternative, reduce that fine;

— order the Commission to pay the costs;

— order any necessary measures of inquiry and, in particular, order the Commission to place on the file copies of the chapters of the SO which were not sent to it and all the necessary information to assess the legality of Article 9 of the contested decision.

61 ATIC (T-63/95) claims that the Court should:

— annul the contested decision in so far as it concerns it and, in particular, Article 1, Article 2(1) and (2)(b), and Article 5 thereof;

— in the alternative, reduce the fine imposed on it;

— order the Commission to pay the costs.

62 Titan (T-64/95) claims that the Court should:

— annul or modify the contested decision in so far as it concerns it, by annulling or reducing the fine imposed on it;

— order the Commission to pay the costs;

— order such alternative or additional measures as justice may require.

63 Italcementi (T-65/95) claims that the Court should:

— annul in whole or in part the contested decision in so far as it concerns it;

— in the alternative, annul or reduce the fines imposed on it;

— annul the Commission's decision of 23 September 1993 in so far as it terminates the international part of the proceeding initiated against the 12 German undertakings and the 6 Spanish undertakings referred to therein;

— order the Commission to pay the costs.

64 Holderbank (T-68/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

65 Hornos Ibéricos (T-69/95) claims that the Court should:

— annul the contested decision in so far as it concerns it;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs;

— request the Commission to produce the complete file and all the documents on which it relied in order to justify the contested decision and, in particular, any analysis of the worldwide cement market situation, as well as any study carried out by the Commission on the economic reasons which prompted the applicant to participate in the EPC;

— authorise the applicant to examine those documents, in so far as they do not contain any business secrets concerning other parties or do not refer to Commission internal documents.

66 Aker (T-70/95) claims that the Court should:

— annul in whole or in part the contested decision in so far as it concerns it;

— annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

67 EUROC (T-71/95) claims that the Court should:

— annul in whole or in part the contested decision in so far as it concerns it;

— annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

68 Cementir (T-87/95) claims that the Court should:

— annul in whole or in part the contested decision;

— in the alternative, annul or reduce the fine imposed on it;

— order the Commission to pay the costs.

69 Blue Circle (T-88/95) claims that the Court should:

— annul the contested decision;

— in the alternative, annul in part, and accordingly reduce, the fine imposed on it;

— order the Commission to pay the costs.

70 AGCI (T-103/95) claims that the Court should:

— annul or modify the contested decision at least in so far as it concerns it, so as to cancel or reduce the fine imposed on it;

— order the Commission to pay the costs;

— order any other necessary measures.

71 Halkis (T-104/95) claims that the Court should:

— give a judgment on the present action irrespective of any other related action brought against the contested decision which could cloud the facts as well as the legal assessment of the pleas in law in support of the action brought by the applicant;

— annul the contested decision or, at the very least, vary it;

— order the Commission to pay the costs.

72 In Cases T-25/95 and T-30/95, the Commission contends that the Court should:

— declare the application inadmissible in so far as it concerns the rules on fair competition;

— dismiss the remainder of the application;

— order the applicant to pay the costs.

73 In Cases T-26/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, it contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

74 In Case T-65/95, it contends that the Court should:

— declare the application inadmissible in so far as it is directed at the Commission's decision of 23 September 1993;

— dismiss it as unfounded in so far as it is directed at the contested decision;

— order the applicant to pay the costs.

75 The parties having been heard on the matter, the Court of First Instance (Fourth Chamber, Extended Composition) considers it is appropriate to join the present cases for the purpose of the judgment, pursuant to Article 50 of its Rules of Procedure.

76 All the actions seek annulment of the contested decision. One applicant, Italcementi, also seeks annulment of the decision of 23 September 1993 by which the Commission terminated the international part of the proceeding against 12 German undertakings and six Spanish undertakings. The Court will first examine Italcementi's claim that the latter decision should be annulled.

The claim for annulment of the decision of 23 September 1993 inasmuch as it terminated the international part of the proceeding initiated against 12 German undertakings and six Spanish undertakings

77 On 23 September 1993 the Commission decided to drop the objections relating to the international part of the SO against 12 German undertakings and six Spanish undertakings. It also decided to drop the objections relating to the national agreements and concerted practices against all addressees of the SO. On 27 September 1993 it informed all of them of its decision to drop the objections relating to the national agreements and concerted practices (see paragraphs 14 and 15 above).

78 Italcementi (T-65/95) complains that the Commission did not send to it the decision of 23 September 1993 to terminate the proceeding against 12 German undertakings and six Spanish undertakings. It became aware of that decision upon reading the contested decision, as the Commission's letter of 27 September 1993 (contested decision, recital 4, paragraph 2) did not make any reference to it. Nor does the contested decision give reasons to justify that decision. Italcementi submits that it was therefore deprived of the right to submit observations and to bring an action against that decision. The latter decision was an essential act in preparation for the contested decision, without which the contested decision would have been different both in form and substance. Italcementi considers that its action is admissible as a challenge to the decision of 23 September 1993. First, it has brought that action within the period laid down in Article 173 of the EC Treaty (now, after amendment, Article 230 EC), which began to run when that decision came to its knowledge. Second, it has a legal interest in

contesting that decision, because that decision is inconsistent with the joint responsibility which the Commission attributed to all the European cement producers and infringes the principle of non-discrimination. It also seeks an order that the Commission produce the text of its decision of 23 September 1993. It states that if its claim for annulment of the latter decision is allowed, the contested decision must also be annulled.

79 The Court notes that the Commission's letter of 27 September 1993 does not mention the decision of 23 September 1993 to drop the international objections against 12 German undertakings and six Spanish undertakings, a fact which the Commission also acknowledged at the hearing in Case T-65/95.

80 It has, however, consistently been held that the acts or decisions against which an action for annulment may be brought under Article 173 of the Treaty are those which produce binding legal effects capable of affecting the interests of the party who brings an action, by bringing about a significant change in his legal situation (see, *inter alia*, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and *Cimenteries CBR and Others* v *Commission*, cited in paragraph 11 above, paragraph 28).

81 In the present case, the Commission's decision to drop the international objections against 12 German undertakings and six Spanish undertakings did not produce such effects in regard to Italcementi.

82 It is not therefore an act against which it may bring an action for annulment under Article 173 of the Treaty. Accordingly, its claim for annulment of that decision is inadmissible.

83 In any event, since Italcementi in reality complains of irregularities in an act that was preparatory to the contested decision — irregularities allegedly affecting the legality of that decision because they constituted infringements of Italcementi's rights of defence, of the obligation to state reasons and of the principle of non-discrimination — those objections must be examined in the context of the claim for annulment of the contested decision (see paragraphs 461 to 471 below). It is settled law that any irregularities affecting a preparatory act which cannot itself be the subject of an action for annulment may be relied upon in an action directed against the definitive act; in the present case, that act is the contested decision, the decision of 23 September 1993 representing a preparatory step for it (*IBM* v *Commission*, cited in paragraph 80 above, paragraph 12; *Cimenteries CBR and Others* v *Commission*, cited at paragraph 11 above, paragraph 47, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 46 to 62).

84 Since this claim is inadmissible, there is no need to grant Italcementi's application for disclosure of the decision of 23 September 1993.

The claim for annulment of the contested decision

I — *The pleas alleging various infringements of essential procedural requirements during the administrative procedure*

85 All the applicants, except Halkis, have pleaded infringements of essential procedural requirements during the administrative procedure. Those pleas, 22 in total, are not, however, submitted by each applicant. When considering each plea, the Court will specify which applicants have raised it.

86 The first plea alleges infringement of the rights of the defence in that the whole of the SO and the documents relating thereto were not accessible during the administrative procedure. One applicant submits that the incomplete disclosure of the objections also infringes the principle of equal treatment. The second, third and fourth pleas allege infringement of the rights of the defence, infringement of the principle of equal treatment and infringement of Article 190 of the EC Treaty (now Article 253 EC) as a result of the Commission's abandonment of the national objections and, in regard to some undertakings, of the international objections (see paragraphs 14 and 15 above). The fifth plea alleges that the Commission committed a procedural irregularity in dropping some of the international objections. The sixth plea alleges that the imprecise and incomplete nature of the SO infringes the rights of the defence. The seventh plea is grounded on infringement of the rights of the defence and of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952–1958, p. 59) because certain documents sent to the applicants during the administrative procedure were not translated. The eighth plea alleges infringement of the rights of the defence as a result of the incorrect translation and citation of some documents. The ninth plea alleges infringement of the rights of the defence and of Article 11(1) of Regulation No 99/63 because of the allegedly inadequate period for replying to the SO. The 10th plea alleges infringement of the rights of the defence, of Article 19(1) of Regulation No 17, and of Articles 7(1), 8(1) and 9 of Regulation No 99/63 because of the faulty organisation of the hearings. The 11th plea alleges infringement of the principle of *ex officio* investigation. The 12th plea is based on infringement of the rights of the defence in that the duration of the administrative procedure was excessive. The 13th plea alleges infringement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter 'the ECHR'). The 14th plea alleges that the Commission failed to observe the principle of the presumption of innocence. The 15th plea alleges infringement of the parties' right not to give evidence against themselves. The 16th plea alleges infringement of Article 10 of Regulation No 17 in that the Commission's consultation of the Advisory Committee was defective. The 17th, 18th, 19th and 20th pleas allege infringement, respectively, of the principles of subsidiarity, sound administration, legal certainty and protection of legitimate expectations during the administrative procedure. The 21st plea alleges that the Commission infringed the principle of collegiality when it adopted the contested decision. Finally, the 22nd plea alleges defective authentication and notification of the contested decision.

The first plea: infringement of the rights of the defence and of the principle of equal treatment in that the whole of the SO and the documents relating thereto were not accessible during the administrative procedure

87 In this plea, complaint is made that the Commission did not ensure that the applicants had access to the whole of the SO (B); that in failing to provide access to certain parts of the SO and numerous documents in the file, the Commission prevented the applicants from adducing exculpatory evidence (C); that in the contested decision it used incriminating documents which had not been disclosed to the applicants or were not referred to in the SO (D); and, lastly, that it failed to disclose documents which, although not part of the file, might nevertheless have been useful to the defence (E). Before considering the relevant arguments, some preliminary observations are necessary (A).

A — Preliminary observations

88 It is necessary to recall the manner in which the objections were notified during the administrative procedure and the conditions under which the addressees of the SO had access to the file during that procedure.

89 On the basis of the documents and information obtained by its officials during investigations carried out at European cement producers and their trade associations between April 1989 and July 1990, and based on replies to requests for information sent under Article 11 of Regulation No 17 and to a statement of objections relating to Article 15(1) of that regulation (see paragraph 2 above), the Commission concluded that there was probably a system of agreements or concerted practices, both at European level and at that of various Member States, between the European cement producers.

90 In those circumstances, the Commission decided to initiate proceedings for infringement of Article 85(1) of the Treaty against 76 undertakings and associations of undertakings in the cement industry. In the course of those proceedings, in November 1991 it sent to all the undertakings and associations of undertakings the SO provided for in Article 2(1) of Regulation No 99/63.

91 The first page of the SO refers to three case numbers: 27.997, 33.126 and 33.322. Cases 33.126 and 33.322 are identified as the 'Cement' cases. Case 27.997 concerns the 'Common Price and Marketing Arrangements' (the 'CPMA'). They are pricing arrangements and conditions of sale adopted in the context of the Cement Makers' Association (the 'CMF'), a United Kingdom association, which were notified by it to the Commission in June 1973.

92 The SO draws a distinction between two types of objection: practices at international level ('the international agreements and concerted practices') and practices at national level ('the national agreements and concerted practices'). It is subdivided into two principal parts: 'The Facts' (Part I) and 'Legal Assessment' (Part II). 'The Facts' has nine chapters. Chapter 1 deals with the cement market. Chapter 2 concerns the international agreements and concerted practices. Chapters 3 to 9 relate to the various national agreements and concerted practices: Italy (Chapter 3), United Kingdom (Chapter 4), France (Chapter 5), Germany (Chapter 6), Greece (Chapter 7), Spain (Chapter 8) and Portugal (Chapter 9). The 'Legal Assessment' in the SO is subdivided into three sections (A, B and C). Section A, headed 'Article 85(1) of the EEC Treaty', contains Chapters 10 to 19 of the SO. Chapters 10 to 12 relate to the international agreements and concerted practices and Chapters 13 to 19 relate to the various national agreements and concerted practices: Italy (Chapter 13), United Kingdom (Chapter 14), France (Chapter 15), Germany (Chapter 16), Greece (Chapter 17), Spain (Chapter 18) and Portugal (Chapter 19). Section B concerns the inapplicability of Article 85(3) of the Treaty and Section C the applicability of Article 15(2) of Regulation No 17.

93 The CPMA (file 27.997), being the subject of national objections, are dealt with in the chapters relating to the United Kingdom (Chapters 4 and 14).

94 The chapters relating to the international agreements and concerted practices (Chapters 2, 10, 11 and 12) and the full index of the SO were sent to each of the applicants. The chapters relating to the national agreements and concerted practices (Chapters 3 to 9 and 13 to 19) were sent only to the undertakings and associations of undertakings established in the Member State in question. Thus, addressees of the SO who were established in a Member State in which there was, according to the SO, a national agreement or concerted practice between the cement producers of that State received the chapters of the SO relating to the international agreements and concerted practices and the chapters of the SO concerning that national agreement or concerted practice, but not the chapters concerning the other national agreements and concerted practices. An addressee of the SO who was established in a Member State which had not been specifically dealt with in the SO received only the chapters of the SO relating to the international agreements and concerted practices.

95 The Commission did not append to the SO the documents supporting its conclusions or the other documents which it considered relevant. In view of the large number of documents in question, it prepared a box of documents, which was made available to each addressee of the SO when it inspected the file at the end of 1991 (hereinafter 'the Box'). By that time, at the latest, the addressees of the SO had received the List (see paragraph 5 above). Rugby (T-53/95) states, however, that it received the List only with the Commission's letter of 4 June 1992.

96 The List (see paragraph 5 above), which referred to the three case numbers (27.997, 33.126 and 33.322), adopted a consecutive numbering system for the documents (from 1 to 3147 for file 33.322, from 1 to 20845 for file 33.126, and from 1 to 40 for file 27.997); an identification code for the documents (from 1 to 12); an accessibility code for the documents ('A' (accessible),

'PA' (partly accessible) and 'NA' (not accessible)); the names of the parties to whom the documents in question were accessible or not accessible; and the indication of the loose-leaf binder in which the documents in question were kept.

97 It is apparent from the List (see paragraph 5 above) that the files in the 'Cement' cases (33.126 and 33.322) contained the following documents: objections and documents cited in support of them (Identification Code '1'); requests for information pursuant to Article 11 of Regulation No 17 and replies to them (Identification Codes '4.1' and '4.2'); correspondence with certain undertakings outside the scope of Article 11 of Regulation No 17 (Identification Code '5.1'); investigation reports and documents annexed to such reports (Identification Code '6.1'); published documents (Identification Code '9'); and internal Commission documents (Identification Code '10'). The file in the CPMA case (IV/27.997) contained a notification (Identification Code '2'); the Commission's internal documents (Identification Code '10'); and the opinion of the Advisory Committee (Identification Code '11').

98 All the documents on the List (see paragraph 5 above) will be referred to as 'the investigation file'.

99 As regards access to the investigation file during the administrative procedure, each undertaking or association of undertakings had access to the documents which the Commission had obtained from that undertaking or association of undertakings, together with the documents relating to the chapters of the SO which had been sent to it. As all the applicants in the present cases received the chapters relating to the international agreements and concerted practices (SO, chapters 2, 10, 11 and 12), they all had access to the documents classified as accessible on the List (see paragraph 5 above) that related to those chapters of the SO.

100 The Box (see paragraph 95 above) did not contain all the documents relating to the international agreements and concerted practices which had been classified on the List (see paragraph 5 above) as accessible to all addressees ('A' or 'A: all' or 'A: European producers'). According to the Commission, it contained the most important documents concerning the international agreements and concerted practices.

101 As regards access during the administrative procedure to the documents relating to the national agreements and concerted practices, the Commission put together a national file for each country concerned by the national chapters of the SO, that is to say, Italy, the United Kingdom, France, Germany, Greece, Spain and Portugal. The applicants had access only to the national file of the Member State in which they were established.

102 Any request for additional access to the national chapters of the SO and/or the investigation file was refused by the Commission during the administrative procedure. The Commission's

attitude gave rise to various actions before the Court of First Instance in February 1992 (see paragraphs 6 and 7 above).

103 By decision of 23 September 1993, the Commission decided to drop the objections relating to the international agreements and concerted practices and to terminate the proceedings relating to those chapters of the SO. The effect of that severance of the objections was that the CPMA case (27.997) was terminated, the objection relating to the CPMA being a national objection referred to in the chapters of the SO relating to the United Kingdom (chapters 4 and 14). For that reason, the contested decision concerns solely cases '33.126 and 33.322 — Cement'.

B — The notification of part of the SO

104 The following 30 applicants complain that the Commission did not serve the whole of the SO on them: CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Ciments Luxembourgeois (T-34/95), Dyckerhoff (T-35/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Alsen-Breitenburg (T-45/95), Nordcement (T-46/95), BDZ (T-48/95), Buzzi (T-51/95), Valenciana (T-52/95), Asland (T-55/95), Castle (T-56/95), Heracles (T-57/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Italcementi (T-65/95), Aker (T-70/95), EUROC (T-71/95), Blue Circle (T-88/95) and the AGCI (T-103/95). They consider, first, that since the SO is presented as a single document, the whole of that document should have been sent to them. Second, they submit that the SO itself states that it was impossible to separate the national agreements and concerted practices from the international ones; the addressees of the SO should therefore have been sent all the national chapters in it. Lastly, Cembureau considers that the failure to send the whole of the SO infringes the principle of equal treatment.

1. The inseparability of the SO and the applicants' right of access to the whole of it

105 The applicants in question submit that under Article 2(1) of Regulation No 99/63 and Article 19(1) of Regulation No 17 they should have received, during the administrative procedure, all the chapters of the SO relating to the national agreements and concerted practices. Where the Commission issues a single SO, all the addressees of the SO should be able to peruse all the objections.

106 The Court points out that the provisions to which the applicants refer, which lay down an obligation on the Commission to notify the undertakings and associations of undertakings in writing of the objections raised against them, enshrine the fundamental principle of Community law that the rights of the defence must be respected in all proceedings in which sanctions may be imposed. The proper observance of that general principle requires that the undertakings and

associations of undertakings concerned be afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11; *Cimenteries CBR and Others* v *Commission*, cited at paragraph 11 above, paragraph 39; Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 59; T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 69). Thus, the SO must give the undertakings and associations of undertakings concerned all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see, *inter alia*, 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 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42, hereinafter referred to as '*Woodpulp II*'; Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63).

107 In the present case, the Commission did not include in the contested decision the objections of the SO relating to the national agreements and concerted practices. It had taken the decision on 23 September 1993 to drop the objections relating to those agreements and concerted practices and to terminate the proceeding relating to the corresponding chapters of the SO (see paragraph 14 above).

108 In those circumstances, the applicants cannot use inseparability of the SO as a ground for arguing that their rights of defence were infringed by the failure to send the chapters relating to the national agreements and concerted practices other than the chapter relating to the Member State in which the particular addressee of the SO was established. An infringement of the rights of defence during the administrative procedure must be assessed in the light of the objections adopted by the Commission in the SO and in the contested decision (see, to that effect, the judgments cited in paragraph 106 above, T-30/91 *Solvay* v *Commission*, paragraph 60, and T-36/91 *ICI* v *Commission*, paragraph 70).

109 The argument that because the SO is inseparable the Commission was obliged to send to the addressees of the SO all the objections in it must therefore be rejected.

2. The existence of an inseparable link between the national and international agreements and concerted practices and the applicants' right of access to the whole of the SO

110 The applicants referred to in paragraph 104 above submit that the failure to send to them the chapters of the SO relating to the national agreements and concerted practices, other than the chapter relating to the Member State in which the relevant addressee of the SO was established, infringes their rights of defence since the Commission inferred the existence of the international agreements and concerted practices — the Cembureau agreement and its implementing measures — from evidence which appeared in the chapters of the SO relating to the national agreements and concerted practices. As presented in the SO, the existence and operation of the international agreements and concerted practices depended also on the existence of the national agreements and concerted practices implementing that agreement. The national and international agreements and concerted practices even constituted a single agreement. The inseparable

link between the national and international agreements and concerted practices is apparent from the wording of the SO. Thus, point 93(b) of the SO stated that 'it [was] impossible to separate the national agreements, decisions and concerted practices from the European ones, since both form an inseparable whole'. Furthermore, paragraphs 58 and 59 of the SO (see paragraph 119 below) emphasise the inseparable link between the various infringements. The Commission's decision of 23 September 1993 to drop the objections relating to the national agreements and concerted practices and to terminate the proceeding relating to those chapters of the SO did not cure the infringement of the rights of the defence, because there is an undeniable link between the objections relating to the national agreements and concerted practices and those relating to the international agreements and concerted practices.

111 The Court points out that the chapters of the SO relating to the national agreements and concerted practices were presented as separate chapters (chapters 3 to 9 and 13 to 19), which enabled the Commission to send 'partial SOs' to the various addressees of the SO.

112 Even though presented in that way, the chapters relating to the national agreements and concerted practices contain all the information concerning the international agreements and concerted practices. Thus, the French chapter in 'The Facts' of the SO (chapter 5, paragraph 44(f)) states that exports of Greek cement were discussed in the office of the Syndicat National des Fabricants de Ciment et de Chaux ('SNFCC') and that the 'dates of the meetings of the office... are to be compared with the dates of the activities of the "Cembureau Task Force or European Task Force" referred to in section 2 [of chapter 2 of the SO relating to the international agreements and concerted practices]'. Similarly, the chapter relating to the United Kingdom in 'The Facts' of the SO contains a paragraph concerning 'the decisions adopted by the CMF and the CPMA against Greek cement imports' (SO, chapter 4, point 39). The chapter relating to the United Kingdom in the 'Legal Assessment' of the SO states as follows: 'All the measures adopted by the United Kingdom producers within the CMF and the CPMA, as described in points 20 and 39 and examined in point 61(h), constituted agreements and/or concerted practices that restrict competition within the meaning of Article 85(1)' (SO, chapter 14, point 75). The Court notes that points 20 and 61(h) of the SO, to which that extract refers, are in chapters 2 and 10 of the SO relating to the international agreements and concerted practices and are entitled '"The carrot actions" adopted by Cembureau Task Force: "Absorption of destabiliser's tonnage"' and '"Cembureau Task Force or European Task Force"'.

113 In the chapter in 'The Facts' of the SO relating to Germany there is a part regarding the information exchanges between SFIC and BDZ (chapter 6, point 49(a)(iii)) and a part regarding the Franco-German agreement and/or concerted practice (chapter 6, point 49(b)(iv)). Those points are reproduced in the 'Legal Assessment' of the SO relating to Germany (chapter 16, point 84). The chapters of the SO dealing with Italy contain a detailed discussion of the agreement concluded between the Italian producers and Calcestruzzi in order to protect the Italian industry against imports of Greek cement (SO, chapter 3, point 35; chapter 13, point 70(b)). The chapter in 'The Facts' of the SO relating to Greece deals with the problem of exports from it (SO, chapter 7, point 53). Finally, the chapters dealing with Spain and Portugal contain a part which deals with the Hispano-Portuguese agreements and/or concerted practices (SO, chapter 8, point 55(c); chapter 9, point 56(b); chapter 18, point 87; chapter 19, point 90).

114 The references to the international agreements and concerted practices and the explanations which have been supplied concerning those agreements and concerted practices in the chapters relating to the national agreements and concerted practices of the SO do not, however, mean that the Commission was obliged to send the national chapters to the applicants before adopting the contested decision, which contains findings of infringements solely in regard to the international agreements and concerted practices. An examination of the chapters relating to the national agreements and concerted practices to which the applicants had not had access was not necessary for the preparation of their defence against the international objections, since the chapters relating to the national agreements and concerted practices did not contain incriminating evidence relating to the international agreements and concerted practices that was not also set out in the international chapters of the SO. The Court will consider below whether the national chapters of the SO contained any evidence exculpating the applicants concerned.

115 Furthermore, the applicants cannot allege that in the SO the Commission based the existence of the Cembureau agreement, and the measures to implement it, on the national agreements and concerted practices. On the contrary, the Cembureau agreement and measures to implement it at international level were considered in the SO to be separate infringements, on the basis of the documents referred to in the international chapters of the SO (chapters 2 and 10 to 12). The Court points out in that regard that the chapters of the SO relating to the international agreements and concerted practices (chapters 2 and 10 to 12) do not contain any reference to the national agreements and concerted practices.

116 However, it is apparent from the national chapters, and in particular the chapter dealing with Germany, that, for their proper operation, the national agreements and concerted practices were dependent on the existence of agreements and concerted practices at international level.

117 Thus, in the chapter in the 'Legal Assessment' relating to Germany, the Commission explained (SO, chapter 16, point 84): 'German cement producers were all the more interested in avoiding exports to other EEC countries whose producers were members of Cembureau, since this would violate the Cembureau "principle" discussed in the first part of this Statement of Objections. It should be noted that a [German] market sharing agreement of this extent could never have been implemented with such rigidity and stability throughout the last thirty years, if the German market had not been isolated from cement imports by means of this "principle". The "principle", by eliminating or limiting transfrontier flows, was the necessary condition of maintaining the restrictive agreements and practices in those Member States, whose producers were members of Cembureau. Exchange of sensitive information between the French and German cement organisations and coordination of exports to the Benelux countries are among the factors that helped the German cement leaders maintain a tight control of their market throughout the years and affected at the same time cement interstate trade. ... It follows that the [German] agreements on the exchange of market information and on sharing local markets and customers, both in themselves and as the consequence or complement on a local or regional basis of the Cembureau "principle of not transhipping to internal European markets", appreciably affect trade between Member States by consolidating national compartmentalisations which obstruct the economic interpenetration desired by the Treaty.'

118 Irrespective of whether, as the Commission alleges, the inseparable link between the national agreements and concerted practices and the international agreements and concerted practices to which paragraph 93(b) of the SO refers concerns only the setting of the level of the fine, the Court finds that in any event this link exists in one sense only: the national agreements and concerted practices display, as 'the consequence or complement on a local or regional basis' of the Cembureau agreement, an inseparable link with that agreement, whereas the Cembureau agreement and the measures for implementing it at international level in no way depend on the existence of the national agreements and concerted practices.

119 Nor, lastly, can the applicants base an argument on points 58 and 59 of the SO. Point 58, which introduces the legal assessment of the SO, states that 'the agreements and concerted practices described above are caught by the prohibition laid down in Article 85(1), and the undertakings in question are undertakings within the meaning of that Article, since they carry out economic activities in the cement production and marketing sectors'. Although that point is supposed to apply to all the objections referred to in the SO, both at national level and at international level, it does not show that there is any link between all those objections. It merely concerns the application of Article 85 of the Treaty to all those objections and the definition of 'undertaking' for the purposes of that provision. Point 59 of the SO, which is the first point in the legal assessment of the international agreements and concerted practices described in chapter 2, sections 1 and 2 (that is to say, the Cembureau agreement and the ETF), states: 'Within the framework of and through Cembureau, the European cement producers agreed on plans, arrangements and measures, adopted under Cembureau's institutional structure and within the framework of a system of meetings and continuous bilateral and multilateral contacts promoted by the Cembureau institutions, designed to ensure non-encroachment on respective home markets, the sharing of markets in accordance with quotas or target volumes or temporary measures designed to regulate and control sales volumes, and the exchange of information on prices and exports and imports so as to enable them to coordinate their action more effectively. The Commission considers that all these arrangements adopted within the framework of Cembureau and the bilateral and multilateral meetings and contacts constituted a single and continuous "agreement", as from the dates indicated below, within the meaning of Article 85(1).' Point 59 makes no reference whatsoever to the objections set out in the national chapters of the SO. The 'single agreement' referred to in it concerns only the international agreements and concerted practices. The fact that the international agreements and concerted practices were characterised as a 'single agreement' does not therefore show that the international and national agreements and concerted practices were inseparably linked, as alleged.

120 It follows that the existence of the Cembureau agreement and its implementing measures is not based, in the SO, on the existence of the national agreements and concerted practices. The inseparable link between the international and national agreements and concerted practices, as alleged by some applicants (see paragraph 110 above), has not therefore been proved.

121 The applicants' argument that the existence of that link made it necessary for them to peruse the national chapters of the SO in order to prepare their defence to the objections relating to the international agreements and concerted practices must therefore also be rejected.

3. Infringement of the principle of equal treatment

122 Cembureau (T-26/95) considers that there has been an infringement of the principle that all parties implicated in the SO should be treated equally because the whole of the SO was not notified to all the parties concerned.

123 That argument must be rejected. The principle of equal treatment precludes the application of different rules to comparable situations or the application of the same rule to different situations (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 40). However, in the present case, all the addressees of the SO were not in the same situation: although some of them, such as Cembureau, were the subject only of international objections, others were deemed to have participated in national agreements and concerted practices in the Member State in which they were established. The Commission was therefore entitled to send to the latter category of addressees the national chapters relating to the Member State in which they were established as well as the international chapters of the SO.

C — Inaccessibility of some parts of the SO and of some documents in the investigation file which might have contained exculpatory evidence

124 The following 39 applicants complain that the Commission did not grant them access to parts of the SO and of the investigation file which might have contained exculpatory evidence: CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Ciments Luxembourgeois (T-34/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Vicat (T-37/95), Cedest (T-38/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Alsen-Breitenburg (T-45/95), Nordcement (T-46/95), BDZ (T-48/95), Unicem (T-50/95), Buzzi (T-51/95), Valenciana (T-52/95), Rugby (T-53/95), Asland (T-55/95), Castle (T-56/95), Heracles (T-57/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Titan (T-64/95), Italcementi (T-65/95), Holderbank (T-68/95), Hornos Ibéricos (T-69/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95), Blue Circle (T-88/95) and AGCI (T-103/95).

125 They allege that in failing to give them access to those items the Commission infringed their rights of defence.

126 The Court points out that, leaving aside the question whether they were refused access to an item of exculpatory evidence in a chapter of the SO, the applicants have not proved that the Commission infringed their rights of defence by failing to send to them during the administrative procedure the chapters of the SO relating to the Member States other than the State in which the addressee of the SO in question was established (see paragraphs 104 to 123 above). That being the case, it is necessary first to examine whether access to the investigation file was given under proper conditions during the administrative procedure (1). The Court will then set out the measures of organisation of procedure adopted by it in the context of the

argument in question (2). The analytical framework for assessing an argument based on the inaccessibility of an alleged item of exculpatory evidence during the administrative procedure will then be explained (3). That analysis will cover both the documents in the investigation file that were not accessible and the parts of the SO that were not communicated. The applicants concerned consider that both the documents in the investigation file and the parts of the SO that were kept secret during the administrative procedure might have contained exculpatory evidence. Once the principles have been established, they will be applied to the case in point (4). Lastly, the Court will examine the general arguments relating to infringement of the rights of the defence during the administrative procedure, those arguments having been raised in pleadings lodged following the measures of organisation of the procedure (5).

1. Organisation of access to the file during the administrative procedure

127 Some applicants criticise the composition and the inspection of the file to which they were given access during the administrative procedure. They state that there were irregularities in the organisation of access to the investigation file (1.1) even in regard to accessible documents. The 39 applicants referred to in paragraph 124 above also submit that the organisation of access to the file during the administrative procedure was irregular because they were not given access to some documents (1.2).

1.1. Irregularities in the organisation of access to the file in regard to accessible documents

128 ENCI, VNC, Dyckerhoff, Uniland, Oficemen, Cimpor, Holderbank, Aker and EUROC contend that the organisation of access to the file was irregular even in regard to the documents to which they were entitled to have access. The defects to which they refer allegedly show that their rights of defence were infringed during the administrative procedure and that the contested decision should therefore be annulled.

129 ENCI and VNC complain that the Commission did not include in the investigation file the documents that it had obtained from them during the administrative procedure, even though they were exculpatory documents.

130 However, the Court finds that ENCI and VNC have not proved that their allegations are correct. Moreover, even if they were correct, their rights of defence would not have been infringed, since exculpatory documents obtained from them by the Commission could have been put in evidence by them during the administrative procedure. Their argument must therefore be rejected.

131 Holderbank asserts that it did not have sufficient access to the file owing to the fact that the pagination of some copies of accessible documents was illegible. As the documents cited in the SO were identified solely by reference to their pagination in the Commission's file, it was unable

to determine the evidence used by the Commission in support of those objections and, accordingly, to properly prepare its defence.

132 The Court points out that the applicant is not claiming that the documents to which it had access were illegible, but solely that their pagination was illegible. However, in the parts of the SO relating to the Cembureau agreement and the ETF, which are the only parts which relate to the objections raised against Holderbank in the contested decision (Articles 1 and 4), the various items of evidence were identified not by reference to any system of pagination, but by reference to their nature (minutes of a meeting, internal memorandum, letter, telex, etc.), their date and/or origin. Furthermore, there is no dispute that the documents in the Box (see paragraph 95 above) followed the order of the SO. Any illegibility of the pagination of some copies of documents could not therefore have prevented the applicant from linking those documents to the passage in the SO where they were mentioned. Consequently, Holderbank's argument must be rejected.

133 Uniland and Oficemen submit that the SO did not identify the documents by reference to the numbering which had been given to them in the investigation file. It was therefore extremely difficult to link documents in the Box (see paragraph 95 above) to the relevant passages in the SO. This latter criticism is also made by Holderbank, Hornos Ibéricos, Aker and EUROC.

134 It is not disputed that the documents in the Box (see paragraph 95 above) followed the order of the SO. Furthermore, in the SO the documents were identified by reference to their nature, date and/or origin. In those circumstances, there could have been no particular problems in linking the documents in the Box to the relevant passages of the SO. The argument must therefore be rejected.

135 ENCI, VNC and Uniland observe that some of the documents in the Box (see paragraph 95 above) were illegible. Dyckerhoff complains of the illegibility of some of the documents. It states that when, by letters of 24 and 31 January 1992, it requested the Commission to send it a legible copy of the documents in question, the new copies sent by the Commission on 11 February 1992 were just as illegible as the first.

136 The Court points out, however, that there was nothing to prevent ENCI, VNC and Uniland from requesting the Commission to send them a new copy of the documents which they had difficulty in reading. Since they did not take that opportunity during the administrative procedure, they cannot now claim that their rights of defence were infringed. As regards the alleged illegibility of the documents to which Dyckerhoff was given access during the administrative procedure, the Court points out that, as the applicant acknowledges, the Commission sent to it by letter of 11 February 1992 a new copy of the documents alleged in its letters of 24 and 31 January 1992 to be illegible. If those new copies proved, in turn, to be illegible, that is because of the poor quality of the originals, for which the Commission cannot be held responsible. On any view, the fact that original documents are illegible does not mean that the applicants' rights of defence were infringed: the position was the same for both the applicants and the Commission. The Commission did not therefore have better knowledge of documents that were illegible or hardly legible than the applicants could have gained through consulting those documents. The arguments of ENCI, VNC, Dyckerhoff and Uniland must therefore be rejected.

137 Cimpor alleges that the List (see paragraph 5 above) contains errors. By way of example, it states that it had only partial access to the note on the meeting of 23 January 1987 between the Portuguese producers and the Spanish association (contested decision, recital 21, paragraph 4; documents 33.322/1406 to 1408), even though in the List it was stated to be one of the documents which was accessible in its entirety.

138 The Court points out that, on the List (see paragraph 5 above), documents 33.322/1406 to 1408 are indeed included amongst the documents stated to be accessible to Cimpor. However, Cimpor has not proved that it had only partial access to those documents. Its argument therefore has no factual basis and must therefore be rejected. For the sake of completeness, the Court points out that the applicant, to which access to the originals of those documents was offered following the measures of organisation of procedure of 18 and 19 June 1997 and which could have taken that opportunity to explain in what respect it had had partial access to the documents in question and how its rights of defence were infringed, ceased to put forward that argument.

139 It follows from all the foregoing that the applicants have not proved that the organisation of the access to the file was irregular in regard to the documents that were accessible during the administrative procedure.

1.2 Organisation of access to the file was irregular because the applicants did not have access to certain documents

140 The 39 applicants referred to in paragraph 124 above complain that the Commission did not give them access to certain documents. Referring to the judgment in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54, they state that during the

administrative procedure access was not given to all documents in the investigation file other than the Commission's internal notes and documents containing business secrets or other confidential information. Furthermore, contrary to the principles laid down in the *Soda Ash* judgments, in particular in those cited in paragraph 106 above, T-30/91 *Solvay* v *Commission* (paragraphs 93 and 94) and T-36/91 *ICI* v *Commission* (paragraphs 103 and 104), the Commission did not provide them with non-confidential versions of the documents which, it claimed, contained business secrets or other confidential information, or prepare a list allowing the undertakings and associations of undertakings concerned to assess whether it was appropriate to request access to specific documents. Since the documents which continued to be inaccessible might have contained exculpatory evidence, those defects should lead to a finding of infringement of the rights of the defence and to annulment of the contested decision. CBR, FIC, ENCI, VNC, Dyckerhoff, SFIC, Heidelberger, Asland, SECIL, ATIC and Hornos Ibéricos also refer to the general principle of equality of arms (judgments cited in paragraph 106 above, T-30/91 *Solvay* v *Commission*, paragraph 83, and T-36/91 *ICI* v *Commission*, paragraph 93).

141 In the present case, it is common ground that, during the administrative procedure, the applicants were not granted access to the large majority of documents in the investigation file. Access to around three quarters of the documents itemised on the List (see paragraph 5 above) was denied.

142 Access to the file in competition cases is intended to allow the addressees of an SO to examine evidence held by the Commission so that they are in a position effectively to express their views on the conclusions which the Commission reaches in the SO on the basis of that evidence (see, most recently, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75). Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Regulation No 99/63 can be exercised effectively. Observance of those rights in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings (*Cimenteries CBR and Others* v *Commission*, cited in paragraph 11 above, paragraphs 38 and 39, T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 30, T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 59, T-36/91 *ICI* v *Commission*, cited in paragraph 106 above, paragraph 69, and Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, hereinafter 'T-37/91 *ICI* v *Commission*', paragraph 49)

143 In the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the defence of parties involved in a proceeding under Article 85(1) of the Treaty (Cases T-30/91 *Solvay* v *Commission*, paragraph 81, T-36/91 *ICI* v *Commission*, paragraph 91). Having regard to the general principle of equality of arms, it is not acceptable for the Commission to be able to decide on its own whether or not to use documents against the applicants, when the applicants had no access to them and were therefore unable to decide whether or not to use them in their defence (judgments cited in paragraph 106 above, Cases T-30/91 *Solvay* v *Commission*, paragraph 83, and T-36/91 *ICI* v *Commission*, paragraph 93).

144 It follows that in order to allow the undertakings and associations of undertakings in question to defend themselves effectively against the objections raised against them in the SO, the Commission has an obligation to make available to them the entire investigation file, except for documents containing business secrets of other undertakings, other confidential information and internal documents of the Commission (judgments in *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 54, and *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 142 above, paragraph 29; Opinions of Advocate General Léger in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, at I-867, point 116, and in Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, at I-8422, point 150).

145 In the light of those principles, it is necessary to determine whether the Commission gave proper access to its investigation file during the administrative procedure.

146 As CBR and Heracles observe, the Commission appears to have based its refusal to grant access to the entire investigation file on considerations stemming from the confidential nature of the documents in question. It thus seems to have taken the view during the administrative procedure that a document obtained by it in the exercise of the powers conferred on it by Regulation No 17 was accessible to third parties only where it had relied on it as evidence against them in the SO (see the order in *Cimenteries CBR and Others* v *Commission*, cited in paragraph 8 above, paragraph 42, and the judgment in *Cimenteries CBR and Others* v *Commission*, cited in paragraph 11 above, paragraph 30).

147 The Court points out that the right of undertakings and associations of undertakings to protect their business secrets must be balanced against the safeguarding of the right to have access to the whole of the file (judgments cited in paragraph 106 above, Cases T-30/91 *Solvay* v *Commission*, paragraph 88, and T-36/91 *ICI* v *Commission*, paragraph 98). Consequently, if the Commission took the view that certain documents in its investigation file contained business secrets or other confidential information, it should have prepared a non-confidential version of the documents in question or had them prepared by the undertakings or associations of undertakings from which they came (judgment cited in paragraph 106 above, Cases T-30/91 *Solvay* v *Commission*, paragraph 92, and Case T-36/91 *ICI* v *Commission*, paragraph 102). If preparation of non-confidential versions of all the documents were to prove difficult, it should have sent to the parties concerned a sufficiently precise list of the documents posing problems so as to enable the undertakings or associations of undertakings to ascertain, with knowledge of the facts, whether the documents described were likely to be relevant for its defence (see Cases T-30/91 *Solvay* v *Commission*, paragraphs 93 and 94, and T-36/91 *ICI* v *Commission*, paragraphs 103 and 104).

148 The Court finds that, in the present case, the Commission did not act in that way. First, it did not make available to the undertakings and associations of undertakings concerned a non-confidential version of the documents which, it claimed, contained business secrets or other confidential information. Second, as Cembureau, ENCI, VNC, Dyckerhoff, Ciments Français, Valenciana, Asland, Uniland, Oficemen, Irish Cement, ATIC, Holderbank, Hornos Ibéricos and AGCI have correctly stated, the list of documents which the Commission provided to the

addressees of the SO was not sufficiently precise. Since it did not describe the content of the documents listed in it (see paragraph 96 above), it did not allow the undertakings and associations of undertakings concerned to assess whether it was expedient to request access to specific documents.

149 The Commission cannot therefore allege, as it has in the cases between it and Dyckerhoff, Heidelberger, Valenciana, Asland, Holderbank and Hornos Ibéricos, that in the present case there can be no question of lack of proper access to the investigation file, because the addressees of the SO could, on the basis of the list itemising all the documents in its investigation file, have requested more extensive access to the file. In any event, where the undertakings or associations of undertakings did request additional access to the documents in the investigation file, the Commission did not grant those requests, which caused some undertakings even to bring an action before the Court (see the judgment in *Cimenteries CBR and Others* v *Commission*, cited in paragraph 11 above). It follows that in the present cases the fact that during the administrative procedure some applicants did not request the Commission to grant them more extensive access to the investigation file or to send specific documents to them, cannot, in view of the obvious pointlessness of doing so at that time, lead to a plea that this was an infringement of their rights of defence being time-barred before the Court of First Instance (Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 96).

150 In these proceedings, the Commission submits that during the administrative procedure all the relevant documents were made available to the addressees of the SO, that is to say, all documents that relate to the accusations against them, whether those documents support the applicants' case or the case against them (Opinion of Advocate General Warner in Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, at 2295, and judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 5 to 10), except for internal notes of the Commission and documents containing confidential information and business secrets.

151 Consequently, the Commission itself submits that, when it assessed which of the various documents in the investigation file should be accessible, it took the relevancy of the documents in question as the criterion for that assessment. In so doing, it therefore selected the documents in the investigation file which, in its view, were useful for the defence of the undertaking or association of undertakings in question.

152 Having regard to all those considerations, the Court finds that, irrespective of whether the Commission's refusal to give access to the inaccessible documents was based on their irrelevancy or their confidential nature, or on a combination of those two criteria, in the present case the Commission did not give the applicants proper access to the investigation file.

153 The Court also points out that during the hearings in Cases T-25/95, T-45/95, T-46/95 and T-60/95, the Commission itself acknowledged that the organisation of access to the file during the administrative procedure in those cases was not as transparent as it should be in an investigation into agreements and concerted practices between undertakings and associations of undertakings. It made that statement when commenting on the usefulness for the applicants' defence of the internal note of Cimpor of 17 February 1983 written by Mr Toscano Jr (documents 33.322/314 to 344) (see paragraph 1123 below). It accepted that this note, in so far as it related to the Head Delegates meeting of 14 January 1983 referred to in point 19(a) of the contested decision, should have been accessible to the applicants during the administrative procedure. During the hearings in Cases T-31/95, T-32/95, T-38/95, T-52/95, T-53/95 and T-56/95 it also acknowledged that there had been errors in organisation of access to the investigation file during the administrative procedure.

154 FIC and Italcementi requested, in documents dated 10 November 1998 and 6 November 1998 respectively, that the Court take formal note, in their cases too, of the Commission's statements regarding access to the file in the hearings in Cases T-25/95, T-45/95, T-46/95 and T-60/95 and in Cases T-31/95, T-32/95, T-52/95 and T-60/95. SFIC and Vicat requested the Court, by letters of 27 October 1998 and 9 February 1999 respectively, to take into account in their cases the statements made by the Commission, regarding the internal note of Cimpor of 17 February 1983 by Mr Toscano Jr (documents 33.322/314 to 344), at the hearings held in other cases. Lafarge and Blue Circle made a similar request in regard to their cases in letters dated 16 November 1998 and 2 December 1998 respectively. Cimpor and SECIL requested, by letters of 11 November 1998 and 17 November 1998 respectively, the Court to take into account in their cases the statements made in Cases T-25/95, T-30/95 and T-60/95. In its letter of 20 November 1998 Cementir requested the Court to take into account in its case the statements made by the Commission relating to access to the file during the hearings held in Cases T-25/95 and T-60/95. Ciments Français made a similar request in regard to its own case in a letter of 4 November 1998. Italcementi also requested, by document of 6 November 1998, that the oral procedure be re-opened pursuant to Article 62 of the Rules of Procedure. Cembureau and Cementir also requested, by letters sent to the Registry of the Court on 1 December 1998 and 20 November 1998 respectively, that the oral procedure be re-opened. According to Cembureau, Italcementi and Cementir the various statements by the Commission in Cases T-25/95, T-31/95, T-32/95, T-52/95 and T-60/95 constitute a new fact.

155 The Court points out that the Commission's statements that proper access to the investigation file was not granted during the administrative procedure are in line with the finding made by the Court solely on the basis of the arguments submitted during the written and oral procedure by the applicants referred to in the previous paragraph (see paragraph 152 above). In those circumstances, the applicants' requests that the Court should take into account statements made by the Commission in other 'Cement' cases are devoid of purpose. As regards the requests for the re-opening of the oral procedure, the Commission has not acknowledged in any of the present 'Cement' cases, either in its pleadings or at the hearing, that it infringed the rights of the defence of the applicants during the administrative procedure by not giving access to some documents in the investigation file (see paragraph 237 et seq. below). For that reason, its statements do not constitute a new fact of such a nature as to be a decisive factor in the outcome of the proceeding (see, to that effect, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 53; Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 127 and

128; Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, hereinafter 'C-200/92 P *ICI* v *Commission*', paragraphs 60 and 61; Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraphs 104 and 105; and Case C-234/92 P *Shell* v *Commission* [1999] ECR I-4501, paragraphs 63 and 64). There is therefore no need to re-open the oral procedure in Cases T-26/95, T-65/95 and T-87/95, nor, therefore, to grant Italcementi's requests that, in preparation for a new oral procedure, there should be added to the file in Case T-65/95 the minutes of the hearing in Cases T-25/95, T-31/95, T-32/95, T-52/95 and T-60/95 and the entire transcript of the hearing in those cases.

156 Contrary to the applicants' contentions, the finding that the Commission did not give the applicants proper access to the investigation file during the administrative procedure cannot in itself lead to annulment of the contested decision as against the 39 applicants who submitted the corresponding line of argument. Access to the file is not an end in itself, but is intended to protect the rights of the defence. Thus, the right of access to the file is inseparable from and dependent on the principle of the rights of the defence (Opinion of Advocate General Léger in *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, points 97 and 98).

157 In the present case, it is therefore necessary to examine whether the applicants' defence was affected by the fact that they were not given proper access to the documents in the investigation file during the administrative procedure.

2. The various measures of organisation of procedure ordered by the Court

2.1. Preliminary observations

158 The Court has already found that the Commission did not give proper access to the investigation file during the administrative procedure (see paragraph 152 above). Furthermore, although no irregularity in that regard has been found (see paragraphs 104 to 123 above), it is common ground that the applicants were not given access to the chapters of the SO relating to the national agreements and concerted practices other than the chapter concerning the national agreements and concerted practices in the Member State in which they were established (see paragraph 94 above).

159 It is therefore necessary to examine whether the rights of the defence of the 39 applicants concerned were infringed because they were not given access to certain passages of the SO and to documents in the investigation file which might have contained exculpatory evidence.

160 The Commission alleges that the applicants' assertion that their rights of defence were infringed is purely theoretical. Referring to the judgment in *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 142 above, paragraph 35, it considers that the Court must reject the vague and hypothetical assertion that there had to be exculpatory evidence in the chapters of the SO and the documents of the investigation file which were inaccessible to the applicants during the administrative procedure.

161 That preliminary argument by the Commission cannot be upheld. Applicants who have raised a plea alleging infringement of their rights of defence cannot be required to set out in their application detailed arguments or a consistent body of evidence to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. Such an approach would in effect amount to requiring a *probatio diabolica* (Opinion of Advocate General Léger in *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, point 119).

162 It was specifically in order to allow the 39 applicants concerned to identify any exculpatory evidence which had not been accessible during the administrative procedure that the Court ordered various measures of organisation of procedure in the course of the present proceedings.

2.2. The various measures ordered

163 By decision notified between 19 January and 2 February 1996 to the parties in each of the cases ('the measures of 19 January to 2 February 1996'), the Court requested the Commission to produce various documents. The Commission did so on 29 February 1996. In each of the cases, it lodged the SO as notified to the applicant concerned, the minutes of the oral hearing of that party, the List (see paragraph 5 above), the Box (see paragraph 95 above) and the correspondence between the Commission and the applicant concerned during the administrative procedure. Since the cases were not joined during the written and oral procedure, none of the applicants could peruse documents lodged by the Commission in the other cases. The measure ordered did not therefore allow the 39 applicants invoking infringement of their rights of defence (see paragraph 124 above) to expound their arguments in that regard.

164 In those circumstances, by decision notified to the parties in the 39 cases concerned (see paragraph 124 above) on 2 October 1996 (hereinafter 'the measure of 2 October 1996'), the Court requested the Commission to authorise the applicants in question to consult the national chapters of the SO at its premises and, in regard to each of the national agreements and concerted practices, to give them access to the same national file as that sent during the administrative procedure to the addressees of the SO established in the Member State concerned. The applicants were requested to identify the passages of the SO and the relevant documents which had not been sent to them during the administrative procedure and to explain in what respect the outcome of the administrative procedure might have been different if those items had been made available to them during that procedure. They were requested to attach to their written submissions a copy of each document commented upon. The Commission was requested to lodge a written reply in each of the cases concerned.

165 As a result it became apparent that all the documents in the files relating to the national agreements and concerted practices were part of files 27.997, 33.126 and 33.322, as itemised on the List (see paragraph 5 above). They were subsets of documents from the Commission's investigation file.

166 By decision notified on 27 February 1997 the Court requested the Commission to specify exactly which documents were rendered accessible to the applicants following the adoption of the measure of 2 October 1996 and to identify them on the List (see paragraph 5 above). The Commission replied to that request by letters of 8 and 17 April 1997.

167 Although the measure of 2 October 1996 enabled the 39 applicants concerned to peruse the whole of the SO and of file 27.997 relating to a national objection concerning the CPMA (see paragraphs 91 and 93 above), it gave them access, however, to only around a quarter of files 33.126 and 33.322 as a whole.

168 Consequently, the Court ordered another measure of organisation of procedure for the disclosure of the remainder of the investigation file. Thus, by decision notified to the parties in the 39 cases concerned (see paragraph 124 above) on 18 and 19 June 1997 ('the measure of 18 and 19 June 1997'), the Court requested the Commission to lodge at the Registry, by 30 September 1997 at the latest, the originals of all documents itemised on the List in files 33.126 and 33.322 except for documents containing business secrets or other confidential information and the Commission's internal documents. The Commission was requested to specify the nature of each internal document on the List (see paragraph 5 above). It was also requested to replace the confidential documents in the file with non-confidential versions or non-confidential summaries (see paragraph 186 below).

169 The 39 applicants concerned were invited to consult, at the Registry of the Court, the original, non-confidential versions of the documents lodged by the Commission. They were allowed to lodge a pleading specifying any document to which they had not had access during the administrative procedure which could have affected their defence and explain briefly why the outcome of the administrative procedure might have been different if the document in question had been made available to them. They were requested to annex to the pleading a copy of each document commented upon. The Commission was allowed to lodge a response in those cases.

170 All the applicants concerned by the measures of 2 October 1996 and 18 and 19 June 1997, except for Ciments Luxembourgeois, lodged observations after they had inspected the Commission's file. The Commission responded in each of those cases.

171 Before examining the arguments which the applicants have set out in their pleadings, the Court points out that in those pleadings Dyckerhoff, Vicat, Heidelberger, Lafarge, Unicem, Blue Circle and AGCI have made some comments that are unrelated to the measures of organisation of procedure, with no specific reference to a document in the investigation file. Those comments must be disregarded: observations lodged in response to measures of organisation of procedure must not extend the written procedure as a whole. For the same reasons, documents which are not from the investigation file must be excluded from consideration. The Court will thus exclude, first, the documents in Annexes IV, V and VI to Lafarge's observations of 10 February 1997 lodged following the measure of 2 October 1996 and the documents in Annexes 87 and 88 to Lafarge's observations of 28 January 1998 lodged following the measure of 18 and 19 June 1997. It is pointed out, moreover, that those documents do not bear references to the numbering in files 33.126 and 33.322 indicated on the List (see paragraph 5 above). Nor can Lafarge allege, as it does in its observations of 28 January 1998, that the documents which it adduces in Annexes IV, V and VI to its observations of 10 February 1997 correspond to documents 33.126/16473 and 16474 adduced in Annex 41 to its observations of 28 January 1998. The alleged correspondence is not apparent from reading those documents.

172 Similarly, the mere reference to a document in the investigation file, without precise explanation of the effect which the failure to disclose it had on the exercise of rights of the defence, does not satisfy the conditions laid down in the measures of organisation of procedure. Consequently, since they cannot be the subject of an appraisal by the Court under those measures, Lafarge's reference to documents 33.126/20386 to 20394 (observations on the measure of 2 October 1996, p. 65) and to documents 33.126/767 to 7886, 16316 to 16765 and 33.322/1 to 3147, listed in a block without specific comments (observations on the measure of 18 and 19 June 1997, pp. 18 to 30), must be rejected.

2.3. The conditions under which the Commission was to perform the measures of organisation of procedure

173 Bearing in mind the object of the measures of organisation of procedure ordered, it is necessary to consider whether the Commission complied with their terms.

2.3.1. The measure of 19 January to 2 February 1996

174 In their pleadings lodged on 7 February 1997 and 13 February 1997 respectively, Rugby, on the one hand, and Castle, Aker and EUROC, on the other, asserted that the Commission had not correctly responded to the Court's requests (see paragraph 163 above). They claimed that the Commission had not sent either the files concerning the national agreements and concerted practices, or the whole of the file concerning the international agreements and concerted practices. Moreover, it had not disclosed certain documents from the correspondence between the applicants and its officials.

175 The Court finds that the first objection has become devoid of purpose following the measures ordered on 2 October 1996, 18 and 19 June 1997. As to the second objection, the applicants concerned do not indicate how the failure to produce the whole of the correspondence between themselves and the Commission could have infringed their rights of defence. The two complaints must therefore be rejected.

2.3.2. The measure of 2 October 1996

176 Pursuant to the measure of 2 October 1996, the 39 applicants concerned were given access to the whole of the SO and to file 27.997 relating to the CPMA, to which reference is made in the chapters of the SO concerning the United Kingdom (Chapters 4 and 14). The argument submitted by Uniland and Oficemen in their pleadings lodged following the measure of 18 and 19 June 1997, claiming that the documents in file 27.997 were not made available to them, must therefore now be rejected.

177 The 39 applicants concerned also had access, following the measure of 2 October 1996, to the documents in files 33.126 and 33.322 relating to the national agreements and concerted practices (see paragraphs 164 to 167 above).

178 In their observations Cembureau, ENCI, VNC, Dyckerhoff, SFIC, Vicat, Ciments Français, Heidelberger, Lafarge, BDZ, Unicem, Valenciana, Rugby, Castle, Cimpor, SECIL, ATIC, Titan, Italcementi, Holderbank, Hornos Ibéricos, Aker, EUROC, Cementir and Blue Circle submit in essence that the Commission did not give them proper access to the investigation file in connection with the measure of organisation of procedure in question.

179 However, those observations have become devoid of purpose. Following the measure of 18 and 19 June 1997 the applicants concerned were given, as found in paragraphs 210 and 211 below, full access to the investigation file (files 27.997, 33.126 and 33.322) apart from documents containing business secrets and other confidential information and the Commission's internal documents.

180 Cembureau, Rugby, Castle, ATIC, Aker and EUROC consider that following the measure of 2 October 1996 the Commission should have made available to the applicants concerned the observations which the addressees of the national chapters of the SO had made in their replies to the SO. According to SFIC, Castle, Irish Cement, Cimpor, SECIL, ATIC, Aker and EUROC, the same applies to the minutes of the hearings concerning the national agreements and concerted practices.

181 However, the measure of 2 October 1996 cannot be interpreted in the sense for which they contend. The Court points out that the measures of 2 October 1996 and 18 and 19 June 1997 were restricted to the national chapters of the SO and to the documents in the investigation file, as itemised on the List (see paragraph 5 above). By those measures the Court wished to ascertain whether the applicants' rights of defence were infringed at the time when they prepared their reply to the SO. The applicants' arguments that their rights of defence were infringed because they were not given access during the administrative procedure to documents not itemised on the List (see paragraph 5 above) will be considered below (see paragraphs 380 to 435).

182 Vicat, Unicem, Asland and Hornos Ibéricos also criticise the Commission's reliance on the plea that certain documents were confidential at the time that access to the national files was organised following the measure of 2 October 1996. Substantial parts of some documents were blanked out because of their confidential nature. The applicants complain that the Commission did not send to them a non-confidential version of documents to which they did not have access. Unicem complains in particular that the Commission did not give access to certain documents relating to events that took place 5 to 10 years previously and which were thus no longer of the slightest business sensitivity. Asland complains that the Commission did not enquire of the undertakings and/or associations of undertakings concerned as to the status of documents for which confidentiality had been claimed in 1990 or in 1991. It refers, by way of example, to documents 33.322/2897 to 2902, to which it was given partial access when it inspected the file at the Commission's offices on 12 November 1996, despite the fact that Hispacement, the

undertaking concerned by those documents, had withdrawn its reservation of confidentiality more than three years previously. Vicat and Hornos Ibéricos refer to the same documents of Hispacement in their submission that the Commission arbitrarily pleaded confidentiality.

183 The Court points out that the purpose of the measure of 2 October 1996 was to grant to the 39 applicants concerned (see paragraph 124 above) access, in respect of each of the national agreements and concerted practices, to the same national file as that which the addressees of the SO established in the Member State concerned had been given access during the administrative procedure. Pursuant to that measure, the Commission did not therefore have to enquire of the undertakings and/or associations of undertakings concerned as to the appropriateness of maintaining the confidentiality claimed for certain documents during the administrative procedure.

184 However, in the measure of 18 and 19 June 1997 the Court requested the Commission to invite the undertakings and associations of undertakings from which documents included in the file had been obtained to 'update' their assessment of the appropriateness of maintaining the confidentiality which they had claimed for certain documents. When they inspected the file at the Registry of the Court, or even sooner (for example, in respect of the documents of Hispacement: documents 33.322/2897 to 2902), Vicat, Unicem, Asland and Hornos Ibéricos were therefore able to have access to all documents in respect of which the request for confidentiality had been withdrawn by the undertakings and/or associations of undertakings during the procedure before the Court, and to submit any observations they had on those documents. The arguments of those four applicants (see paragraph 182 above) have therefore become devoid of purpose.

2.3.3. The measure of 18 and 19 June 1997

185 The measure of 18 and 19 June 1997 applied to the whole of files 33.126 and 33.322, except for documents containing business secrets or other confidential information and the Commission's internal documents (*BPB Industries and British Gypsum* v *Commission*, cited in paragraph 142 above, paragraph 29).

186 As regards the documents or categories of documents classified as internal on the List (see paragraph 5 above) (Identification Code No 10), the Commission was requested to explain the nature of each document and to insert those explanations in place of the documents to which they referred in the files organised in accordance with the numbering of the List. As regards the documents containing business secrets or other confidential information, the Court requested the Commission to contact the undertakings and associations of undertakings from which they had obtained the documents making up the investigation file and to ask them to specify which items should not be disclosed to third parties, giving reasons on each occasion for the request for confidentiality and preparing a non-confidential version or a non-confidential summary of

the documents containing those items. The Commission was requested to insert those non-confidential versions or non-confidential summaries in the files organised in accordance with the numbering of the List, in place of the documents containing confidential items.

187 After receiving files 33.126 and 33.322 the Court noted that, as Dyckerhoff, Ciments Français, Lafarge, Unicem, ATIC and Italcementi had submitted in their observations, the Commission had not specified the nature of documents 33.126/19057 to 19156, classified on the List (see paragraph 5 above) as internal documents of the Commission, in a set of documents 33.126/19026 to 19156. In reply to a written question from the Court, the Commission explained that an error in numbering had been committed in the Registry of the Directorate-General for Competition (DG IV) when all the documents in the investigation file were registered, and that documents 33.126/19057 to 19156 did not exist.

188 The Commission's explanations in that regard must be accepted. The summary and pagination of file No 49 of the investigation file, as made up by the Registry of DG IV, refer to pages 33.126/18612 to 19056, whereas the summary and pagination of file No 50 refer to pages 33.126/19157 to 19433. It can therefore be concluded that there was an error of numbering when file No 50 was made up.

189 Several applicants contend that the Commission did not always grant access to the whole of the investigation file.

190 The Court finds that the applicants' argument is based on a factual error where they claim not to have had access to certain documents when those documents are in fact in the investigation file sent to the Court. That is so in the case of documents 33.126/19865 to which Ciments Français refers, 33.126/5236 and 12012, 33.322/56, 57, 1881, 1882 and 2463 to which Lafarge refers, 33.126/4595, 4621, 4633, 4650, 4713 and 4796, 33.322/30 to 32, 207 to 209, 237, 1090, 1091 and 1184 to which Uniland and Oficemen refer, document 33.126/166 to which Oficemen refers, and documents 33.126/11248, 11249, 17568 to 17576, 17994, 18007 and 19865, and 33.322/1760 to 1769 to which Italcementi refers.

191 Ciments Français, Lafarge, Unicem and Italcementi also contend that the Commission failed to send to the Court documents 33.126/895 to 911. They state, moreover, that document 33.126/3434 in the investigation file has not been made available. Nor, according to Ciments Français and Italcementi, did the file sent to the Court include documents 33.126/10241 to 10243. Finally, Unicem complains that documents 33.126/19422 and 19423 were missing.

192 In response to a written question from the Court concerning that point, the Commission states that it sent all those documents to the Court. It assumes that, if the pages are no longer at the place where they should be, that is because they were misfiled during inspection of the file.

193 That explanation may be accepted, particularly since the Commission resubmitted, prior to the hearings, a copy of the pages in question, which were thus part of the file in each of the 39 cases concerned.

194 Lafarge also alleges that documents 33.126/1691 and 33.322/3 are incomplete. However, no part of those documents has been blanked out. The applicant's argument therefore has no factual basis.

195 Lafarge, Uniland and Oficemen submit that they were not given access to documents 33.126/1 to 165 and 11494 to 11517. Uniland and Oficemen made the same objection in regard to documents 33.322/1092 to 1183 and 1185 to 1194, and Unicem in regard to document 33.126/19056.

196 However, the Court points out that all those documents are internal notes of the Commission, the nature of which was explained in the file sent to the Court. As internal notes, those documents could validly be excluded from the process of inspection implemented pursuant to the measure of organisation of procedure (*Hercules Chemicals* v *Commission*, cited above at paragraph 140, paragraphs 53 and 54, and *BPB Industries and British Gypsum* v *Commission*, cited at paragraph 144 above, paragraph 22; order of 10 December 1997 in Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, paragraph 35).

197 Several applicants allege that they were unable to gain access to the following documents for which the companies at whose premises they had been obtained had, following the measure of organisation of procedure, maintained their request for confidential treatment: documents 33.126/682 to 684 and 711 to 716 to which Lafarge, Uniland, Oficemen and Italcementi refer, documents 33.322/58 to 70 to which Lafarge refers, documents 33.126/4596 to 4620, 4634 to 4649, 4659 to 4712 and 4719 to 4795 to which Uniland, Oficemen and Italcementi refer, and documents 33.322/33 to 55 and 210 to 236 to which Lafarge, Uniland and Oficemen refer.

198 Documents 33.126/682 to 684 and 711 to 716 are, respectively, a summary of the 'Business plan of Inter-Béton', the joint venture between CBR and Obourg for the manufacture and distribution of concrete, and the management contract for Inter-Béton. Documents 33.322/58 to 70 contain a 'Strategic plan for Cimpor'. Documents 33.126/4596 to 4620, 4634 to 4649,

4659 to 4712 et 4719 to 4795 are documents which Lafarge still considers to be covered by the protection of business secrets (budget for the years 1989-1991, by Gilbert Liduena, Lafarge, 18 October 1988 (documents 33.126/4642 to 4649 and 4659 to 4712); Scénarios d'impasse — Trois scénarios possibles (deadlock scenarios — three possible scenarios) (documents 33.126/4596 to 4620); Strategy against the Greek cement industry, Lafarge, DEP, 12 April 1988 (documents 33.126/4634 to 4641); Sud-Est/Vallée de Seine study, introduction — methodology, working document, Lafarge, DEP, F. Phélip, 21 April 1989 (documents 33.126/4719 to 4724); working document of the Sud-Est/Vallée de Seine study, Direction Études et Plan, F. Phélip, Lafarge, 21 April 1989 (documents 33.126/4725 to 4730); Vallée de Seine, DEP Lafarge, M. Morel, 21 April 1989 (documents 33.126/4731 to 4766); Sud-Est, DEP Lafarge, M. Morel, 21 April 1989 (documents 33.126/4767 to 4795)). Documents 33.322/33 to 55 and 210 to 236 are internal studies of Cimpor which illustrate that company's business strategy and set out basic options as to the positioning of the company on the market.

199 When they inspected the file pursuant to the measure of 18 and 19 June 1997, the 39 parties were given access to a non-confidential version or a non-confidential summary of the above documents. By means of those non-confidential versions or summaries they were therefore able to gain an adequate idea of the documents in question with which to assess the extent to which they were relevant to the exercise of their rights of defence during the administrative procedure. The fact that the Commission always acceded to the various requests for confidential treatment and never examined the substance of those requests, a point which was raised by Uniland and Oficemen, is wholly irrelevant in that regard, since Lafarge, Uniland, Oficemen and Italcementi have not adduced any evidence to show that the documents could have been of interest for their defence. The objection based on lack of access to those documents during inspection of the file must therefore be rejected.

200 Similarly, but in a general manner, Ciments Français contend that the lawyers' letters claiming confidentiality for certain documents not included in the investigation file do not refer to the numbers of the missing documents. However, it does not adduce the slightest evidence to show that the documents to which it refers — which it does not even specify — could have been of interest for its defence during the administrative procedure. In those circumstances, its argument must be rejected as insufficiently precise.

201 ATIC contends that the confidential documents were rarely replaced by summaries. Similarly, Cimpor and SECIL state that, of the documents made available following the measure of organisation of procedure, a large number were replaced by sheets of paper which solely indicated the number and nature of the document. That argument, which has not been supported by any specific reference to documents in the investigation file, must also be rejected on the ground that it lacks precision.

202 In that same context, Italcementi refers to documents 33.126/436 to 439, 4491 to 4592, 11215 to 11218, 11224 to 11241, 11250 to 11252, 17476 to 17483, 17995 to 18006, 18102 to 18109, pages 12 to 19 of document 33.126/4982, documents 33.322/1636, 1638 to 1755, 1757, 1759, 1770 to 1789 and 1792 to 1796. After reading the lawyers' letters placed in the

file, it notes that the absence of some of those documents is explained by the fact that the undertakings concerned repeated the reservation of confidentiality in the context of the inspection of the file organised by the measure of 18 and 19 June 1997. It considers, however, that the lawyers' letters, which make no reference to the numbering given by the Commission to the documents in its file, do not allow it to be ascertained whether all the missing documents are confidential. It states that although the Court, in its measure of organisation of procedure, gave very specific instructions to the undertakings and associations of undertakings concerned regarding the treatment of confidential documents, some lawyers' letters not only failed to annex the non-confidential version of the documents for which they were claiming continued confidentiality, but were even so vague that they did not allow their content to be ascertained, even in summary. It refers, by way of example, to the letter of 5 August 1997 from Valenciana's lawyers to the Commission asking it not to grant third parties access to the documents of the board of directors of that company, as a result of which documents 33.322/1825 to 1880 were removed from the file, but without the inclusion in the file accessible to Italcementi of the agenda of those meetings or the subject-matter of the decisions adopted in them.

203 Lafarge also complains of the confidential treatment of documents 33.322/1825 to 1880 and of documents 33.322/911 to 918.

204 The Court finds that documents 33.322/1792 to 1796 are not in the investigation file to which the Commission granted access and that at the place where those documents should be found there is no indication or explanation of the reasons for their unavailability. However, by its measure of 18 and 19 June 1997 the Court also requested the Commission to send to the Court the documents in the investigation file for which the parties concerned had requested confidential treatment. After checking the files containing the confidential documents in the investigation file thus sent by the Commission, the Court finds that confidential treatment had been requested by Asland for documents 33.322/1792 to 1796. They constitute a document entitled 'details of balance sheet of Zemland Investment AG', which is unconnected with any objection raised against Italcementi in the contested decision and which could clearly not have been of any use for its defence during the administrative procedure. In those circumstances, Italcementi cannot base any argument on improper performance of the measure of organisation of procedure in regard to that document.

205 As regards documents 33.322/1825 to 1880 to which Lafarge and Italcementi refer, it is correct that, contrary to the instructions given by the Court in June 1997, the letter of 5 August 1997 from Valenciana's lawyers seeking continued confidential treatment of those documents was not accompanied by a non-confidential version or summary of them, nor did it indicate the agenda or subject-matter of the meetings in question. Likewise, as regards documents 33.322/911 to 918, it was solely stated that it was a framework agreement for cooperation between Cimpor and Ciments Français. However, Lafarge and Italcementi have not explained how those documents could have been of interest for their defence during the administrative procedure. In any event, after checking the files containing the confidential documents in the investigation file, the Court finds that the content of documents 33.322/1825 to 1880 and 33.322/911 to 918 are unconnected with any objection raised against Lafarge and Italcementi in the contested decision. Those documents could not therefore have been useful for the defence of Lafarge and

Italcementi during the administrative procedure. In those circumstances, Lafarge and Italcementi cannot base any argument on the improper performance of the measure of organisation of procedure in regard to those documents.

206 Confidential treatment of all the other documents cited in paragraph 202 above had been requested, and, following the measure of organisation of procedure, Italcementi had access to a non-confidential version or summary of them. At the place in the investigation file where documents 33.126/436 to 439 should be there is a letter of 28 August 1997 from the lawyers of Obourg, which lists five documents which that company classifies as business secrets (Inter-Béton management contract between Obourg and CBR of 10 October 1967; agreement between the future shareholders of NCGCP (Nouvelle Gralex) of 2 July 1985 and supplementary agreement No 1 thereto of 12 July 1985; agreement between Obourg and CBR for the common management of Nouvelle Gralex; business plan of Inter-Béton, Gralex and Obourg-Calcaire; cost price calculations for clinker and cement sold by Obourg in November 1988) with a brief non-confidential summary of those five documents. In the places in the file where documents 33.126/4491 to 4592 and pages 12 to 19 of document 33.126/4982 should be found, there is, each time, a letter of 16 September 1997 from Lafarge's lawyers which lists various documents which that company still considers to be covered by the protection of business secrets (forward planning of the Lafarge group, cement and associated activities, summary of notes made by members of the executive committee during the first quarter of 1986, Philippe Agid, 25 April 1986 (documents 33.126/4491 to 4509); scénario de déstabilisation concurrentielle en Europe — éléments clés — risque d'impasse — diagnostics (destabilisation of competition in Europe — key elements — risk of deadlock — diagnoses), Lafarge, March 1988 (documents 33.126/4510 to 4592); extract from the budget for 1989-1991, by Gilbert Liduena, Lafarge, 18 October 1988 (documents 33.126/4982, pp. 12 to 19)) and which encloses a non-confidential summary of those documents. Documents 33.126/11215 to 11218, 11224 to 11241 and 11250 to 11252 (relating to Blue Circle's business policy) have been replaced in the file by a non-confidential version. In the place in the file where documents 33.126/17476 to 17483 and 17995 to 18006 should be there are 8 and 12 pages respectively, each with the words 'non-confidential version' set out in the upper right corner. In the place in the file where documents 33.126/18102 to 18109 should be there is a letter of 12 September 1997 in which CBR's lawyers state that the Commission's official to whom the letter was addressed had indicated that Obourg SA had 'requested confidentiality for the Inter-Béton management contract which it had concluded with CBR on 10 October 1967'. It seemed to them to be 'necessary for reasons of coherency and consideration for the other party to the contract, to extend confidentiality to the two supplementary agreements to the contract, namely "the first confidential supplement to the Inter-Béton management contract of 10 October 1967 (freezing of securities)" and "the second confidential supplement to the Inter-Béton management contract", those two supplementary agreements having been supplied by CBR to the Commission in Annex 5A to the reply to the request for information of 19 March 1990.' It seemed to them 'to be all the more reasonable to give those two supplementary agreements confidential treatment since they relate to issues which are wholly irrelevant to the present case'. In each place in the file where documents 33.322/1636, 1638 to 1755, 1757, 1759, 1770 to 1789 and 1792 to 1796 should be, there is a letter of 28 July 1997 from Asland's lawyers, which specifies amongst the documents in pp. 1508 to 1810 of file 33.322 those documents which Asland wishes to keep confidential because 'they relate to internal restructuring operations of the company, have no bearing on the alleged infringements, and are an integral part of the strategy and internal policy adopted by Asland during the reference period', and

identifies those documents to which Asland has no objection that they be made available to third parties.

207 In those circumstances, as Italcementi has not adduced any evidence to show that the documents listed in paragraph 202 above that were given confidential treatment in accordance with the Court's instructions could have been of interest for its defence during the administrative procedure, the Court must reject the objection based on lack of access to those documents during the inspection of the file following the measure of 18 and 19 June 1997. It should be added that the various letters from the lawyers referred to in the previous paragraph each listed with precision the documents affected by the reservation of confidentiality and identified them systematically by reference to their heading. In the absence of proof to the contrary, the Court must therefore find that the Commission, in allowing the parties to inspect only the documents to which those requests related, correctly gave effect to the requests for confidential treatment in those letters.

208 Finally, Holderbank alleges that the Commission failed to protect business secrets when it performed the measure of 18 and 19 June 1997. It states that although it and its subsidiary Obourg informed the Commission that the contract to establish Inter-Béton, which was in the investigation file, should not be made available to third parties because it contained business secrets (see letters of 3 September 1997 from the applicant to the Commission and of 28 August 1997 from Obourg to the Commission, Annex 7 to the applicant's observations of 8 December 1997), the Commission made that document accessible to all parties. It states that, although action on its part when it inspected the file on 29 October 1997 made it possible to prevent other applicants from inspecting the document thereafter, its competitors and those of Obourg which inspected the file before 29 October 1997 nevertheless saw that contract, so that its subsequent removal from the file did not redress the failure to protect its business secrets. It finds that this event is all the more incomprehensible since the other documents which Obourg and it had classified as business secrets were withdrawn from the file by the Commission before inspection commenced.

209 Although it is regrettable that the Commission allowed that confidential document to be inspected for a time by third parties, the Court finds that Holderbank's argument has no bearing on an assessment of the merits of its action. Such conduct by the Commission does not affect the legality of the contested decision.

2.3.4. Interim findings

210 It follows from the whole of the foregoing that the 39 applicants concerned by the line of argument in question (see paragraph 124 above) had, during the written procedure before the Court, full access to the SO and access to the investigation file that was equal to that which they should have had during the administrative procedure. They had access to the whole of the investigation file except for documents containing business secrets of other undertakings or other confidential information and the Commission's internal documents. Moreover, the Commission specified the nature of the internal documents in the investigation file and made available a non-confidential version or non-confidential summary of documents for which confidential treatment had been requested. The rare defects in performance of the measure of organisation of procedure which have been indicated in paragraphs 204 and 205 above relate to documents which would clearly not have been useful for the defence of the applicants during the administrative procedure.

211 The Court therefore finds that following the measures of 2 October 1996 and 18 and 19 June 1997 the 39 applicants concerned had all the necessary information to expound the argument that their rights of defence were infringed because the chapters of the SO and the documents in the investigation file to which they were not given access during the administrative procedure contained exculpatory evidence. Furthermore, those measures of organisation of procedure gave effect to the applications of Dyckerhoff, Aalborg, Rugby, Castle, Heracles, Aker, EUROC and Italcementi for an order that the Commission produce the documents in files 27.997, 33.126 and 33.322. Finally, the complaint by Hornos Ibéricos that on 6 January 1995 the Commission had refused to grant it access to the investigation file has no further purpose.

2.3.5. Special circumstances which impaired the effectiveness of the measures of 2 October 1996 and 18 and 19 June 1997

212 In their pleadings lodged following the measures of 2 October 1996 and 18 and 19 June 1997, some applicants have pleaded that special circumstances impaired the effectiveness of those measures.

213 First, Blue Circle complains that it was given an extremely short period of time within which to assess the documents which became available following the measure of 2 October 1996. Unicem, Titan and Blue Circle make the same criticism regarding the documents to which access was granted following the measure of 18 and 19 June 1997, stating that they did not have adequate time to coordinate their examination of all those documents with the examination of the documents to which they had previously had access. Blue Circle adds that it was unable to provide any assistance to its lawyers in the examination of the mass of

commercial documents, for the purposes of preparing its statement following the measure of 18 and 19 June 1997, since none of its employees were available to do so during that period.

214 As regards the measure of 2 October 1996, the Court points out that Blue Circle was able to inspect the files relating to the national objections on 27 November 1996. That applicant, which lodged its observations on the relevance of the documents in that file on 10 February 1997, therefore had a period of two and a half months within which to prepare those observations. Unicem, Titan and Blue Circle then had a period of six weeks following inspection of the investigation file within which to prepare their written statements in connection with the measure of 18 and 19 June 1997.

215 Having regard to the fact that Article 173 of the Treaty allows a period of two months for the bringing of an action for annulment, those applicants were therefore given a reasonable period. The Court points out that the object of those measures of organisation of procedure was limited. It was to enable the 39 applicants concerned to identify the exculpatory evidence in the documents which had been kept secret during the administrative procedure and to explain how the outcome of that procedure might have been different if they had had access to that evidence during that procedure. In order to prepare a statement following the measures it was not necessary to make a careful examination of each document made accessible. It is apparent merely from the title of numerous documents in the investigation file that they had no bearing on the objections adopted against Unicem, Titan or Blue Circle in the contested decision.

216 As to the argument that it was physically impossible for Blue Circle to assist its lawyers in the performance of the measure of 18 and 19 June 1997, the Court points out that except in the case of *force majeure*, which has not been proved in this case, the difficulties and uncertainties associated with a party's internal organisation cannot be pleaded by it where it has had a reasonable period within which to exercise its rights of defence. In any event, Blue Circle cannot reasonably contend in this case that during the period allowed within which to lodge observations following its lawyers' inspection of the file at the Registry of the Court none of its employees was able to devote any time whatsoever to assist them in appraising the documents which they had selected.

217 It follows that the Court must reject the arguments of Unicem, Titan and Blue Circle alleging that an inadequate period was given to them within which to prepare a written statement following the measures of organisation of procedure.

218 Second, Dyckerhoff, BDZ, Asland, Uniland, Oficemen, Holderbank, Hornos Ibéricos and Blue Circle claim that some documents to which they were given access following the measure of 2 October 1996 were illegible. Asland gives document 33.322/1012 et seq. as an example. BDZ, Castle, Holderbank and Hornos Ibéricos also complain of the fact that the documents inspected were copies and not original documents. Holderbank criticises in particular the

Commission's express refusal to allow access to the original documents. As the Commission claims that Holderbank was able to have access to the original documents, Holderbank requests the Court, in its letter of 27 May 1997, to examine the relevant Commission official. It explains that some documents were photocopied in a reduced format before being made accessible following the measure of 2 October 1996. It is, moreover, impossible to ascertain whether the copies made available to the applicants were all complete and there are even grounds for supposing that this was not the case with some of them. Holderbank refers in particular to document 33.126/14929.

219 Uniland, Oficemen and Italcementi complain of the illegibility of some documents which were accessible following the measure of 18 and 19 June 1997. Uniland and Oficemen refer to documents 33.126/879, 11411 to 1144 (sic), 5803, 5804, 5885, 5886, 6499, 7157 to 7163, 14762, 14789, 15124, 15125, 15319, 15320, 15356, 15357, 15391 to 15393, 19554, 19555, 20026 to 20032 and 20168 to 20171.

220 The Court finds that the applicants do not complain of the illegibility of the documents in file 27.997 made available following the measure of 2 October 1996. As to the documents in files 33.126 and 33.322, the applicants had access to the originals of those documents following the measure of 18 and 19 June 1997 (see paragraphs 168 and 169 above). The observations regarding the illegibility of copies which the applicants were able to inspect following the measure of 2 October 1996 therefore serve no further purpose. There is therefore no longer any need to order the measure requested by Holderbank. The Commission is not responsible for the illegibility of original documents which it had during the administrative procedure and such illegibility could not have hindered the attainment of the objectives which the measures of 2 October 1996 and 18 and 19 June 1997 sought to attain by granting the applicants access to the investigation file: any such illegibility was the same for both the applicants and the Commission. The knowledge gained by the Commission from the illegible documents was not therefore different from that which the applicants could have gained from inspecting them.

221 The arguments of Dyckerhoff, BDZ, Asland, Uniland, Oficemen, Italcementi, Holderbank, Hornos Ibéricos and Blue Circle grounded on the illegibility of certain documents to which they had access following the measures of 2 October 1996 and 18 and 19 June 1997 cannot therefore be upheld.

222 Third, Unicem, Titan and Blue Circle complain that they were not provided with translations of the documents to which they obtained access following the measures of organisation of procedure, even though those documents were in many different languages. That complicated the preparation of their observations within the period allowed to them. Similarly, Valenciana complains that it was not provided with a translation of the national chapters of the SO other than the Spanish chapters, or of documents to which those chapters refer, or of other documents in the file.

223 The Court points out that the language rules laid down in Article 3 of Regulation No 1 apply solely to documents sent by the institutions to specified addressees (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 21). The Commission was not therefore required to provide the applicants with a translation of the various documents obtained during its investigation: even though the Commission was required to provide access to them during the procedure before the Court, they were not documents officially communicated by the Commission to the applicants. Nor was the Commission required to provide Valenciana with a translation of the national chapters of the SO other than those relating to Spain (Chapters 8 and 18), as it was not one of the addressees of those other national chapters. The objection raised by Unicem, Valenciana, Titan and Blue Circle must therefore be rejected.

224 Fourth, Valenciana, Asland, Uniland, Oficemen and Hornos Ibéricos complain that there was no list giving the tenor of the documents in the investigation file.

225 The Court notes that the applicants did not, either during the administrative procedure or during the procedure before the Court, have a list giving the tenor of the documents in the investigation file. The only list which they had was the List, sent to addressees of the SO during the administrative procedure (see paragraph 5 above).

226 However, that fact did not impair their rights of defence during the procedure before the Court. Following the measures of 2 October 1996 and 18 and 19 June 1997 they had access to all the documents in the investigation file, except for those containing business secrets or other confidential information and internal documents of the Commission. They also had access to non-confidential versions or summaries of documents regarded as confidential, and the Commission indicated the nature of the internal documents held in its files. The absence of a list giving the tenor of each document could not have prevented them from identifying, during the procedure before the Court, those documents in the investigation file which might have been useful for their defence during the administrative procedure and, accordingly, from showing that their rights of defence were infringed during the latter procedure.

227 Consequently, the Court must reject the applicants' argument inasmuch as it criticises the lack, during the procedure before the Court, of a list giving the tenor of the documents in the investigation file. The Court will examine that argument below (see paragraphs 272 to 275) inasmuch as it criticises the lack of a detailed list during the administrative procedure.

228 Fifth, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Aalborg, Asland, Uniland, Oficemen and Blue Circle point to several filing or classification errors which, they claim,

increased the difficulties which they encountered when preparing written pleadings pursuant to the measures of organisation of procedure. Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Aalborg and Asland criticise the way in which the national files were composed. Ciments Français emphasises in particular the arbitrary classification of documents according to their allegedly national or international character (33.126/10827, 10828, 17157 to 17159, 17166 to 17170, 17178, 17179 and 19881 to 19887). According to Aalborg, there is no logical distinction between the alleged national agreements and concerted practices and the alleged international agreements and concerted practices. By way of example, it refers to documents 33.126/19201 and 19202 which it found in the Greek file, despite the fact that they relate to a Greek-Spanish body cooperating on overseas exports. Ciments Français also objects to the fact that numerous documents are numbered solely on the first page, in particular in the file relating to Spain. Ciments Français and Lafarge criticise generally the total lack of transparency in the composition of files 33.126 and 33.322. Heidelberger, for its part, submits that the numbering of the investigation file is impenetrable. It refers to the lack of numbering of certain documents in the L ring binder of documents lodged by the Commission at the Registry of the Court pursuant to the measure of 18 and 19 June 1997. It points to document 33.126/9571, which has 32 pages, document 33.126/4982 which is subdivided into numerous sub-numbers, and ring binder XLI of the file. Dyckerhoff, Unicem, Castle, Holderbank, Hornos Ibéricos and Cementir complain that the numbering of documents was illegible. Cementir adds that the illegible numbering of a series of documents to which it was given access following the measure of 2 October 1996 compelled it to undertake an extremely careful examination in order to identify the 'new' documents to which it had access following the measure of 18 and 19 June 1997. BDZ objects to the existence of different numbering on the documents consulted. Asland observes that some documents appeared two or three times in the national files with a different pagination but the same reference number on the List (see paragraph 5 above). By way of example, it refers to pp. 64 to 70, 105 to 111 and 182 to 188 of the file relating to Portugal, which bear the number 33.322/2897 et seq. Hornos Ibéricos also submits that the file made available to it seems to have been tampered with: various documents in the file have been annotated by the Commission's officials. It cites documents 33.322/170, 172 and 489 and documents 33.126/11988, 17359, 17441, 17578, 17579, 17582, 17586, 17658, 17936 and 17996.

229 Italcementi makes similar observations regarding the investigation file which it was allowed to inspect following the measure of 18 and 19 June 1997. When it inspected that file it saw that it included unnumbered documents (ring binder XVIII, document 33.126/6857a contains unnumbered pages in Annex 5; in ring binder XX there are seven unnumbered pages after document 33.126/6891; in ring binder XXII there are, after document 33.126/8384a, four unnumbered pages; in ring binder XXIV, document 33.126/9416 is followed by seven unnumbered pages and document 33.126/9571 by 33 unnumbered pages; in ring binder XXVII, document 33.126/10743 is followed by 17 unnumbered pages and document 33.126/10745 by two unnumbered pages; in ring binder XXVIII there are two unnumbered pages, after document 33.126/11206; in ring binder XXX, documents 33.126/11912 and 12230 are, in each case, followed by one unnumbered page; in ring binder XXXVI, documents 33.126/14411 and 14502 are followed by one unnumbered page; in ring binder XLII, document 33.126/16934 is followed by three unnumbered pages; in ring binder XLIII, document 33.126/16971 is followed by five unnumbered pages; in ring binder XLVII, document 33.126/18099 is followed by one unnumbered page). The applicant also found that in the case of documents comprising several pages, such as brochures, balance sheets, contracts or lists of sales or prices, the Commission merely numbered the first page of the document in question or numbered it alternately or non-consecutively (for example, ring binder XXXVII, in which some documents printed on both sides of the page have, on their reverse, numbers which are several units higher than the

numbers printed on their front (for example, front page 33.126/14982 — reverse 33.126/14991, front page 33.126/14983 — reverse 33.126/14990, front page 33.126/14984 — reverse 33.126/14989); ring binder LI in which certain contracts are numbered only on the cover page (for example, 33.126/19556), whereas others are numbered on each page (for example, 33.126/19561 to 19577)). Ring binder VIII of file 33.322 is in such a state of disorder that it is impossible to be certain whether it is complete.

230 Blue Circle draws attention to the disorderly state of the file, the absence of some pages and the double numbering of some documents. Uniland and Oficemen contend that ring binder LI, relating to case 33.126 is not referred to in the List (see paragraph 5 above) of documents drawn up by the Commission. Similarly, inspection of that list would lead one to believe that in ring binder XXXVII, only documents 33.126/14740 to 14742 relate to SIPAC, whereas SIPAC is dealt with from document 33.126/14739 onwards. When they inspected the file on 17 December 1997, Uniland and Oficemen discovered documents relating to case 33.126 in the files relating to case 33.322: documents 2448 to 2477 of case 33.126, which should have appeared in ring binder VII of that case, are in ring binders I and II of case 33.322. The disorderly numbering of documents in ring binders IV and V of case 33.322 made it difficult to examine them. Uniland and Oficemen state that the file passes without transition from document 1018 to document 1039 then, further on, from document 1050 to document 1069, then, a little further again, from document 1072 to document 1012, which is immediately followed by document 1038 and decreasing numbering until document 1019, which in turn is followed by six unnumbered pages which are impossible to place in the file. Some pages of those files are, moreover, impossible to classify. Documents 33.126/11123 to 11127 which, according to the List drawn up by the Commission (see paragraph 5 above), should have been in ring binder XXVIII, are in ring binder XXVII. Ring binder XXIX of case 33.126 contains numbering errors, Nos 11694 to 11699 having been used to designate two different series of documents.

231 Those objections are irrelevant to the Court's examination of the argument in question. The applicants have not explained how the way the files were made up affected their rights of defence in this case. As regards the objection relating to the numbering of and 'tampering' with documents, the Court finds that, even if the parties' allegations were proved, the lack of numbering or incomplete or disorganised numbering of one or other document, or the annotation by the Commission of one or other document in the investigation file, are not such as to hinder the attainment of the objectives which the measures of 2 October 1996 and 18 and 19 June 1997 sought to attain by granting to the applicants access to the investigation file. The applicants were able to adduce, as annexes to their observations, documents from the file whose numbering was illegible or which had been 'annotated' by the Commission, and explain how those documents would have been relevant to their defence during the administrative procedure. The same holds for the disorderly state of some isolated parts of the investigation file.

232 The objection alleging that the Commission gave the same numbering (33.126/11694 to 11699) to two separate series of documents is based on the handwritten alteration, on some copies made by Uniland and Oficemen, of the numbering of the original documents in the

Commission's file. It is absolutely clear from examination of the Commission's original file that the documents numbered from 33.126/11694 to 11699 in that file relate solely to extracts from hand-written notes taken (in all likelihood by Cembureau) at the meeting of the Head Delegates of 30 May 1983 in Kerkyra (documents 33.126/11694 to 11696); a letter of 20 January 1984 from J. Bailly (Chairman of Cembureau) to Mr Bertran (Chairman of Asland) (document 33.126/11697); the minutes taken by 'P.D.' (probably Philippe Dutron of Cembureau) on 13 March 1984; a telephone conversation with Mr d'Agostino (Italcementi) relating to exports of cement from Italy to Switzerland (document 33.126/11698); and the list of participants in the Head Delegates meeting of 19 March 1984 in Noordwijk (document 33.126/11699). The other series of documents, which Uniland and Oficemen submit is also covered by the numbering from 33.126/11694 to 11699 and which relates to other extracts from handwritten notes taken at the meeting of the Head Delegates of 30 May 1983 in Kerkyra, is numbered 33.126/11689 to 11693. Finally, as Uniland and Oficemen point out, the List (see paragraph 5 above) does not refer to a ring binder LI. It does, however, refer to two ring binders L, so that the second ring binder L to which the List refers is in fact ring binder LI.

233 It follows from the foregoing that the whole of the arguments set out in paragraphs 228 to 230 above must be rejected.

234 Finally, in the sixth place, Blue Circle states that it endeavoured to avoid relying, in its observations lodged following the measure of 18 and 19 June 1997, on documents which had legitimately been classified as confidential during the administrative procedure. It complains that the Commission refused to supply it with a list of those documents. It annexes to the observations it lodged following the measure of 18 and 19 June 1997 (Annex 3) the relevant exchanges of correspondence in that regard, during which it justified its request by the concern, having regard to the short period allowed to it within which to submit its observations following its inspection of the remainder of the file, to distinguish between the documents to which it had been refused access during the administrative procedure because a request for confidential treatment of them had been made by the party or parties concerned, and documents to which it had not had access because the Commission had decided that they were not relevant to its defence.

235 The Court points out that although the Commission did not make available to Blue Circle the list which it had requested, it nevertheless informed it, by letter of 13 November 1997 (Annex 3 to the applicant's observations lodged following the measure of 18 and 19 June 1997), of the criteria enabling it to identify the documents for which confidentiality had been claimed during the administrative procedure. There would have been no point whatsoever in a more precise explanation of the documents classified as confidential during that procedure, since, by the measure of 18 and 19 June 1997, the undertakings and associations of undertakings concerned were requested to 'update' their assessment of the need to maintain the confidentiality then claimed for certain documents. A number of documents classified as confidential during the administrative procedure were thereby rendered accessible to the applicants when they inspected the investigation file at the Registry of the Court. The provision by the Commission of the list of documents classified as confidential during the administrative procedure certainly did

not deprive Blue Circle of the possibility of relying on one or other of the documents which were on that list but for which confidentiality subsequently ceased to be claimed. Consideration of the documents annexed by the applicant to its observations shows, moreover, that — contrary to its assertions in those observations — it did not hesitate to rely on documents which had been classified as confidential during the administrative procedure but which the undertakings and/or associations of undertakings concerned had agreed to allow to be made available to third parties in the context of the measure of 18 and 19 June 1997. The Court refers, by way of example, to documents 33.126/16936 to 16938, contained in Annex 5-10 to the applicant's observations, which are stated to be 'confidential'. Blue Circle's argument must therefore be rejected.

236 It follows from the whole of the foregoing that none of the special circumstances pleaded by the various applicants could have hindered the attainment of the objectives which the measures of 2 October 1996 and 18 and 19 June 1997 sought to attain by granting access to the whole of the SO and of the investigation file to them.

3. Analytical framework for assessing an argument alleging infringement of the rights of the defence because of the inaccessibility of allegedly exculpatory evidence during the administrative procedure

237 By the measures of 2 October 1996 and 18 and 19 June 1997, the 39 applicants submitting the argument under consideration (see paragraph 124 above) were requested to provide a detailed explanation of their argument that the parts of the SO and of the investigation file to which they were not given access during the administrative procedure would have been useful for their defence.

238 Before examining the various specific arguments adduced by those applicants, the Court will set out generally the circumstances in which incomplete access to the SO and/or to the investigation file during the administrative procedure will lead to a finding that the rights of the defence have been infringed.

239 The 39 applicants in question submit that the defective access which they had to the investigation file cannot but lead to the annulment of the contested decision. They refer in that regard to the judgments in Case T-30/91 *Solvay* v *Commission* and Case T-36/91 *ICI* v *Commission*, cited in paragraph 106 above. They point out that in those two judgments (at paragraphs 84 and 94 respectively) the Court found that the Commission had 'infringed the applicant's rights of defence by excluding from the proceeding documents which it possessed and which might have been of use in the applicant's defence'. They state that in each of those

judgments the Court annulled the contested decision after having taken the view that an infringement of the rights of the defence which occurred during the administrative procedure could not be regularised during the proceedings before the Court of First Instance.

240 The Court points out that it cannot annul the contested decision in whole or in part unless it is found that the lack of proper access to the investigation file given to the applicants during the administrative procedure prevented them from perusing documents which were likely to be of use in their defence and thus infringed their rights of defence (judgments cited in paragraph 106 above, Case T-30/91 *Solvay* v *Commission*, paragraphs 80, 81, 84, 98 and 100, and Case T-36/91 *ICI* v *Commission*, paragraphs 90, 91, 94, 108, 110 and 115). The large number of documents in the investigation file to which the applicants were not given access during the administrative procedure does not in itself suffice to justify such a finding.

241 When, in the context of an action seeking annulment of the Commission's final decision, an applicant challenges the Commission's refusal to disclose a document or documents in the file, it is for the Court to require production of the documents and to examine them (Opinion of Advocate General Léger in *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, point 121). The Court cannot act as a substitute for the Commission (judgments cited in paragraph 106 above, Case T-30/91 *Solvay* v *Commission*, paragraph 98, and Case T-36/91 *ICI* v *Commission*, paragraph 113); its examination must first of all be directed at the question whether there is an objective link between the documents which were not made accessible during the administrative procedure and an objection adopted against the applicant concerned in the contested decision. If there is no such link, the documents in question are of no use in the defence of the applicant invoking them. If, on the other hand, there is such a link, it must first be examined whether the failure to disclose them could have impaired the defence of that applicant during the administrative procedure. It is therefore necessary to examine the evidence adduced by the Commission in support of that objection (judgments in Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraphs 61 to 65, Case T-36/91 *ICI* v *Commission*, cited in paragraph 106 above, paragraphs 71 to 75, and Case T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraphs 51 to 56) and to assess whether the documents not disclosed might — in the light of the evidence adduced by the Commission — have had a significance which ought not to have been disregarded (Case T-30/91 *Solvay* v *Commission*, paragraph 68, and Case T-36/91 *ICI* v *Commission*, paragraph 78). There will be an infringement of the rights of the defence if there was — even a small — chance that the outcome of the administrative procedure might have been different if the applicant could have relied on the document during that procedure (*Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 56, Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 68, Case T-36/91 *ICI* v *Commission*, cited in paragraph 106 above, paragraph 78, and opinion of Advocate General Léger in *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, point 120).

242 In order to examine the question whether a document that was not accessible during the administrative procedure was likely to be useful in the defence of an applicant it is therefore necessary, save where the document has no objective link with an objection adopted against that applicant, to carry out a provisional examination of the evidence on which the Commission relied in support of its finding of an infringement in the contested decision.

243 The Court points out that an initial examination of the evidence adopted by the Commission in its decision was also carried out by the Court of First Instance in its judgments in the *Soda Ash* cases (Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, Case T-31/91 *Solvay* v *Commission* [1995] ECR II-1821, Case T-32/91 *Solvay* v *Commission* [1995] ECR II-1825, Case T-36/91 *ICI* v *Commission*, cited in paragraph 106 above, and Case T-37/91 *ICI* v *Commission*, cited in paragraph 142 above), even though the applicants consider that some parts of those judgments, read in isolation (in particular T-30/91 *Solvay* v *Commission*, paragraph 98, and T-36/91 *ICI* v *Commission*, paragraph 108), show that a failure to give proper access to the investigation file cannot but lead to annulment of the contested decision. In the cases which gave rise to the judgments in T-32/91 *Solvay* v *Commission*, cited above, and T-37/91 *ICI* v *Commission*, cited above, the Commission had found in two separate decisions of 19 December 1990 that there had been infringements of Article 86 of the EC Treaty (now Article 82 EC) by Solvay and ICI on the soda ash market. It alleged that Solvay had abused its dominant position on that market on the western European market and that ICI had done the same on the United Kingdom market. Furthermore, in a third decision of the same date, it had found that there had been a concerted practice between Solvay and ICI, contrary to Article 85(1) of the Treaty. It found that this practice had existed from 1 January 1973 until the beginning of 1989 and had concerned the sharing of the western European soda ash market. Under that practice, continental western Europe had been allocated to Solvay, and the United Kingdom and Ireland to ICI. The last-mentioned decision gave rise to the judgments cited in paragraph 106 above, Case T-30/91 *Solvay* v *Commission*, and T-36/91 *ICI* v *Commission*.

244 In those judgments, the Court had to examine a plea alleging that the rights of the defence had been infringed because the parties had not had access, during the administrative procedure, to the file concerning the alleged abuse of a dominant position by the other party. The applicants took the view that those files might have contained exculpatory evidence. In dealing with that line of argument the Court first of all examined the evidence on which the Commission had relied. The Commission had first found that ICI and Solvay had concluded a market sharing agreement in 1949. Although that agreement had been formally cancelled in 1972, the Commission had taken the view in the decision that there was ample evidence of collusion, from which it could be inferred that the original 1949 arrangement had continued to be implemented in the form of a concerted practice after 1972 (see Case T-30/91 *Solvay* v *Commission*, paragraph 61, and Case T-36/91 *ICI* v *Commission*, paragraph 71, cited in paragraph 106 above). Thus, in order to prove the concerted practice, the Commission relied on four elements, namely, first, the absence of any trade in soda-ash by ICI and Solvay across the English Channel during the period in question; second, the precise coincidence of that lack of competition with the terms of the agreement concluded in 1949; third, the conclusion and implementation of purchase for resale agreements whereby soda-ash was delivered by Solvay to ICI from 1983 to 1989; and, fourth, frequent contacts between Solvay and ICI designed to coordinate their strategy in the soda-ash sector (Case T-30/91 *Solvay* v *Commission*, paragraph 65, and Case T-36/91 *ICI* v *Commission*, paragraph 75).

245 Next, the Court found in those cases that the only specific documentary evidence of the infringement found in respect of the period between 1973 and 1982 was the 1949 agreement: the purchase for resale contracts dated from the 1983-1989 period. Furthermore, there were no documents relating to meetings in that first period (Case T-30/91 *Solvay* v *Commission*, cited at paragraph 106 above, paragraph 74, and Case T-36/91 *ICI* v *Commission*, cited at paragraph 106 above, paragraph 84). The Court considered the evidential value of the 1949 agreement. It

found (Case T-30/91 *Solvay* v *Commission*, paragraph 73, and T-36/91 *ICI* v *Commission*, paragraph 83) that that agreement had been formally terminated in 1972 and that the Commission could not fail to take account of the possibility that by terminating that agreement the two undertakings wished to comply with the Treaty. In the Court's view, the 1949 agreement was therefore weak evidence on which to find that the infringement in question had been committed by ICI and Solvay from 1 January 1973. The only other evidence of the existence of a concerted practice, at least in regard to the period from 1973 to 1982, was derived from their conduct on the market, that is to say, the absence of trade in soda ash by ICI and by Solvay across the English Channel. However, on account of the weakness of the documentary evidence relating, in particular, to 1973 and the years immediately following it, the Court held that the Commission should, in order to prove to the requisite legal standard the concerted practice alleged against ICI and Solvay, have been prompted to make an overall and detailed economic assessment, in the statement of objections, in particular of the relevant market and the size and conduct of the undertakings active on that market. It considered that that assessment, if it was to be complete, objective and balanced, ought at least to have taken into account, first, the strong positions held by Solvay and ICI on their respective geographical markets and, second, the loyalty arrangements with their clients, for which they had been criticised in the course of the proceedings initiated under Article 86 of the Treaty (Case T-30/91 *Solvay* v *Commission*, paragraph 76, and Case T-36/91 *ICI* v *Commission*, paragraph 86). It was in that context that the Court held that the documents concerning the infringement of Article 86 allegedly committed by ICI could have been of use in Solvay's defence in order to rebut the claim that a concerted practice existed between Solvay and ICI. Those documents might have shown that the passive conduct alleged against Solvay was based on its own independent decisions, motivated by the difficulty of penetrating a market, access to which was blocked by an undertaking in a dominant position (Case T-30/91 *Solvay* v *Commission*, paragraph 77). On the same grounds, the documents concerning the infringement of Article 86 allegedly committed by Solvay were of use in ICI's defence (Case T-36/91 *ICI* v *Commission*, paragraph 87). As there was a chance that, if ICI and Solvay had had access to the documents in question during the administrative procedure, they might have been able to influence the Commission's assessment, at least so far as concerns the conclusiveness of the alleged passive and parallel conduct in regard to the beginning and therefore the duration of the infringement, the Court found that the rights of the defence had been infringed and annulled the decision in question (Case T-30/91 *Solvay* v *Commission*, paragraphs 98 and 99, and Case T-36/91 *ICI* v *Commission*, paragraphs 108 and 109).

246 However, in the judgment in Case T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, which related to the Commission's decision finding an infringement by ICI of Article 86 of the Treaty, the Court rejected the plea of insufficient access to the file. It held (paragraph 61) that the finding of a dominant position in the contested decision had been based on ICI's market share and that the abuse of that position was apparent from specific documentary evidence, such as the rebate systems applied by ICI and the exclusive supply contracts imposed by it on its customers. After appraising the conclusiveness of the evidence adduced by the Commission, it held (paragraph 63) that ICI's defence could not have been affected by the fact that it had not had access during the administrative procedure to the documents emanating from the continental producers. There was no evidence to suggest that those documents might have rebutted the findings made by the Commission in its decision, in which it had found an abuse of a dominant position by ICI.

247 Consequently, where an applicant submits, in the context of an application for annulment, that its rights of defence have been infringed because it was not given access during the administrative procedure to a document in the investigation file which, it claims, could have been useful in its defence, the Court must require that document to be disclosed to the Court. It must then examine that document for any relationship with the objections upheld against the applicant in the contested decision. If there is no objective link between the document and the objection upheld in the contested decision, the outcome of the administrative procedure could not have been different for the applicant if it had had access to that document during that procedure. In such circumstances, the plea by that applicant must be rejected. If, on the other hand, there is an objective link between the document in question and one of the objections upheld against the applicant in the contested decision, the Court must assess whether, in the light of the evidence adduced by the Commission in support of the objections referred to in the contested decision, the document would have had any — even a small — chance of altering the outcome of the administrative procedure if the applicant had been able to rely on it during that procedure. If, in the light of the evidence as a whole, the Court considers that the document would have had such a chance of altering the outcome to the administrative procedure, it will find that the rights of the defence have been infringed (see paragraphs 2205 to 2212, 2224, 2225, 2284 to 2290, 2384, 2385, 2469, 3406 to 3435 and 3996 to 4005 below).

248 Finally, it cannot be accepted that an applicant's rights of defence were infringed by the Commission's failure to disclose a document which might contain exculpatory evidence where that document emanates from that applicant or was manifestly in its possession during the administrative procedure (see, by analogy, *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, paragraph 25, and Case T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraph 64). If a document available to an addressee of the SO contains exculpatory evidence, there is nothing to prevent it from relying on that document during the administrative procedure. When organising its defence, an applicant is not restricted to using only documents in the Commission's file to which it has access. It may use any document which seems to it to be appropriate to rebut the Commission's allegations.

4. Application of the principles to the present case

249 The Court finds, first, that several documents to which the applicants refer in their written statements lodged following the measures of 2 October 1996 and 18 and 19 June 1997 are documents to which they already had access during the administrative procedure. Those documents were classified 'A' ('A: all' or 'A: European producers') on the List (see paragraph 5 above). Even though often those documents were not in the Box (see paragraph 95 above), they were accessible during the administrative procedure and the applicants could have relied on them to support the arguments set out in their replies to the SO. The applicants cannot therefore use those documents to support their claim that their rights of defence were infringed during the administrative procedure.

250 The applicants listed below have referred in their written statements to the following documents to which they had access during the administrative procedure: FIC to documents 33.126/4858 to 4861, 4911 to 4913, 19205 and 19218; ENCI to documents 33.126/12519, 12627, 12642, 12648 to 12654 and to document 33.126/4470, identical to document 33.126/12627, which was classified as 'A: European producers' on the List (see paragraph 5 above); Dyckerhoff to documents 33.126/18959, 18960, 19195 and 19196 and to documents 33.126/16509, 16515 and 16516, which correspond to documents 33.126/18857, 18821 and 18822, which were classified as 'A: European producers' on the List; Heidelberger to documents 33.126/14809, 14826, 19202, 19218, 19220 to 19233, 19250 and 19264 to 19279; Aalborg to documents 33.126/15134, 15135, 15170 and 15201; Buzzi to documents 33.126/4982, 14809, 14812, 14813, 14815, 14817, 14820, 14822, 14824, 14898 and 15174; Valenciana to documents 33.126/4911 to 4913; Asland to documents 33.126/19202, 19205 and 19218; Heracles to documents 33.126/18755 to 18763; Uniland and Oficemen to documents 33.126/11026, 11027, 11080 to 11084, 19195, 19196, 19754, 19762, 19770, 19776, 19817, 19819, 19827, 20011, 20019, 20065, 20071 and 20072; Rugby and Castle to documents 33.126/14331 to 14333; Titan to documents 33.126/4858, 4859, 10982, 10985, 18755 to 18763, 18771 to 18779, 18842, 18843 and 18848 and to documents 33.126/13119 and 16155, which correspond to documents 33.126/18862 and 19007 respectively, which were classified as 'A: European producers' on the List; Holderbank to documents 33.126/10959, 19195 and 19196, and, lastly, Blue Circle to documents 33.126/19220 to 19347 and 19875 to 19877 and to documents 33.322/1503 to 1505 which correspond to documents 33.126/16786 to 16789, which were classified as 'A: European producers' on the List.

251 Second, several applicants rely on passages in the SO and documents in the investigation file which have no link with the objections upheld against them in the contested decision. They would therefore have been of no use in their defence (see paragraphs 241 and 247 above).

252 Thus, some applicants refer to documents concerning the 'rules of fair competition' (SO, Chapter 10, point 60). SFIC refers to documents 33.126/2412 to 2415 and Aalborg to document 33.126/14806. The Court points out, however, that the discussions on 'fair or healthy or correct' competition referred to in recital 17 of the contested decision were not the subject-matter of a specific objection in the operative part of that decision. In those circumstances, the comments which the abovementioned applicants could have made on the basis of the abovementioned documents could not have altered the outcome of the administrative procedure if they had had access to them during that procedure.

253 Heidelberger refers to documents which it claims prove that the Commission's assertion that there were agreements and concerted practices between the German, Belgian and Netherlands producers to share the Netherlands market (contested decision, recital 23) is unfounded. It cites documents 33.126/832, 3720, 8165, 8728, 8729 and 8915. However, as is explained in recital 51 of the contested decision, the Commission did not adopt a position in the contested decision on the facts set out in recital 23 relating to the Belgium-Netherlands-Germany agreements and concerted practices. As no objection has been raised against it on that basis, Heidelberger

cannot allege in this case that its rights of defence were infringed because it did not have access to the above documents during the administrative procedure.

254 Next, several applicants rely on documents relating to an infringement referred to in the contested decision but in which, they claim, they did not participate.

255 Vicat refers to documents 33.126/2088 to 2096, 6590, 6591, 6608, 6690, 6691, 7640, 10811 to 10813, 10827, 10828, 11052, 11053, 11066, 11073 to 11075, 11077, 11078, 13111, 15342 to 15347, 15386, 15387, 16445, 16446 to 16449, 16460 and 16461 as proof that it did not participate directly or indirectly in the ETF. However, as the Commission's decision did not allege that it participated in the ETF's activities, the documents in question are not relevant to its defence.

256 Hornos Ibéricos and Blue Circle refer to several documents directly relating to the Spanish-Portuguese agreement referred to in Article 3(2) of the contested decision. Hornos Ibéricos refers to documents 33.322/124 to 133, 170, 905, 966 to 973, 1019, 1020, 1027, 1080 to 1089, 1319 to 1322, 1395, 1396 et 1409, and Chapter 9 'Portugal' of the SO. Blue Circle refers to documents 33.322/2898 to 2903. However, Hornos Ibéricos and Blue Circle are not referred to in Article 3(2) of the decision. Consequently, even if the documents to which they refer would have enabled them to show, during the administrative procedure, that the Spanish-Portuguese agreement did not exist, that could not have altered the outcome of that procedure for them.

257 Rugby, Castle, Aker and EUROC contend that it is apparent from the national chapters of the SO and from documents 33.126/3213 to 3222 that the information exchange organised in the context of Cembureau could not have had an appreciable effect on competition and did not serve to facilitate the operation of the Cembureau agreement. Titan submits that it is apparent from documents 33.126/3332 to 3334, 4919, 11121 to 11123 and 17881 to 17886 that the pricing information exchanged through Cembureau had no commercial value. Even if the assertion by Rugby, Castle, Titan, Aker and EUROC were correct, the fact that they did not have access during the administrative procedure to those items could not have impaired their defence, since they were not referred to in Article 2 of the contested decision, which complains of the exchanges of price information organised within Cembureau.

258 Uniland and Oficemen refer to documents 33.126/11080 to 11084, 13104 to 13106, 13108, 13109, 19817 to 19832 and 20065 to 20071, which all directly relate to the carrot actions referred to in Article 4(4) of the contested decision. However, as that infringement does not relate to them, those documents are of no relevance to their defence.

259 Aker and EUROC submit that point 46 of 'The Facts' in the SO, relating to the French agreements and concerted practices (Chapter 5), shows that the ECEC was not an instrument serving the export policies of the Community cement producers, set up in order to defend the home-market rule. However, they were not referred to in Article 5 of the contested decision relating to the concerted practices in the framework of the ECEC. The passage of the SO to which they refer is therefore clearly irrelevant to their defence.

260 Third, as regards documents relating to infringements alleged against an applicant who relies on those documents, the Court finds that, unlike in the cases which gave rise to the judgments in T-30/91 *Solvay* v *Commission* and T-36/91 *ICI* v *Commission*, cited in paragraph 106 above, in the present case the Commission relied, both in the SO and in the contested decision, solely on specific documentary evidence to show the various infringements and the participation of the various addressees of the contested decision in one or more of those infringements. In order to assess the plea that the rights of defence were infringed because the applicants did not have adequate access to the SO and to the investigation file during the administrative procedure, it will be necessary first to assess the conclusiveness of that evidence and then to examine whether the information to which they had no access could have led to a different decision if the applicants had been able to rely on those documents during the administrative procedure (see paragraphs 241 and 247 above and paragraph 263 below).

261 Since the Court will in any event be required, when considering the substantive pleas, to rule on the evidence adduced by the Commission to prove the various infringements to which the contested decision refers, it will be appropriate for reasons of procedural economy to assess the correctness of the applicants' arguments based on documents relating directly to those infringements when the Court considers the substantive pleas concerning the infringements found. However, the assessment of the procedural pleas will not be identical to that of the applicants' substantive pleas. When examining the plea of infringement of the rights of the defence, the Court will examine the evidence on which the Commission relies solely in order that it may assess whether, in the light of that evidence, the fact of not having had access during the administrative procedure to a particular — allegedly exculpatory — document could have affected the applicants' defence.

262 The Court will therefore reserve its examination of the applicants' arguments concerning documents relating directly to the infringements which they are found in the contested decision to have committed.

263 It should, however, be stated at this point that where, as in the present case, the Commission relied both in the SO and in the contested decision solely on specific documentary evidence in order to prove the various infringements and the participation by the addressees of the contested decision in one or more of them, the applicants must prove that the evidence that was inaccessible to them during the administrative procedure was at variance with the thrust of that

evidence or at least sheds a different light on it (see, to that effect, Case T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraph 63). Only in such circumstances might documents that were inaccessible during the administrative procedure have influenced the Commission's assessment of the documentary evidence relied on in the contested decision.

264 It already follows that since the infringements were proved in the SO and in the contested decision on the basis of documentary evidence, not on the basis of parallel conduct on the market, the Court cannot uphold the argument adduced by some applicants (CBR, Cembureau, FIC, Dyckerhoff, SFIC, Vicat, Aalborg, Unicem, Castle, Heracles, Oficemen, Irish Cement, Titan, Italcementi, Holderbank, Hornos Ibéricos, Aker, EUROC, Cementir, and Blue Circle) to the effect that an alternative economic explanation of the cement producers' conduct on the market could have been given by them, based on the documents which remained inaccessible to them. In the light of the way in which matters were proved in the SO and the contested decision, such an argument could not have altered the outcome of the administrative procedure.

265 Fourth, several applicants refer to documents emanating from themselves or of which they were manifestly aware during the administrative procedure. For the reasons set out in paragraph 248 above, any argument submitted by the applicants on the basis of such documents must be rejected.

266 Thus, ENCI refers to an extract from alleged draft minutes of the board of CBR (document 33.126/723) and an alleged business plan of CBR for 1989-1991 (documents 33.126/732 and 733). As the Commission correctly states, document 33.126/723 is an extract from the draft minutes of the board of ENCI itself which took place on 22 February 1989 in the offices of CBR, the company which controls ENCI. The extract cited is a report of an account given by Mr Platschorre, a senior executive of ENCI. Furthermore, the business plan annexed to the minutes (documents 33.126/732 and 733) concerns the ENCI group and cannot be regarded as a business plan of CBR. ENCI therefore already had those documents during the administrative procedure and could have based arguments on them if it had believed that they contained evidence in its favour. In those circumstances, there can be no finding that its rights of defence were infringed. For the same reasons, the Court must reject any argument based on the correspondence between Vicat and Mr Schuhmacher, chairman of Heidelberger (documents 33.126/3594 to 3597), on which Vicat relies. The same holds for the letter of the chairman of BDZ of 20 May 1985 (document 33.126/14762) on which BDZ relies. Ciments Français refers to a letter of 20 December 1983 from BDZ to the French association at that time, the SNFCC (document 33.126/14762). It must, however, be pointed out that this letter was sent to the chairman of the SNFCC, who was none other than Mr Poitrat, the then chairman of Ciments Français. The letter is, moreover, addressed to the registered office of Ciments Français ('p.a. Société des Ciments Français'). Furthermore, the chairman of Ciments Français replied to that letter (document 33.126/14763). Since the document in question was addressed to the chairman of Ciments Français, that company cannot now use it to support an argument that its rights of defence were infringed during the administrative procedure, even in order to illustrate an argument that it wishes to base on the content of other documents. As regards the correspondence between SECIL and Cimpor on 31 August and 1 September 1987 and a telefax from Cimpor to SECIL in September 1987 (documents 33.322/1018 to 1020 and 1031),

to which SECIL refers, the Court points out that SECIL, too, which already had those documents during the administrative procedure, cannot use them to support a plea of infringement of its rights of defence.

5. General arguments relating to infringement of the rights of defence during the administrative procedure

267 Since the Court has reserved examination of arguments relating to documents directly concerning the infringements found, it is necessary to examine other arguments, of a general nature, in the statements lodged.

268 First, Cembureau, SFIC, Unicem, Valenciana, Asland, Titan, Cementir and Blue Circle contend that the measures of organisation of procedure are not capable of redressing the procedural defect which vitiated the contested decision: an infringement of the rights of the defence which has occurred during the administrative procedure cannot be regularised during the proceedings before the Court of First Instance (judgments cited in paragraph 106 above, Case T-30/91 *Solvay* v *Commission*, paragraph 98, and Case T-36/91 *ICI* v *Commission*, paragraph 108). Valenciana, Rugby, Asland, Cementir and Blue Circle add that following the measures of organisation of procedure they were compelled to search, amongst the documents to which they had had access before the Court, for documents which were likely to disprove the charges made against them; that reversed the burden of proof. Asland also observes that, if the Court were not to annul the contested decision, despite the substantive procedural defect affecting that decision, it would implicitly authorise the Commission to infringe with impunity fundamental rights enshrined in Article 6 of the ECHR.

269 The Court points out that the measures of 2 October 1996 and 18 and 19 June 1997 did not seek to redress any alleged defect in the administrative procedure. The object of those measures was to allow the 39 applicants referred to in paragraph 124 above to show that the administrative procedure was vitiated by a procedural defect, in the form of an infringement of their rights of defence, because they had not been given access during that procedure to passages of the SO and documents in the investigation file alleged to contain exculpatory evidence. The identification of that evidence necessarily meant, however, that the applicants concerned were able to peruse, during the procedure before the Court, passages of the SO and documents from the investigation file which had been inaccessible during the administrative procedure.

270 Nor can it be claimed that the burden of proof was reversed. In conformity with the principles laid down in the case-law (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79; Case T-337/94 *Enso-Gutzeit Oy* v *Commission* [1998] ECR II-1571, paragraphs 87 and 151 to 153; Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 86; *Hüls* v *Commission*, cited above at paragraph 155, paragraph 154; and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 179), the various infringements referred to in the contested decision and the applicants' participation in one or more of those infringements were established by the Commission in the SO and in the contested decision on the basis of specific

documentary evidence, the conclusiveness of which will be assessed below. Far from reversing the burden of proof, the measures of organisation of procedure enabled the applicants concerned to refer to passages in the SO and documents in the investigation file to which they had not had access during the administrative procedure and which were of such a nature as to contradict or shed a different light (see paragraph 263 above) on the specific documentary evidence on which the Commission relied in finding the abovementioned infringements and/or in order to prove the participation of the applicants in one or more of those infringements, so that they might show that the administrative procedure had an — even small — chance of reaching a different outcome if they had had access to those items during the administrative procedure.

271 Second, Valenciana, Asland, Uniland, Oficemen and Hornos Ibéricos complain that there was no list indicating the tenor of the documents making up the investigation file. The lack of a list prevented them from identifying, with a minimum of certainty, the general purport of the documents made available to them and, consequently, to make a detailed examination of the documents which might have been relevant to their defence. They submit that the Commission's attitude in that regard is in marked contrast to those of the Spanish competition authorities.

272 The Court points out that the applicants did not, either during the administrative procedure or during the procedure before the Court, have a list giving the tenor of the documents in the investigation file. The only list which they had was the list sent to the addressees of the SO who inspected the file during the administrative procedure (see paragraph 5 above).

273 During that procedure, a list giving the tenor of documents in the file is a means whereby the undertakings or associations of undertakings concerned can ascertain the documents which, classified as unavailable, might be relevant for their defence (judgments cited in paragraph 106 above, Case T-30/91 *Solvay* v *Commission*, paragraphs 93 and 94, and Case T-36/91 *ICI* v *Commission*, paragraphs 103 and 104). The object of such a list is therefore to enable the undertakings or associations of undertakings involved in a proceeding which may lead to a finding of an infringement to assess whether it is expedient to demand access to the documents classified as inaccessible, notwithstanding that classification.

274 It follows that the fact that the Commission did not prepare a list which described each document in the file cannot as such infringe the rights of the defence. Only the documents to which the list (see paragraph 5 above) refers, not the list itself, can contain information useful to the defence of an undertaking or an association of undertakings.

275 The applicants' argument must therefore be rejected inasmuch as it relates to the administrative procedure. That argument has already been examined in paragraphs 225 to 227 above, to the extent that complaint is made of the lack of a list during the procedure before the Court.

276 Third, Rugby, Castle, Aker and EUROC state that a number of documents which were classified on the List (see paragraph 5 above) as available were not in the Box (see paragraph 95 above).

277 However, they were able, by comparing the numbers of documents in the Box with the numbers of documents classified as accessible on the List, to establish that a number of accessible documents were not in the Box. That could also have been established by comparing the volume of documents classified as accessible on the List with that of the documents in the Box. Nothing prevented the applicants at that juncture from requesting access to accessible documents that were not in the Box. The fact that certain documents classified as accessible on the List were not in the Box could not therefore impair their defence.

278 Fourth, Vicat, Ciments Français, Lafarge, Rugby, Castle, Aker, EUROC and Cementir object to the Commission's reliance on the plea that certain documents were confidential at the time when access was granted to the investigation file during the administrative procedure. Ciments Français states that the Commission wrongly made use of that plea so as to refuse it access to documents, the content of which related to subjects touched on in the SO or was clearly public. Vicat, Ciments Français and Lafarge observe that identical documents were classified as not accessible under Nos 33.126/11040 to 11045 and accessible under Nos 33.126/18857 to 18862. Ciments Français adds that those same documents were then classified as non-accessible under Nos 33.126/16150 to 16155 and 16509 to 16514 and that the documents classified as non-accessible under Nos 33.126/14361 and 14362 were accessible under 33.126/10997 and 10998. Lafarge also refers to documents 33.126/2720, 2721, 2850, 2851 and 3245 to 3248. Rugby, Castle, Aker, EUROC and Cementir also claim that the Commission's approach was incoherent as it classified the same document on one occasion as 'not accessible' and on another as 'accessible'.

279 The Court points out that those criticisms are relevant only to the extent that they could show that the rights of the defence were infringed. The argument of Ciments Français that the Commission misused the plea of confidentiality so as to refuse to grant it access to various documents only goes to show that proper access was not given to the investigation file, a finding already made by the Court (see paragraph 152 above). Ciments Français does not, however, explain in what respect that fact affected its right of defence during the administrative procedure. Furthermore, even though, following the measures of 2 October 1996 and 18 and 19 June 1997, the Court placed the applicants concerned in a position to inspect all the documents of the investigation file, they have not explained how the dual classification of the documents referred to in the preceding paragraph impaired their rights of defence in the present

case. Consequently, the criticisms as to the alleged misuse of the plea of confidentiality during the administrative procedure are irrelevant.

6. Conclusions

280 The Court has reserved examination of the arguments relied upon by the 39 applicants referred to in paragraph 124 above that are based on documents relating directly to the infringements which the contested decision finds they committed. The Court must reject the other arguments upon which they rely in support of their plea that their rights of defence were infringed because the Commission refused to grant them access to documents in the investigation file and to parts of the SO allegedly containing exculpatory evidence.

D — The use in the contested decision of incriminating documents not disclosed to the applicants during the administrative procedure or not identified in the SO

1. Preliminary observations

281 Hornos Ibéricos (T-69/95) submits that it was unable to identify the new evidence on which the Commission relied in the contested decision. It was unable to express its views on that evidence during the administrative procedure, inasmuch as the Commission's method of referring to the evidence was different in the contested decision.

282 That argument must be rejected. In the parts of the SO relating to the Cembureau agreement and to the EPC (Chapters 1, 2, 10 and 12), which are the only parts of the SO relating to the objections raised against Hornos Ibéricos in the contested decision (Articles 1 and 6), the various items of evidence were identified by reference to the nature of the documents (minutes of a meeting, internal note, letter, telex, etc.), their date and/or origin. In the contested decision, the documents on which the Commission relied in order to establish the various infringements were identified in the same way. The only change in relation to the SO is that the contested decision also mentions, for each document, a number relating to the pagination of that document in files 33.126 or 33.322. However, the mere addition of a number to each document referred to in the contested decision cannot have prevented Hornos Ibéricos from identifying any new evidence on which it had not had an opportunity to express a view during the administrative procedure. On the contrary, as all the documents in the Box (see paragraph 95 above), which followed the order of the SO, and any other document accessible to the applicant

during the administrative procedure bore a number relating to their pagination in files 33.126 or 33.322, the addition of that numbering for each document used in the contested decision must have facilitated the applicant's task when it drew up its application and needed to identify any new evidence.

283 VNC (T-32/95), SFIC (T-36/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Unicem (T-50/95), Castle (T-56/95), Uniland (T-58/95), Oficemen (T-59/95), Cimpor (T-61/95), SECIL (T-62/95), Italcementi (T-65/95), Holderbank (T-68/95), Aker (T-70/95), EUROC (T-71/95) and Blue Circle (T-88/95) state that during the administrative procedure they were not given access to certain documents, specified in their applications, which were used against them in the contested decision. They consider that for that reason the contested decision should be annulled as against them.

284 In that connection, the Court points out that a document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated. It does not suffice that an applicant shows that it was unable to express its views during the administrative procedure on a document used in some part of the contested decision. For such a line of argument to succeed, it is necessary for the applicant to prove that in the contested decision the Commission used a new item of evidence in order to sustain an infringement in which the applicant is alleged to have participated.

285 For the purposes of this analysis and before drawing conclusions from it (6), four categories of documents will be distinguished: documents which were neither cited nor mentioned in the contested decision (2); documents which, although mentioned in the contested decision to describe a fact or conduct, were not used to make a finding of an infringement in the contested decision (3); documents which although supporting the finding of an infringement in the contested decision do not relate to the infringements attributed to the applicants relying on the documents in question (4); documents used in the contested decision in the context of an infringement attributed to the applicant relying on them (5).

2. Documents neither cited nor mentioned in the contested decision

286 Oficemen complains of the use by the Commission of documents 33.322/1582 to 1588 as new items of evidence. However, the Court finds that those documents were neither cited nor mentioned in the contested decision. The same holds for documents 33.322/59, 71 to 78, 80 to 83, 86, 87, 91, 94, 169, 171, 178 to 180, 1226 to 1234, 1312, 1313, 1315, 1523 to 1527, 1531, 1636 to 1796, 1819 and 2952 to 2956 and documents 33.126/11507 to 11516, 11494 to 11504, 13077 to 13129, 13132 to 13177, 19393 to 19401 and 19878 to 19901, to which Cimpor and SECIL refer, and for document 33.126/18951, to which Italcementi refers. Nor did the contested decision mention the organisation chart of Cembureau which, according to Unicem, is mentioned in recital 15, paragraph 4, of that decision.

287 The Court finds that none of the above documents were used as incriminating evidence in the contested decision. The applicants' argument must therefore be rejected.

3. Documents mentioned in the contested decision to describe a fact or conduct, but not used to make a finding of an infringement

288 SFIC, Lafarge, Aalborg, Uniland, Oficemen, Italcementi, Holderbank and Blue Circle refer, in their applications, to documents which were mentioned in the contested decision to describe a fact or conduct, but not used to make a finding of an infringement. However, such documents cannot be regarded as incriminating evidence.

289 Blue Circle complains that in recital 9, paragraph 6, of the contested decision the Commission relied on a table comparing cement prices in various States which had not been disclosed to it during the administrative procedure. It is clear that the table in question was brought to the attention of the Commission by the Italian industry during the hearing of 2 March 1993, in which Blue Circle did not wish to take part (contested decision, recital 3, paragraph 2). However, the Commission refers to that table in recital 9, paragraph 6, of the contested decision, solely in order to illustrate the differences in production costs, and thus in prices, between the various member countries of Cembureau. The table in question is not therefore evidence on which the Commission relies in support of its finding of one or other of the infringements in the contested decision.

290 Blue Circle also complains that the Commission did not mention documents 33.126/6042 and 6043 (internal note of Vicat of 1 September 1982; contested decision, recital 11, paragraph 4) in the SO. Italcementi refers to all the documents mentioned in recital 11, paragraph 4, of the contested decision. The Court points out that the documents cited in that part of the contested decision show that some European cement producers were in a position to sell cement at more than 200 kilometres from their established works. However, those documents were not used by the Commission to make a finding of one or other infringement referred to in the operative part of the contested decision.

291 Aalborg and Blue Circle refer to documents 33.126/296 to 298, 2388 to 2405, 9434 to 9450 and 11725 (contested decision, recital 23, paragraphs 3 and 5), which concern the agreements and concerted practices relating to the Belgian, Netherlands and German markets. Nevertheless, those agreements and concerted practices were not ultimately the subject of a finding of infringement in the contested decision. Nor is the intergovernmental agreement between Greece and the United Kingdom, to which document 33.126/2907 refers (contested decision, recital 28, paragraph 13), which Aalborg and Blue Circle also cite, an objection that was the subject of a finding of infringement in the contested decision.

292 Blue Circle also complains that the Commission did not mention in the SO documents 33.126/11617 to 11633 (contested decision, recital 17, paragraph 3), on which it nevertheless relied in recital 17 of the contested decision, headed 'The discussions on "fair or healthy or correct" competition'. However, as the discussions on 'fair or healthy or correct' competition were not the subject-matter of any specific objection in the operative part of the contested decision, the documents relied on cannot be regarded as incriminating evidence on which the applicants should have had an opportunity to express their views during the administrative procedure.

293 Blue Circle also refers to documents 33.126/11523 and 11524, the Commission's request to Cembureau to produce documents (contested decision, recital 18, paragraph 4). However, such a request is obviously not incriminating evidence against any applicant. Only the reply to that request was used as incriminating evidence in the contested decision, that is to say, document 33.126/11525 (contested decision, recital 18, paragraph 4).

294 Documents 33.126/19210 to 19217 (contested decision, recital 27, paragraph 2) to which Blue Circle also refers, the contract concluded on 30 April 1986 between Calcestruzzi and Titan, are not used in the decision as evidence of any infringement.

295 The same holds for document 33.126/4365 (contested decision, recital 35, paragraph 5), to which Blue Circle refers, which is a checklist of the documents found in the office of the sales manager of Ciments Français.

296 Lafarge objects to the use, in support of the finding of an 'infringement', of documents from the file of the German Bundeskartellamt relating to a decision by that body dated 12 September 1988. It refers in that regard to documents 33.126/20384 to 20394, 20416, 20417, 20418 to 20443, 20481, 20492 to 20495 and 20497 to 20499. At the hearing, in reply to a question from the Court, Lafarge explained that the infringement in question was the cartel on the cement market in south-west Germany which, it claims, was the subject of the chapters in the SO dealing with the German market (chapters 6 and 16). Lafarge's argument must be rejected: the cartel on the cement market in south-west Germany is not the subject of the contested decision and the Commission never alleged that Lafarge took part in it. Even if Lafarge's complaint were that the Commission used documents from the German Bundeskartellamt's file relating to its decision of 12 September 1988 to support the finding of the infringement referred to in Article 3(3)(a) of the contested decision, namely the Franco-German Agreement, the Court finds that the Bundeskartellamt's decision of 12 September 1988 and the documents relating to that decision were not used in the SO and in the contested decision in order to prove the existence of the Franco-German Agreement and/or Lafarge's participation in it. They were cited by the Commission solely in order to show that Lafarge was interested by the south-west German cement market because of the special situation of its subsidiary Wössingen on that market (SO, chapter 2, point 12; contested decision, recital 22, paragraph 11; see paragraph

2380 below). In those circumstances, there cannot be any question of infringement of Lafarge's rights of defence.

297 SFIC complains of the use as new evidence in the contested decision of statements made by Ciments Français at the hearing (contested decision, recital 22, paragraph 15). In those statements Ciments Français explained that the change in the delivery gap between France and Germany after 1986 could not be linked to the existence of an alleged Franco-German agreement. However, that explanation was rejected by the Commission in the contested decision (recital 22, paragraph 15); it is not therefore part of the set of documentary evidence on which the Commission relied in recital 22, paragraphs 1 to 12, in order to prove the existence of the various infringements relating to the Franco-German agreement. The statements of Ciments Français reproduced in recital 22, paragraph 15, of the contested decision cannot therefore be regarded as new evidence.

298 Aalborg, Uniland, Oficemen, Italcementi, Holderbank and Blue Circle refer to documents 33.126/19009 and 19010 (contested decision, recital 25, paragraph 43), which are the minutes of a meeting of 6 November 1986 between representatives of the European cement industry and Mr Sutherland, Member of the Commission responsible for competition policy, regarding the 'Greek problem'. The Court finds, however, that this document relates to the lobbying activities which were conducted at that time in regard to that issue but to which the Commission did not object in the contested decision (see footnote 115 in the contested decision). That document was not therefore incriminating evidence. Similarly, documents 33.126/18844 and 18845 (contested decision, recital 25, paragraph 19), to which Blue Circle also refers, were not incriminating evidence, as they also concern the lobbying activities relating to the 'Greek problem'.

299 Aalborg and Blue Circle refer also to document 33.126/22289a, cited in recital 30, paragraph 6, of the contested decision. It is a letter of 31 December 1992 in which Mr Gac informed the Commission that the European Cement Manufacturers Export Committee ('ECMEC') was being dissolved as from 1 January 1993. However, the Commission did not rely on that document to substantiate any of the infringements found in the contested decision.

300 Both those applicants also refer to the telex from Holderbank of 13 August 1986 mentioned in recital 25, paragraph 20, of the contested decision. It refers to the Blue Circle study on the possibility of investing in Halkis (document 33.126/18846). However, that document was not used by the Commission to substantiate any of the infringements found in the contested decision. It was not therefore incriminating evidence.

301 Oficemen complains that it did not have access to documents 33.126/11260 to 11267, 11269 and 11270 during the administrative procedure. Those documents are the lease between Blue Circle and the ECMEC, to which reference was made in the contested decision in order to explain an undisputed, material fact, namely that the ECMEC had its headquarters in the offices of Blue Circle (contested decision, recital 30, paragraph 4). They were not, however, used as incriminating evidence in the contested decision. Nor were they taken into account in order to characterise conduct in the ECEC and the EPC as infringements (contested decision, Articles 5 and 6).

302 Blue Circle refers, lastly, to documents relating to the activities of the EPC which are mentioned in footnotes 183 and 184 in the contested decision but on which the Commission did not rely either to find the infringement referred to in Article 6 or to find that Blue Circle, or any other applicant, had participated in that infringement. Those documents are documents 33.126/11421 to 11430, 12762 to 12770, 12788 to 12799, 12805 to 12807, 12815, 12817 to 12832, 12967 to 13050, 14062 to 14085, 14094 to 14097, 14148 to 14154, 18169 to 18172, 18179, 18180 and 18188 to 18191, mentioned in footnote 183 (contested decision, recital 37, paragraph 5) and documents 33.126/12732 to 12734, 12761, 12808 to 12814, 12864 to 12874, 12876 to 12904, 12915 to 12966, 13854 to 14021, 14027 to 14029, 14043 to 14061, 14086 to 14092, 14098 to 14147, 14155 to 14169, 14175 to 14180, 14186 to 14229, 14237 to 14243 and 14270 to 14284, mentioned in footnote 184 (contested decision, recital 37, paragraph 6). Those documents are not therefore incriminating documents used by the Commission in the contested decision.

303 It follows from the whole of the foregoing that none of the documents referred to under this heading can be regarded as an incriminating document used by the Commission in the contested decision. SFIC, Lafarge, Aalborg, Uniland, Oficemen, Italcementi, Holderbank and Blue Circle cannot therefore refer to any of those documents in order to show that the Commission did not grant them an opportunity during the administrative procedure to express their views on incriminating documents relied upon in the contested decision.

4. Documents supporting the finding of an infringement in the contested decision but not relating to infringements attributed to the applicants relying on those documents

304 SFIC, Ciments Français, Aalborg, Uniland, Oficemen, Holderbank, Aker, EUROC and Blue Circle refer in their applications to documents which, although supporting the finding of an infringement in the contested decision, do not relate to infringements attributed to the applicants relying on those documents. As those documents were not used against them in the contested decision, the applicants concerned cannot allege that their rights of defence were

infringed because they could not express their views on those documents during the administrative procedure.

305 Thus, Aker and EUROC assert that they were not given access to a series of documents relating to the information exchanges on prices, in particular to documents 33.126/15065 to 15305 (contested decision, recital 16, paragraphs 8 to 22). Blue Circle complains that the Commission made no mention in the SO of document 33.126/11592 (contested decision, recital 16, paragraph 3) relating to the exchange of specific information, and documents 33.126/15066, 15099 to 15102, 15104 to 15107, 15109, 15111, 15112, 15115 to 15122, 15126, 15127, 15129 to 15167 and 15170 to 15305 (contested decision, recital 16, paragraphs 8 to 21) relating to the periodic exchanges of information. In that regard it suffices to point out that those applicants were not found to have committed infringements in the form of the exchanges of price information (contested decision, Article 2(1) and (2)). Accordingly, the documents relating to those objections cannot be characterised as evidence incriminating them.

306 Likewise, documents 33.322/1410 to 1412 (contested decision, recital 21, paragraph 5), to which Ciments Français refers, documents 33.322/1311, 1314, 1397 to 1399, 1406 to 1408, 1410 to 1412 and 2901 (contested decision, recital 21, paragraphs 2 to 6) to which Aalborg and Blue Circle refer, and documents 33.322/79, 84, 85, 88 to 90, 158 to 162, 170, 172, 177, 181, 252, 270 to 276, 485, 486, 493 to 495, 512, 513, 530 to 532, 537, 538, 549, 550, 566 and 567 (contested decision, recital 21, paragraphs 5 to 8) to which Blue Circle refers, relate to the Spanish-Portuguese agreement referred to in Article 3(2) of the contested decision. Those applicants are not alleged to have participated in that agreement and, contrary to Aalborg's assertions, the Commission did not rely on it any more than it relied on the other alleged measures for implementing the Cembureau agreement in order to establish the very existence of that agreement: the Commission deduced the existence of the Cembureau agreement exclusively from the bundle of specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision.

307 Documents 33.126/818 and 819 (contested decision, recital 22, paragraph 11) to which Aalborg refers, and documents 33.126/3573 (contested decision, recital 22, paragraph 10), 33.126/16556 (contested decision, recital 22, paragraph 11) and 33.126/15161 to 15163 and 15168 to 15170 (contested decision, recital 22, paragraph 15) to which Blue Circle refers, all relate to the Franco-German agreements and concerted practices which are the subject of Article 3(3) of the contested decision, for which those applicants were not held responsible. The documents relating to the Franco-German agreements and concerted practices cannot therefore be characterised as evidence incriminating Aalborg and Blue Circle.

308 Ciments Français refers to the statistics of BDZ referred to in recital 22, paragraph 18, of the contested decision. Those statistics were not, however, used as incriminating evidence against it. They relate to the infringement referred to in Article 3(3)(b) of the contested decision, in which, according to that provision, only SFIC and BDZ participated.

309 Aalborg refers also to Holderbank's reply to the Commission's question 7e relating to Holderbank's letters of 22 September 1986 regarding the payment of share quotas in Interciment (contested decision, recital 26, paragraph 9) and to the letter of 3 May 1993 from Holderbank's lawyer relating to the dissolution of Interciment (contested decision, recital 26, paragraph 16). Those documents concern the infringement relating to the agreement on the setting-up of Interciment referred to in Article 4(2) of the contested decision, an infringement which Aalborg was not alleged to have committed.

310 Aalborg submits, however, that the Commission relied on the letter of 3 May 1993 from Holderbank's lawyer in order to establish the date on which the alleged infringements ceased (contested decision, recital 65, paragraph 4) and that it is therefore evidence used against it in the contested decision. SFIC, which is referred to in Article 4(2) of the contested decision, also considers that the letter is a new item of incriminating evidence, to which it should have had access during the administrative procedure and which should have been mentioned in the SO.

311 Those arguments must be rejected. That letter cannot be regarded as an incriminating document. In the grounds relating to the setting of the fines, the Commission states as follows in recital 65, paragraph 4, of the contested decision: 'While the Commission is able to establish the date on which the infringement constituted by the Cembureau agreement or principle commenced, it has no certainty that the infringement ever really ceased, and it cannot therefore establish a date for the ending of the infringement. However, since the apparently final manifestation of the agreement, known to the Commission, is the liquidation of Interciment SA on 26 March 1993, the Commission has used that date for determining the reference period for the fine.' It is plain from that passage that if the Commission had not had the information supplied in the letter of 3 May 1993, it would have taken the view, for the purpose of setting the fines, that the infringement constituted by the Cembureau agreement was still continuing when the contested decision was adopted, as had been its view in the SO (point 93). That letter therefore caused the Commission to shorten the reference period adopted for the purpose of calculating the fines, thus benefiting all the addressees of the contested decision, including SFIC and Aalborg, which do not therefore have any interest in seeking to have that document excluded from the proceedings.

312 Ciments Français, Aalborg, Uniland and Oficemen refer to documents 33.126/12145 to 12159 and 12161 to 12342 (contested decision, recital 27, paragraph 6). Those documents concern agreements concluded between Calcestruzzi and the three Italian cement producers, Italcementi, Unicem and Cementir. It is clear from recital 55, paragraph 2, of the contested decision that the Commission relied on those documents as proof of the infringement complained of in Article 4(3)(b) of the contested decision, namely the agreement between the Italian cement producers that aimed to prevent imports of Greek cement by Calcestruzzi. Since that infringement was not alleged to have been committed by Ciments Français, Aalborg, Uniland and Oficemen, they cannot claim that their rights of defence were infringed by the fact that they were not able to express their views on those documents.

313 Uniland, Oficemen and Blue Circle refer to document 33.126/19208 (contested decision, recital 27, paragraph 10) and Blue Circle to documents 33.126/19203 and 19204 (contested decision, recital 27, paragraphs 8 and 9). Contrary to the indication in the contested decision, document 33.126/19208 does not in fact correspond to the telex of 2 June 1987 in which Calcestruzzi repeated to Titan its request for a meeting with the Italian cement producers in order to resolve

the problem linked to the non-performance of the contract to purchase Greek cement, but to a telex of 29 January 1987 from Titan to Calcestruzzi, which is not referred to in the contested decision. The telex of 2 June 1987 from Calcestruzzi to Titan, a large extract of which is reproduced in recital 27, paragraph 10, of the contested decision, in fact corresponds to document 33.126/19218, a document which was in the Box (see paragraph 95 above). It supports the Commission's case relating to the infringement referred to in Article 4(3)(b), namely the agreement between the Italian cement producers that aimed to prevent imports of Greek cement by Calcestruzzi. The same holds for documents 33.126/19203 (telex from Titan to Calcestruzzi of 20 May 1987 (contested decision, recital 27, paragraph 9)) and 33.126/19204 (telex from Italcementi to Titan of 13 May 1987 (contested decision, recital 27, paragraph 8)) to which Blue Circle refers. As the infringement referred to in Article 4(3)(b) was not attributed to Uniland, Oficemen and Blue Circle, the abovementioned documents cannot be regarded as evidence used against them in the contested decision.

314 Aalborg also refers to documents 33.126/10926 to 10941, 14446 to 14453 and 20057 to 20064 (contested decision, recital 28, paragraphs 15, 17 and 19), which relate to the infringements referred to in Article 4(4)(b), (d) and (f) respectively of the contested decision; those infringements are not alleged to have been committed by the applicant. Uniland refers to documents 33.126/10908 to 10913, 10927 to 10935, 10937 to 10940, 10897 to 10901, 10903 to 10905, 19562 to 19574 and 19576 to 19579 (contested decision, recital 28, paragraph 15), 19501, 19502, 19504 to 19510, 19482, 19483, 19485 to 19487, 19489, 19814 to 19816, 19818, 19820 to 19826 and 19828 to 19843 (contested decision, recital 28, paragraph 16), 20058, 20060, 20061, 20064 and 20066 to 20070 (contested decision, recital 28, paragraph 17), 19708, 19711 to 19716, 19718 to 19721 and 14407 (contested decision, recital 28, paragraph 18), 14455 to 14465, 14467 to 14469 and 14446 to 14453 (contested decision, recital 28, paragraph 19), 18118 to 18121 and 18125 to 18127 (contested decision, recital 28, paragraph 20), 7631 (contested decision, recital 28, paragraph 21), 19622 to 19627, 19629, 19586, 19588 to 19590, 19592 to 19595, 19598 to 19600, 19602, 19604, 19606, 19608, 19618 to 19620, 19631, 19633, 19634, 19636 to 19644, 19646 to 19650, 19652 and 19654 (contested decision, recital 28, paragraph 22), all of which relate to the contracts or transactions for the purchase of Greek cement to which the Commission objected in Article 4(4)(b) to (h) of the contested decision on the ground that they were carrot actions. None of those infringements was, however, alleged against Uniland. Aalborg and Uniland cannot therefore allege that their rights of defence were infringed by the fact that they were not able to express their views on the abovementioned documents.

315 Blue Circle also refers to documents 33.126/19482 to 19489, 19501 to 19511 and 19814 to 19843 (contested decision, recital 28, paragraph 16) relating to the agreement between Titan and Holderbank objected to in Article 4(4)(c) of the contested decision; documents 33.126/20057 to 20071 (contested decision, recital 28, paragraph 17), which relate to the agreement between Heracles and Holderbank objected to in Article 4(4)(d) of the contested decision; documents 33.126/14407 to 14417 (contested decision, recital 28, paragraph 18) relating to the agreement between Lafarge and Titan objected to in Article 4(4)(e) of the contested decision; documents 33.126/14446 to 14453, 18179 and 18180 (contested decision,

recital 28, paragraph 19), relating to the agreement between Lafarge and Heracles objected to in Article 4(4)(f) of the contested decision; documents 33.126/7629 to 7631, 18117 to 18121 and 18125 to 18127 (contested decision, recital 28, paragraphs 20 and 21), relating to the concerted practice by CBR, Heracles and Titan objected to in Article 4(4)(g) of the contested decision; and documents 33.126/19585 to 19620, 19621 to 19629 and 19631 to 19656 (contested decision, recital 28, paragraph 22), relating to the agreement between Titan, Aker and EUROC alleged in Article 4(4)(h) of the contested decision. However, as those documents were used in the contested decision as evidence of infringements for which Blue Circle was not held responsible, they cannot be regarded as incriminating evidence relied upon as against it.

316 Lastly, Blue Circle complains that the Commission did not mention in the SO various documents concerning the ECEC: documents 33.126/12524 to 12534, 18201 to 18204 (contested decision, recital 31, paragraph 3) and documents 33.126/3410 to 3412, 3422 to 3433, 6139 to 6142, 12544 to 12674, 12706 to 12709, 12721 to 12728, 14027 to 14029, 14245 to 14249, 14257 to 14262, 14289 to 14298, 14300, 14301, 14303 to 14309, 14311 to 14316, 16766 and 16790 to 16824 (contested decision, recital 33, paragraphs 1 to 5). However, as Blue Circle was not alleged to have participated in the concerted practices in the framework of the ECEC, the subject-matter of Article 5 of the contested decision, those documents cannot be regarded as evidence which was used against it. The same holds for other documents to which Blue Circle refers (documents 33.126/3418 to 3421, 12607 to 12610, 12614 to 12616, 12627 to 12634, 12667 to 12674, 14184, 14257 to 14262, 14266, 14267, 14303 to 14315, 18218 and 18219; contested decision, recital 32, paragraphs 1 to 3), which concern the link between the EPC, in which Blue Circle participated, and the ECEC, since that link between the two export committees was used solely in order to characterise the ECEC's activities as infringements (contested decision, recital 58, paragraph 3(b)).

317 It follows that none of the abovementioned documents identified by SFIC, Ciments Français, Aalborg, Uniland, Oficemen, Holderbank, Aker, EUROC and Blue Circle were used against them as incriminating documents. Those applicants cannot therefore refer to one or other of those documents in order to show that the Commission did not give them an opportunity during the administrative procedure to express their views on incriminating documents used in the contested decision.

5. Documents used in the contested decision in the context of an infringement attributed to the applicant who is relying on them

318 First, the Court points out that documents used in the contested decision in the context of an infringement attributed to an applicant are not necessarily all incriminating documents used against it, on which it should have had an opportunity to express its views during the administrative procedure. Its rights of defence are not infringed where a document to which it was not given access was used solely in the contested decision to substantiate an allegation that another applicant participated in the same infringement or where it was used to refute a specific argument relied upon by such an applicant during the administrative procedure.

319 Thus, document 33.126/15983 (contested decision, recital 25, paragraph 9), on which Uniland, Holderbank and Blue Circle rely, was used only to prove that Italcementi participated in the meeting in Stockholm on 9 June 1986. It is a letter from Italcementi of 21 March 1990 in reply to the Commission's request for information, in which Italcementi states: 'As regards the Stockholm meeting, Mr Pesenti [of Italcementi] remembers having participated, on the margins of a Cembureau meeting, with representatives of other European producers.' That document does not contain any evidence of such a nature as to incriminate Uniland, Holderbank or Blue Circle. It is not therefore used as incriminating evidence against them. Nor do documents 33.126/18771 and 18755 (contested decision, recital 25, paragraph 9), to which Blue Circle also refers, constitute incriminating evidence used against Blue Circle inasmuch as they confirm the presence of the Spanish and Swiss Head Delegates at the meeting in Stockholm on 9 June 1986.

320 Uniland and Blue Circle also refer to documents 33.126/14828 to 14860 mentioned in recital 29, paragraph 4, of the contested decision; they are documents of the SFIC on which the Commission relies at that point of the contested decision to refute the SFIC's assertions that it did not take part in any meeting of the ETF and knew nothing of its activities. It is not therefore incriminating evidence used against Uniland and Blue Circle in the contested decision.

321 In that same context, Blue Circle complains that the Commission did not refer in the SO to documents 33.126/12808 to 12814, 12915 to 12966, 12967 to 12970, 12987 to 12998 and 13004 to 13011, mentioned in recital 35, paragraph 3, of the contested decision, to substantiate its argument that Valenciana took part in the meetings of the EPC after 1 January 1986. It is, however, clear that the documents in question were not used as incriminating evidence against Blue Circle in the contested decision. The same is true of documents 33.126/2035 to 2043, 2063 to 2069 and 2436 to 2447, to which Blue Circle also refers, which were mentioned (contested decision, recital 44, paragraph 3) in order to refute a specific argument which the FIC had raised at the hearing.

322 Second, the Court points out that in their applications several applicants referred to documents which had been used against them in the contested decision but to which they allegedly did not have access during the administrative procedure or which were not sufficiently identified in the SO.

323 In principle, only documents which have been cited or mentioned in the SO are valid evidence (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55; and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 34). However, documents appended to the SO which are not mentioned in it may be used in the decision as against the applicant if he could reasonably

deduce from the SO the conclusions which the Commission intended to draw from them (*Shell* v *Commission*, cited above, paragraph 56, and T-13/89 *ICI* v *Commission*, cited above, paragraph 35).

324 In the present case, there were no appendices to the SO. When access was given to the file, the Commission made available to each addressee, by means of the Box (see paragraph 95 above), a set of documents substantiating the SO. The documents thus made available were comparable to appendices to the SO. They therefore constitute admissible evidence against the applicants inasmuch as they could have reasonably deduced from the SO the conclusions which the Commission intended to draw from them (judgments cited in paragraph 323 above, *AKZO* v *Commission*, paragraph 21, and T-13/89 *ICI* v *Commission*, paragraph 34).

325 SFIC contends, first of all, that although the SO is based on various documents identified in it the Commission should have made clear which documents were being relied upon as against which addressee. That argument must be rejected: where an addressee of the SO was specifically the subject-matter of an objection set out in that SO it should have realised that the documents cited in support of that objection concerned it.

326 As regards the evidence used to support the finding of the infringement referred to in Article 1 of the contested decision, Blue Circle complains that the Commission did not mention in the SO the statement by Mr Kalogeropoulos at the Heracles board meeting of 25 June 1986 (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877; see paragraph 816 below). However, the Court points out that the passage from that statement, set out in recital 18, paragraph 5, of the contested decision, was cited word for word in point 9 of the SO. Furthermore, the documents in question were in the Box (see paragraph 95 above). In those circumstances, they must be considered to be admissible evidence against Blue Circle and the other addressees of the contested decision.

327 Lafarge, Unicem, Cimpor and Italcementi refer to documents 33.126/11332 to 11337, two internal notes of Blue Circle, the content of which is set out in recital 18, paragraphs 2 and 3, of the contested decision in the part of 'The Facts' relating to the existence of the Cembureau agreement. Those notes were in the Box (see paragraph 95 above). Moreover, the notes which refer to a Cembureau principle of non-transhipment to home markets (documents 33.126/11332 to 11334 and 11335 to 11337) were cited in recital 9 of the SO entitled 'The Cembureau agreement or Cembureau principle of not transhipping to internal European markets'. In those circumstances, the abovementioned notes of Blue Circle are evidence which may be relied upon as against all the addressees of the contested decision.

328 Unicem, Irish Cement and Blue Circle also contend that they had no opportunity during the administrative procedure to reply to Cembureau's observations on those same notes. Those observations, set out in documents 33.126/11525 and 13568 to 13573 (contested decision,

recital 18, paragraph 4), were expressly referred to in point 9 of the SO. They were, moreover, in the Box (see paragraph 95 above). Unicem, Irish Cement and Blue Circle cannot therefore allege that they had no opportunity during the administrative procedure to submit their observations on those documents.

329 Italcementi and Blue Circle also complain that the Commission did not rely, in the SO, on a number of documents relating to meetings of the Head Delegates. As regards the meeting of the Head Delegates on 14 January 1983, they refer to document 33.126/11581 (list of participants in the meeting of 14 January 1983; contested decision, recital 19, paragraph 4), and to documents 33.126/11578 and 11579 (memorandum on the structure of the meeting; contested decision, recital 19, paragraph 6). Blue Circle also refers to various documents concerning the amendment to the initial agenda for the meeting on 14 January 1983: documents 33.126/11580 (draft agenda of that meeting; contested decision, recital 19, paragraph 3), 33.126/11559 (telex from Cembureau to Mr Van Hove of 17 November 1982; contested decision, recital 19, paragraph 3), 33.126/11558 (telex from Mr Van Hove to Cembureau of 17 November 1982; contested decision, recital 19, paragraph 3) and No 33.126/11565 (minutes of the Executive Committee meeting on 22 December 1982; contested decision, recital 19, paragraph 3). As regards the meeting of the Head Delegates on 19 March 1984, Italcementi and Blue Circle refer to the following documents: document 33.126/11715 (table attached to the letter calling the meeting; contested decision, recital 19, paragraph 7) and documents 33.126/11699 to 11700 (list of participants in the meeting in question; contested decision, recital 19, paragraph 8). Blue Circle also refers to documents Nos 33.126/11714 and 11730 (letter calling the meeting of the Head Delegates on 19 March 1984; contested decision, recital 19, paragraph 7) and Italcementi to documents 33.126/11717 to 11727 (documents attached to the letter calling the meeting of 19 March 1984; contested decision, recital 19, paragraph 7). As regards the meeting of 7 November 1984, Italcementi and Blue Circle refer to documents 33.126/11748 (letter calling the meeting; contested decision, recital 19, paragraph 12) and 33.126/11751 (draft introductory statement for the meeting, contested decision, recital 19, paragraph 12). Italcementi refers also to document 33.126/11749 (agenda of the meeting on 7 November 1984; contested decision, recital 19, paragraph 12) and Blue Circle to document 33.126/11752 (list of participants in the meeting on 7 November 1984; contested decision, recital 19, paragraph 13).

330 All those documents were in the Box (see paragraph 95 above). In the SO (Chapter 2, point 9) the Commission had stated: 'Several Cembureau documents relating to Head Delegates meetings referred to the fact that the "Cembureau agreement or Principle" was developed and established within Cembureau.' In that connection, it referred expressly (same point) to the Head Delegates meetings of 14 January 1983, 19 March 1984 and 7 November 1984. In those circumstances, the applicants were able to understand that all the documents in the Box that referred to their presence at those meetings and/or disclosed the content of the discussions at those meetings might be used against them in the Commission's decision. The documents referred to in the previous paragraph therefore constitute admissible evidence against all the addressees of the contested decision.

331 As regards the evidence on which the Commission relied in finding the infringement referred to in Article 3(2) of the contested decision, the Spanish-Portuguese agreement, Cimpor submits, first, that in the international part of the SO no reference was made to documents 33.322/155

to 157. Those documents are Cimpor's record of the meeting held on 22 July 1985 between representatives of the Spanish and Portuguese producers. That record, which states that the representatives of Spanish and Portuguese cement producers expressed their clear support for the principle that there should be no cement movements from Spain to Portugal and from Portugal to Spain, was used by the Commission in recital 21, paragraphs 2 and 11, and recital 49, paragraph 1, of the contested decision in the context of the infringement found in Article 3(2) thereof. It had been mentioned in point 11 of the international part of the SO (Chapter 2) relating to the Spanish-Portuguese agreement and had even been cited word for word there. That document, which was also in the Box (see paragraph 95 above), is therefore admissible evidence against Cimpor.

332 Oficemen, Cimpor and SECIL object to the use of the Hispacement document (documents 33.322/2898 to 2903) in recital 21, paragraphs 2 and 11, of the contested decision. They state that although that document was reproduced in part in the chapter of the SO relating to Spain (Chapter 8, point 55(c)), to which Oficemen had access during the administrative procedure, and in the chapter of the SO relating to Portugal (Chapter 9, point 56(b)) to which Cimpor and SECIL had access during the same procedure, it was, on the other hand, not mentioned at all in the international part of the SO. It is not therefore admissible evidence.

333 The Court points out that point 55(c) of Chapter 8 of the SO dealing with Spain is entitled 'Movements of cement between Spain and Portugal'. Point 56(b) of Chapter 9 of the SO dealing with Portugal is entitled 'Movements of cement between Portugal and Spain'. In those passages of the SO it is explained that representatives of Spanish and Portuguese cement producers indicated their full support for the principle of excluding any movement of cement between the two countries in either direction. Those passages refer expressly to the Hispacement document (document 33.322/2898 to 2903), on which Oficemen, Cimpor and SECIL rely, as follows: 'That total support for excluding any movement of cement in either direction between the two countries was ratified by an agreement adopted in the "last 10 days of October 1985" or in December 1985. In fact, in document 17-4 discovered at Hispacement (documents 33.322/2898 to 2903) concerning the meeting of 28 May 1986 between SECIL and Hispacement, it is stated: "Mr Bordado informs me that the chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts in December last year, at which time it was decided to agree on a reciprocal ban on exports between the two countries".' Accordingly, Oficemen, on reading point 55(c) of the chapter of the SO relating to Spain, and Cimpor and SECIL, on reading point 56(b) of the chapter of the SO relating to Portugal, must have been able to understand that those passages and the Hispacement document (documents 33.322/2898 to 2903) to which express reference had been made, had to be related to the objection relating to the Spanish-Portuguese agreement set out in the international chapters of the SO (SO, Chapter 2, point 11, and Chapter 10, point 61(c)). According to the SO, that agreement concerned the 'agreements entered into between the association of Spanish producers Oficemen... and the Portuguese producers Cimpor and SECIL (point 11) not to export to their respective traditional sales territories' (SO, Chapter 10, point 61(c)). Having regard to the obvious link between the Hispacement document (documents 33.322/2898 to 2903) and the objection relating to the Spanish-Portuguese agreement, and despite the position of the reference to that document in the SO, the Commission was entitled, in the contested decision, to use against the applicants concerned the parts of that document which had been accessible to

Oficemen, Cimpor and SECIL during the administrative procedure (see paragraphs 369 to 372 below).

334 Cimpor and SECIL also object to the use of documents 33.322/1311 and 1314 as incriminating evidence in the contested decision. These documents are the minutes of the Oficemen board meeting referred to in recital 21, paragraph 3, of the contested decision to support the finding that a meeting had been held between Oficemen, Cimpor and SECIL on 20 January 1986, the object of which was a mutual exchange of information as to changes in exports between Spain and Portugal. However, in point 11 of the SO (Chapter 2) the Commission had already observed: 'so as to overcome any problems posed by exports, meetings between Portuguese and Spanish producers were held [*inter alia* on] 20 January 1986.' In those circumstances, Cimpor and SECIL could reasonably have foreseen the conclusions which the Commission was going to draw from documents 33.322/1311 and 1314, both of which were in the Box (see paragraph 95 above).

335 Cimpor and SECIL also submit that in the international part of the SO there was no reference to other evidence adduced by the Commission in recital 21, paragraphs 4 and 5, of the contested decision (documents 33.322/162, 163 to 166, 170, 172, 1406 to 1408 and 1410 to 1412). Cimpor also criticises the use of documents 33.322/181 and 252 in recital 21, paragraph 7, of that decision.

336 Documents 33.332/163 to 166 and 33.322/1406 to 1408, on the one hand, and documents 33.322/1410 to 1412, on the other, relate, respectively, to the minutes of the meetings on 23 January and 6 March 1987 between the Portuguese and Spanish producers. The SO explicitly referred to the holding of those meetings, both in point 11 of Chapter 2 of the SO, dealing with the international objection relating to the Spanish-Portuguese agreement and in point 56(b) entitled 'Movements of cement between Portugal and Spain' of Chapter 9 of the SO relating to Portugal. Although point 56(b) is in a national chapter of the SO, Cimpor and SECIL must have realised that this passage of the SO had to be placed in the context of the objection relating to the Spanish-Portuguese agreement set out in the international chapters of the SO (SO, Chapter 2, point 11, and Chapter 10, point 61(c)). Furthermore, point 11 of Chapter 2 of the SO, relating to the Spanish-Portuguese agreement, states: 'The solution to [the problem of exports of cement to Spain by Portuguese distributors, retailers and transport undertakings] seems to have been found at the meeting on 23 January 1987: in the medium term, a policy of increasing Portuguese cement prices; in the short term, a policy of discouraging Portuguese operators carrying out frontier-zone exports.' The meeting of 6 March 1987 was also expressly referred to in point 11 of the SO as one of the Spanish-Portuguese meetings which sought 'to overcome any problems posed by [Portuguese] exports' (SO, point 11). In those circumstances, Cimpor and SECIL could have linked documents 33.322/163 to 166, which were in the Box (see paragraph 95 above), and documents 33.322/1406 to 1408 and 1410 to 1412, which were in the Portuguese file (to which they had access during the administrative procedure), to the Spanish-Portuguese agreement referred to in the international chapters of the SO (SO, Chapter 2, point 11, and Chapter 10, point 61(c)) and could have foreseen the conclusions which the Commission intended to draw from those various documents in the context of the infringement referred to in Article 3(2) of the contested decision. There can therefore be no question of infringement of the rights of the defence.

337 Documents 33.322/162, 181 and 252 and documents 33.322/170 and 172 were used by the Commission to support its contention that the state of cement exports from Portugal to Spain was examined in the meetings between representatives of the Portuguese and Spanish producers held between 6 March 1987 and 24 April 1989. As those meetings were expressly referred to in point 11 of the SO as amongst the Spanish-Portuguese meetings which aimed to 'overcome any problems posed by [Portuguese] exports' (SO, point 11) and as the SO stated in the same point that at 'each meeting, an analysis of monthly exports of Portuguese cement to Spain [had been] carried out for each entry point', Cimpor and SECIL could reasonably have foreseen the conclusions which the Commission was going to draw from those documents (all of which were in the Box (see paragraph 95 above)) in recital 21, paragraphs 5 and 7, of the contested decision.

338 Cimpor also submits that in the international part of the SO there was no reference to documents 33.322/512, 513, 549, 550, 566, 567, 1397 and 1398, which were used in recital 21, paragraphs 6 and 8, of the contested decision.

339 Documents 33.322/512, 513, 549, 550, 566 and 567 are telexes from 1988 and 1989 either to or from Cimpor, which, according to the contested decision, 'show that Cimpor ... refused all requests for cement from Spain [in 1988 and 1989] with the standard response "we have no availabilities for export"' (contested decision, recital 21, paragraph 8). Those documents were identified by their numbering in the Portuguese chapter of the SO (see SO, Chapter 9, point 56(c); 'Refusal to sell'), which concerned the refusals, using that standard response, of requests for cement received from Spain. The chapter of the SO relating to Portugal was sent to Cimpor during the administrative procedure and the documents in question were all in the Portuguese file to which it had access during that procedure. Since the Commission stated in point 11 of the international part of the SO (Chapter 2) relating to the Spanish-Portuguese agreement that 'a whole series of telexes sent in 1988 and 1989 [showed] that Cimpor, the producer having the most direct interest in exports, [had] refused all Spanish requests for cement with the standard response "we have no availabilities for export"', Cimpor could reasonably have linked those documents to point 11 of the SO and have foreseen the conclusions which the Commission intended to draw from them in the context of the infringement referred to in Article 3(2) of the contested decision.

340 Documents 33.322/1397 and 1398 are telexes indicating the names of the persons who were to attend the Spanish-Portuguese meeting of 27 July 1988. That meeting was clearly mentioned in point 11 of the international part of the SO (Chapter 2) as one of the Spanish-Portuguese meetings which aimed to 'overcome any problems posed by [Portuguese] exports'. The meeting in question was also referred to in point 56(b) of Chapter 9 of the SO relating to Portugal in the context of the problems associated with movements of cement between Portugal and Spain. Moreover, the two documents in question were part of the national file to which Cimpor was given access during the administrative procedure. In those circumstances Cimpor could have foreseen that the Commission was going to rely on them in order to find in the contested decision (recital 21, paragraph 6) that a meeting had taken place on 27 July 1988 between

representatives of the Spanish and Portuguese producers. The two documents are therefore also admissible against Cimpor.

341 Oficemen refers to documents 33.322/92, 93, 95, 96, 177, 270 to 276, 492, 493 to 495, 527 to 529, 530 to 532, 537, 538 and 575. Cimpor and SECIL object to the use of documents 33.322/79, 84, 85, 88 to 90, 92, 93, 95, 177 and 270 to 276 as evidence in the contested decision. Cimpor also objects to the use of documents 33.322/158, 159, 160, 161, 485, 486, 490 to 492, 493 to 495, 496 to 511, 514, 515, 516, 517, 523, 524, 525, 526, 527 to 529, 530 to 532, 533 to 536, 537, 538, 539 to 541, 543 to 545, 546 to 548, 551 to 553, 554 to 556, 571 to 574 and 575 in the contested decision.

342 The Court points out, however, that document 33.322/575, a telex from Tracoisa to Cimpor of 13 March 1989, mentioned in recital 21, paragraph 8, of the contested decision, was expressly referred to in point 11 of the international part of the SO (Chapter 2). The same is true of documents 33.322/490 to 492, 496 to 511, 514, 515, 516, 517, 523, 524, 525, 526, 533 to 536, 539 to 541, 543 to 545, 546 to 548, 551 to 553, 554 to 556 and 571 to 574. Those documents are telexes which, according to point 11 of the SO and recital 21, paragraph 8, of the contested decision, show that Cimpor agreed to specific requests for cement during 1988 and 1989 for the following destinations: Africa, Guinea, Senegal, Libya, Madagascar, Puerto Rico, United States of America and Antilles. Those telexes, and the telex of 13 March 1989, were also in the Box (see paragraph 95 above). They are therefore admissible against Oficemen (documents 33.322/492 and 575) and against Cimpor (documents 33.322/490 to 492, 496 to 511, 514, 515, 516, 517, 523, 524, 525, 526, 533 to 536, 539 to 541, 543 to 545, 546 to 548, 551 to 553, 554 to 556, 571 to 574 and 575).

343 Documents 33.322/485, 486, 493 to 495, 527 to 529, 530 to 532, 537 and 538 are telexes from 1988 and 1989 sent by or to Cimpor. They are referred to in recital 21, paragraph 8, of the contested decision in order to show that Cimpor refused any request for Spanish cement in 1988 and 1989. Those documents were also in the Box (see paragraph 95 above). Since the Commission stated in point 11 of the SO (Chapter 2) that 'a whole series of telexes sent in 1988 and 1989 [showed] that Cimpor, the producer having the most direct interest in exports, [had] refused all Spanish requests for cement with the standard response "we have no availabilities for export"', Oficemen and Cimpor could reasonably have linked those documents to the relevant passages of the SO and have foreseen the conclusions which the Commission intended to draw from them. Documents 33.322/92, 93, 95 and 96 and documents 33.322/158 and 159, 160, 161 and 270 to 276, referred to in recital 21, paragraph 6, of the contested decision, confirm that meetings were held between the Portuguese cement producers and representatives of the Spanish producers on 28 October 1988, 12 January, 23 February and 24 April 1989 and on 10 November 1987, 5 February, 21 April, 10 May and 27 July 1988. Point 11 of the SO (Chapter 2) mentioned that on those dates meetings had taken place between Spanish and Portuguese producers 'so as to overcome any problems posed by exports' of cement from Portugal to Spain. Documents 33.322/92, 93, 95, 96, 158, 159, 160, 161 and 270 to 276 were all in the Box. Oficemen, Cimpor and SECIL could reasonably have foreseen from point 11 of the international part of the SO which conclusions the Commission would draw in the

contested decision from documents 33.322/92, 93, 95, 96 and 270 to 276. From reading point 11 of the international part of the SO, Cimpor could also foresee that documents 33.322/158, 159, 160 and 161 were going to be used against it in the context of the infringement referred to in Article 3(2) of the contested decision.

344 As regards documents 33.322/79, 84, 85 and 88 to 90, referred to in recital 21, paragraph 6, of the contested decision, they confirm that meetings were held between the Portuguese cement producers and representatives of the Spanish producers on 25 June 1987 (document 33.322/79), 10 November 1987 (document 33.322/84), 5 February 1988 (document 33.322/85), 21 April 1988 (document 33.322/88), 10 May 1988 (document 33.322/89) and 27 July 1988 (document 33.322/90). Point 11 (Chapter 2) of the SO stated that on those dates meetings between Spanish and Portuguese producers had been held 'so as to overcome any problems posed by exports' of Portuguese cement to Spain. In those circumstances, Cimpor and SECIL could reasonably have foreseen the conclusions which the Commission was going to draw from those documents in the contested decision, all of those documents being in the Box (see paragraph 95 above). Finally, point 11 (Chapter 2) of the SO stated that 'at each meeting, an analysis of monthly exports of Portuguese cement to Spain [had been] carried out for each entry point'. As document 33.322/177, also contained in the Box, confirmed that fact, Oficemen, Cimpor and SECIL should also have foreseen the conclusions which the Commission was going to draw from it in recital 21, paragraph 7, of the contested decision, which paraphrases the abovementioned extract from the SO.

345 Next, as regards the evidence used to support the allegation of an infringement in Article 3(3)(a) of the contested decision, namely the Franco-German agreements and concerted practices, SFIC, Ciments Français and Heidelberger object to the use in the contested decision of a Heidelberger memorandum of 12 August 1987 (contested decision, recital 22, paragraph 10; document 33.126/3573) as allegedly new evidence. Although it is clear that this memorandum is not referred to in the SO, the Court points out that it was nevertheless in the Box (see paragraph 95 above). As it is therefore a document that is comparable to an appendix to the SO, it suffices to examine whether the applicants concerned could reasonably have deduced from the SO the conclusions which the Commission was going to draw from that memorandum. The applicants ought to have done so, since the SO contained a point 12 entitled 'Implementation of the "Cembureau agreement or Principle of not transhipping to internal European markets": France-Germany', in which the Commission referred expressly to the letter from Ciments Français of 22 September 1986 (contested decision, recital 22, paragraph 10; documents 33.126/3574 to 3576) which was attached to the Heidelberger memorandum of 12 August 1987 (see paragraph 2396 below).

346 As regards the evidence used to substantiate the various infringements alleged in Article 4 of the contested decision, namely the setting-up of the ETF and the measures adopted in the context of the ETF, Holderbank and Blue Circle cite, first of all, the handwritten record by Mr Dutron, director of Cembureau, following the meeting of 28 May 1986 in Rome (contested decision, recital 25, paragraph 1; documents 33.126/10982 and 10983). Blue Circle also refers to the typewritten record of that meeting (contested decision, recital 25, paragraph 1; document 33.126/18771). It refers, moreover, to the list of participants in the Zurich-Céligny meeting from 3 to 5 June 1986 (contested decision, recital 25, paragraph 2; document 33.126/18756). Those meetings and their subject-matter were clearly set out in point 17(a) and (b) of 'The

Facts' in the SO dealing with the ETF (Chapter 2, Section 2), and the documents in question were in the Box (see paragraph 95 above). Holderbank and Blue Circle could therefore reasonably have linked those documents to the relevant passages in the SO and have deduced from them the conclusions that the Commission was going to draw as regards the various infringements referred to in Article 4 of the contested decision.

347 Holderbank also refers to the minutes of the meeting of the Head Delegates and of the ETF on 9 September 1986 in Baden-Baden (contested decision, recital 25, paragraph 22; documents 33.126/18849 to 18862), to the handwritten record of Lafarge relating to the ETF meeting of 11 February 1987 in Geneva (contested decision, recital 25, paragraph 46; documents 33.126/4911 to 4913) and to Lafarge's record of the meeting on 17 March 1987 of the subgroup of the ETF on 'stick actions' (contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4861). Those various meetings were all referred to in the SO (at point 17(e) and (g) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2)) with a brief description of the agenda of those meetings. Furthermore, the various documents cited by that applicant in regard to those three meetings were in the Box (see paragraph 95 above). Holderbank could therefore have reasonably linked those documents to the relevant passages of the SO and deduced from them the conclusions the Commission was going to draw from them as regards the various infringements referred to in Article 4 of the contested decision. For the same reasons, Lafarge's handwritten record of the ETF meeting of 11 February 1987 in Geneva (contested decision, recital 25, paragraph 46; documents 33.126/4911 to 4913) is admissible evidence against Aalborg.

348 Blue Circle also complains that in the contested decision the Commission relied on documents 33.126/18821 and 18822 (contested decision, recital 25, paragraphs 9 and 10, and recital 26, paragraph 2), 33.126/18857 to 18861 (contested decision, recital 26, paragraph 2) and 33.126/18755 (contested decision, recital 25, paragraphs 9 and 10) in order to prove that Blue Circle participated in the Stockholm meeting on 9 June 1986 and to prove the subject-matter of that meeting. It also complains of the use in the contested decision of the record of the Head Delegates meeting in Baden-Baden on 9 September 1986. It refers in particular to document 33.126/18861, from which it may be inferred that it was present at the Stockholm meeting (contested decision, recital 25, paragraph 9). The meetings at Stockholm and Baden-Baden and the subject-matter of those meetings were clearly alluded to in point 17(c) and (e) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2), and the documents in question were in the Box (see paragraph 95 above). Blue Circle could therefore reasonably have linked those documents to the relevant passages of the SO and have deduced from them the conclusions the Commission was going to draw from them as regards the various infringements referred to in Article 4 of the contested decision.

349 Blue Circle also refers to various documents concerning other meetings mentioned in recital 25 of the contested decision. They concern the ETF meeting of 17 June 1986 in London, mentioned in recital 25, paragraph 11, of the contested decision (documents 33.126/18781 to 18790); documents concerning the ETF meeting on 2 July 1986 in Milan, mentioned in recital 25, paragraph 12, of the contested decision (documents 33.126/18756, 18757 and 18791 to 18794); documents concerning the ETF meeting on 8 July 1986 in Geneva, mentioned in recital 25, paragraph 13, of the contested decision (documents 33.126/18757 and 18795); documents concerning the ETF meeting on 19 August 1986 in Geneva, mentioned in recital 25, paragraph 14, of the contested decision (documents 33.126/18757, 18758 and 18795 to 18811); a document concerning the ETF meeting in Baden-Baden on 9 September 1986, mentioned in

recital 25, paragraph 21, of the contested decision (document 33.126/18848); documents concerning the meeting of the Head Delegates in Brussels on 6 November 1986, mentioned in recital 25, paragraph 39, of the contested decision (documents 33.126/19007 and 19008); documents concerning the ETF meeting in Milan on 9 January 1987, mentioned in recital 25, paragraph 44, of the contested decision (documents 33.126/18759, 18921 and 18922); documents concerning the ETF meeting in Geneva on 11 February 1987, mentioned in recital 25, paragraph 45, of the contested decision (documents 33.126/18760, 18939 to 18944 and 18946 to 18949); and documents concerning the meeting of the ETF's subgroup on 'stick actions' on 17 March 1987, mentioned in recital 25, paragraph 47, of the contested decision (documents 33.126/4858 to 4861). Those various meetings were all referred to in point 17(d), (f) and (g) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2) with a brief description of the agenda of those meetings. Furthermore, the various documents cited by that applicant in regard to those meetings were all in the Box (see paragraph 95 above). Blue Circle could therefore reasonably have linked those documents to the relevant passages of the SO and have deduced the conclusions which the Commission was going to draw from them as regards the various infringements referred to in Article 4 of the contested decision.

350 Blue Circle refers in addition to documents 33.126/4487 to 4490 (contested decision, recital 25, paragraph 48), the internal note of 1 June 1987 drawn up by Lafarge following the meetings in Luxembourg from 25 to 28 May 1987, in which it is stated, *inter alia*, regarding the future of the ETF: '... as the tool had been forged it might as well be kept ready for use'. Those documents were in the Box made available to Blue Circle during the administrative procedure (see paragraph 95 above). Blue Circle could reasonably have foreseen the conclusions the Commission was going to draw from them, because in point 61(h) of the SO, relating to the 'Legal Assessment' of the ETF (Chapter 10), the Commission stated that 'the infringements committed by the undertakings in question [in the ETF] from 1986 [were] all the more serious as they [had been] of long duration', but it did not establish, as it had done for the other objections, any date for the end of the infringement, and in point 93(b) of the SO, concerning the applicability of Article 15(2) of Regulation No 17, it '[considered] that almost all of the agreements, decisions and concerted practices [were] continuing'. The documents in question must therefore be considered to be admissible evidence against Blue Circle.

351 Italcementi refers to the following documents concerning the meetings mentioned in recital 25 of the contested decision: the draft agenda for the ETF meeting in Milan on 2 July 1986 (contested decision, recital 25, paragraph 12; document 33.126/18794); the agenda of the ETF meeting in Geneva on 19 August 1986 (contested decision, recital 25, paragraph 14; document 33.126/18811); and the notes of the meeting of the Head Delegates in Brussels on 6 November 1986 (contested decision, recital 25, paragraph 39; documents 33.126/19007 and 19008). Since all the abovementioned documents were in the Box (see paragraph 95 above) and the Commission referred in point 17(d) and (f) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2) to the holding of the meetings in question and to the agenda of those meetings, Italcementi could reasonably have deduced from the SO the conclusions the Commission intended to draw from the documents in question in regard to the infringements referred to in Article 4(1) to (3) of the contested decision.

352 The SFIC submits that there was no reference in the international part of the SO to the agendas and minutes of three of its meetings, held on 8 July, 9 September and 7 October 1986 (documents 33.126/14828 to 14860; minutes cited in recital 29, paragraph 4, of the contested decision), which were used against it so as to hold it responsible for the infringements referred to in Article 4(1) to (3)(a) of the contested decision. However, the Court finds that the documents in question, which emanate from SFIC and were in the file relating to France to which it was given access during the administrative procedure, were alluded to in broad terms in the chapter of the SO dealing with France, in the passage relating to exports of cement from Greece (Chapter 5, point 44(f)), which concludes, in regard to those documents, that 'in any case the dates of the meetings of the office (of the SFIC) with "exports of Greek cement" on their agenda must be compared with the dates of the activities of the "Cembureau Task Force or European Task Force" referred to in Section 2 above'. It is clear from that passage that those documents, although referred to in the chapter of the SO relating to France, were clearly linked by the Commission not only to the objections concerning the French producers but also to the international objections relating to the ETF. On reading those statements, SFIC should therefore have realised that those documents, despite their position in the SO, were liable to be used by the Commission in the contested decision also in support of the objections against the applicant in the context of the ETF, and that it was appropriate for it to comment on documents 33.126/14828 to 14860 both by reference to the national objections and by reference to the international objections raised against it in the SO. They are therefore admissible evidence against it. Since the link between those national documents and the objections relating to the ETF had been clearly established in the SO and since SFIC had been able to comment on those documents during the administrative procedure, the Commission was legally entitled to refer to them in the contested decision, notwithstanding the fact that the national objections had been dropped.

353 As regards, in particular, the evidence on which the Commission relied in finding the infringement referred to in Article 4(2) of the contested decision, the setting-up of Interciment, Blue Circle submits that the Commission did not adequately refer in the SO to documents 33.126/18734 to 18739 and 18823 to 18832. Those documents were mentioned in the contested decision to substantiate the finding that Interciment, a company with a share capital of SFR 50 000, had been set up on 24 June 1986 by three Swiss lawyers and had been registered in Fribourg at the offices of the lawyer who had subscribed almost all of the shares and who was its sole administrator (contested decision, recital 26, paragraphs 3 and 5). Blue Circle also refers to document 33.126/18329 (contested decision, recital 26, paragraph 9) — extract from Holderbank's reply to a request for information — from which the Commission infers that Blue Circle had paid the relevant amount of its quota of shares in Interciment. However, there was a clear reference to those facts in point 18 of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2). Blue Circle could therefore have reasonably linked documents 33.126/18734 to 18739, 18823 to 18832 and 18329, all of which were in the Box (see paragraph 95 above), to the relevant passages of the SO and deduced the conclusions which the Commission intended to draw from them as regards the infringement referred to in Article 4(2) of the contested decision.

354 Blue Circle also complains of the fact that no mention was made by the Commission in the SO of the memorandum from Blue Circle's in-house lawyer of 10 July 1986 (contested decision, recital 26, paragraph 13; documents 33.126/18842 and 18843). However, on reading point 18 of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2), it could have seen that this memorandum, which was in the Box (see paragraph 95 above) and which states

that the setting-up of Interciment infringes Article 85(1) of the Treaty, was going to be used as incriminating evidence in the contested decision.

355 Documents 33.126/10960 to 10962 (statement of accounts of BCO, Blue Circle's Swiss subsidiary, of 7 November 1986), 10958 (telex from Blue Circle to Cementia of 10 October 1987), 6647 (handwritten Lafarge note of 3 October 1986) and 2915 (undated legal opinion of French origin) (contested decision, recital 26, paragraphs 7, 11, 12 and 13), to which Holderbank refers and which were also used by the Commission in the context of the infringement referred to in Article 4(2) of the contested decision, were expressly mentioned in the SO (SO, point 18 and footnote 14) and were in the Box (see paragraph 95 above). The mere fact that they were not identified in the SO by reference to their pagination cannot constitute an infringement of the applicant's rights of defence. Holderbank also refers to documents 33.126/16218 and 16220 (contested decision, recital 26, paragraph 8) which relate to the subscription by Italcementi of its share quota in the capital of Interciment and the subsequent resale of its shares to Holderbank. Those facts were clearly set out in point 18 of the SO and the documents in question were in the Box. Holderbank could therefore reasonably have linked those documents to the relevant passages of the SO and deduced from them the conclusions the Commission intended to draw from them as regards the infringement referred to in Article 4(2) of the contested decision.

356 As regards the infringement referred to in Article 4(3)(b) of the contested decision, Italcementi objects to the fact that during the administrative procedure it was not given access to documents 33.126/12145 to 12342. Those documents, cited in recital 27, paragraph 6, of the contested decision, are the agreements concluded in April 1987 between Calcestruzzi and three Italian cement producers, Unicem, Cementir and Italcementi. Although those documents were indeed classified as inaccessible to parties other than Unicem during the administrative procedure, with the exception of document 33.126/12160, most of them were accessible to Italcementi when it inspected the file relating to Italy during that same procedure, namely documents 33.126/12145 to 12166, 12180 to 12188 and 12231 to 12341. In any event, Italcementi, as a signatory to the agreements in question, was aware of their content. It also accepts that it had knowledge of those documents but considers that it should have had access to them during the administrative procedure so that it could check the copy in the Commission's file. It does not prove or even allege that the Commission, when referring to those documents in recital 27, paragraph 6, of the contested decision, misrepresented their original version. The Court points out, next, that point 35 of the chapter in 'The Facts' of the SO dealing with Italy, which was accessible to the applicant during the administrative procedure, indicated: 'The agreement [between the Italian producers and Calcestruzzi] was "finalised" on 3 and 15 April 1987, the dates on which a series of agreements were signed.' Point 70(b) of the chapter in the 'Legal Assessment' of the SO relating to Italy, also accessible to Italcementi during the administrative procedure, stated in regard to it: '... the agreements between the [Italian] producers and Calcestruzzi ... constitute restrictions of competition within the meaning of Article 85[(1) of the Treaty].' Furthermore, in the SO, the agreements concluded in April 1987 were also linked to the international objections relating to the ETF: point 19(d) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2), to which Italcementi had access during the administrative procedure, stated: '... Italcementi, Unicem, Cementir and Calcestruzzi signed an agreement ... under which the three cement producers undertook to meet all the Calcestruzzi's groups' cement requirements and the Calcestruzzi group undertook to obtain virtually all its cement supplies from them.' Point 61(h)(iv) of the international part, 'Legal Assessment', in the SO states: 'The pressure brought to bear on Calcestruzzi and the non-implementation by Calcestruzzi of the

contract on the purchase of cement from Titan are the result of agreements and/or concerted practices between the Italian producers Italcementi, Unicem and Cementir, ... aimed at removing from the Greek producers an important customer through which they could penetrate the Italian market.' Italcementi, which, as a signatory, had a copy of the agreements concluded in April 1987 could therefore reasonably have foreseen the conclusions which the Commission was going to draw from them as regards the infringement referred to in Article 4(3)(b) of the contested decision. In those circumstances, documents 33.126/12145 to 12342 are admissible evidence against Italcementi.

357 Italcementi also contends that document 33.126/19208, mentioned in recital 27, paragraph 10, of the contested decision, was not sufficiently identified in the SO. The Court points out (see paragraph 313 above) that that document, referred to in the contested decision in the description of the facts relating to the measures to defend the Italian market, does not in fact correspond, as the contested decision indicates, to the telex of 2 June 1987 by which Calcestruzzi repeated its request to Titan for a meeting with the Italian producers in order to resolve the problem associated with the non-performance of the contract for the purchase of Greek cement, but to a telex of 29 January 1987 from Titan to Calcestruzzi, to which no reference was made in the contested decision. The telex of 2 June 1987 from Calcestruzzi to Titan, a large extract from which is reproduced in recital 27, paragraph 10, of the contested decision, is in fact document 33.126/19218, which was in the Box (see paragraph 95 above). In connection with the objection which was ultimately to be the subject-matter of Article 4(3)(b) of the contested decision, the SO (point 19(d)) refers to meetings at Calcestruzzi's request between the Italian producers and Titan. Upon reading that passage of the SO, Italcementi could therefore reasonably have foreseen the conclusions the Commission was going to draw from the document in question in the context of the infringement referred to in Article 4(3)(b) of the contested decision.

358 As regards, in particular, the carrot actions referred to in Article 4(4) of the contested decision, Blue Circle complains that the Commission did not mention in the SO the 'Memorandum of Understanding' (document 33.126/11096) referred to in recital 28, paragraph 9, of the contested decision. It is a document, contained in the Box (see paragraph 95 above), which confirms the content of another document, namely the internal note of Blue Circle headed 'Discussion paper — Cheap imports — Meeting 7.7.1986' (documents 33.126/10992 to 10994) which was also in the Box. That internal memorandum was expressly mentioned in point 20(a) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2) and the extracts from that document were cited in the same point of the SO. In those circumstances, Blue Circle could reasonably have linked document 33.126/11096 to the relevant passages of the SO and deduced the conclusions the Commission was going to draw from them as regards the infringement referred to in Article 4(4) of the contested decision.

359 Documents 33.126/19864 and 19865 (contested decision, recital 28, paragraph 9), to which Blue Circle refers, is an undated Heracles note on paper headed 'Sheraton Park Tower — London' which was used by the Commission in the context of the infringement referred to in Article 4(4)(a) of the contested decision. They were in the Box (see paragraph 95 above) and were expressly mentioned in point 20(a) of the section of 'The Facts' in the SO dealing with the ETF (Chapter 2, Section 2). They are therefore also admissible evidence against that applicant.

360 As regards the infringement referred to in Article 5 of the contested decision, the concerted practices in the context of the ECEC, Cimpor and Italcementi refer to the Blue Circle internal memorandum of 9 April 1981 referred to in recital 30, paragraph 1, of the contested decision in the context of the background to the establishment of the export committees (documents 33.126/11338 to 11340; the date of 4 April 1981 mentioned in the contested decision is erroneous). The note is of no relevance to Cimpor's defence since Cimpor is not referred to in Article 5 of the contested decision. In any event, the Blue Circle internal memorandum was in the Box (see paragraph 95 above). Furthermore, it is cited in point 24 of the SO relating to the ECMEC. In those circumstances, it is admissible evidence against the applicants.

361 As regards the infringement referred to in Article 6 of the contested decision, the concerted practice in the context of the EPC, Blue Circle considers that the letter from Mr Gac of 30 March 1990 (contested decision, recital 35, paragraph 2; documents nos 33.126/16766 to 16777) is a new item of evidence. That argument must be rejected. That document, which was moreover in the Box (see paragraph 95 above), was expressly referred to in point 24 of the SO (Chapter 2, Section 4) relating to the background to the establishment of the ECMEC and the EPC.

362 Blue Circle also submits that the record of the EPC meeting of 20 October 1988 (contested decision, recital 36, paragraph 8; documents 33.126/18179 and 18180), mentioned in order to prove that the intra-European problems were discussed in the EPC, was not adequately referred to in the SO. The Court points out that in point 28 (Chapter 2, Section 4) of the SO, entitled 'Respect of home markets', express reference was made to the EPC meeting of 20 October 1988. In those circumstances, Blue Circle could have foreseen that the Commission would use the record of that meeting, which was in the Box (see paragraph 95 above), to show that the EPC dealt not merely with exports outside Europe but also with intra-European trade.

363 Ciments Français submits that its handwritten notes relating to the EPC meeting on 20 October 1988, cited in recital 36, paragraph 7, of the contested decision (documents 33.126/12791 to 12799), and the record of that meeting, referred to in recital 36, paragraph 8, of the contested decision (documents 33.126/18179 and 18180), which were used by the Commission in order to show that the intra-Community problems had been discussed in the context of the EPC, were not cited in the SO. The Court points out that the 'handwritten notes on the EPC meeting held on 20 October 1988' are expressly cited in point 28 (Chapter 2, Section 4) of the SO, under the heading 'Respect of home markets'. As regards the record of that meeting, although not expressly cited or mentioned in the SO, it was nevertheless in the Box (see paragraph 95 above) and Ciments Français could, upon reading the abovementioned passage of the SO which stated that the meeting of 20 October 1988 had been held, reasonably have foreseen the conclusions the Commission was going to draw from it in order to prove that the EPC did not deal merely with exports outside Europe but also with intra-European trade.

364 The Court finds, however, that some applicants have identified in their applications documents which were used against them in the contested decision but which were not available to them

during the administrative procedure or from which they could not foresee the conclusions the Commission was going to draw. In accordance with settled case-law, those incriminating documents must be excluded as evidence. Far from leading to the annulment of the entire decision, the exclusion of those documents is significant only in so far as the corresponding objection raised by the Commission could be proved only by reference to them (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30; T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 58, and T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraph 71). That question falls within the scope of other pleas, concerning the correctness of the Commission's factual assessments.

365 As regards, first, the evidence used to substantiate the finding of the infringement referred to in Article 1 of the contested decision, Unicem complains in particular that it was not given access to the 'Members Directory' of Cembureau. That document, which is not in the investigation file, was relied upon by the Commission in recital 45, paragraph 13, of the contested decision in order to refute Unicem's allegation that none of its representatives had ever been a Head Delegate. It is a document on which the Commission relied in order to show that Unicem participated in the Cembureau agreement. As it was not mentioned in the SO and was not in the Box (see paragraph 95 above), it cannot be considered to be admissible evidence against Unicem. It will be necessary, when examining the substance of the claim that Article 1 is unlawful, to assess whether Unicem's participation in the Cembureau agreement is adequately proved without that item of evidence (see paragraphs 1429 to 1431 below).

366 Italcementi and Blue Circle refer to a series of documents relating to the Head Delegates meetings mentioned in recital 19 of the contested decision. It is a key paragraph of that decision as regards proof of the existence of the Cembureau agreement. The applicants in question are referring to documents 33.126/11560 to 11577 and 11587 to 11633 relating to the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 6), documents 33.126/11697, 11698, 11701 to 11713 and 11732 relating to the Head Delegates meeting of 19 March 1984 (contested decision, recital 19, paragraph 11) and documents 33.126/11739 to 11747, 11750, 11756 to 11773 and 11774 to 11789 relating to the Head Delegates meeting of 7 November 1984 (contested decision, recital 19, paragraph 15). As those documents were not mentioned in the SO and, apart from a few pages, were not in the Box (see paragraph 95 above), the Court, when examining the substance of the claim that Article 1 of the contested decision is unlawful, will have to assess whether that infringement is adequately proved without those documents (see paragraphs 1111 and 1112 below).

367 As regards the evidence used to substantiate the finding of the infringement referred to in Article 2(2) of the contested decision, the periodic exchanges of price information organised in Cembureau, VNC alleges that documents 33.126/15136 to 15157 are not admissible evidence against it. The Court finds that those documents were used in recital 16, paragraphs 8 and 18, of the contested decision in order to establish the infringement linked to the above information exchanges. None of those documents were mentioned in the SO or were in the Box (see paragraph 95 above). They cannot therefore be considered admissible evidence against VNC. The Court, when examining the substance of the claim that Article 2(2) of the contested

decision is unlawful, will assess whether the infringement which VNC is found to have committed is adequately proved without those documents (see paragraphs 1579 to 1593 below).

368 Aalborg submits that documents 33.126/15096 to 15305, cited in recital 16, paragraphs 8 to 22, of the contested decision, are new items of evidence. These documents are used by the Commission to prove the existence of the infringement referred to in Article 2(2) of the contested decision and Aalborg's participation therein. The Court finds that, apart from documents 33.126/15096 and 15097, none of those documents were mentioned in the SO or were in the Box (see paragraph 95 above). Those documents cannot be regarded as admissible evidence against Aalborg. The Court, when examining the substance of the claim that Article 2(2) of the contested decision is unlawful, will assess whether the infringement which Aalborg is found to have committed is adequately proved without those documents (see paragraphs 1579 to 1593 and 1684 to 1691 below).

369 As regards the evidence adduced by the Commission in support of its finding of the infringement referred to in Article 3(2) of the contested decision, Oficemen, Cimpor and SECIL complain that during the administrative procedure they were not given access to part of document 33.322/2901. That document, which is part of the record (documents 33.322/2898 to 2903) of a visit to SECIL on 28 and 29 May 1986 by two employees of Hispacement, had been classified on the List (see paragraph 5 above) as 'PA' (partially accessible) to those three applicants. The extract from document 33.322/2901 on which the Commission relies in the contested decision (recital 21, paragraph 2) states as follows: 'Mr Bordado informs me that the Chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts in December last year, at which time it was decided to agree on a reciprocal ban on exports between the two countries. He confirmed that SECIL is firmly committed to carrying out this arrangement. He said that Cimpor had recently received several requests to export to Extremadura in Spain. This is a temptation that Cimpor has resisted until now, in view of the harm which the cement companies in the two countries could suffer as a result of such a decision.'

370 However, the version sent to the applicants during the administrative procedure contained only the first sentence of the above extract. On the basis of the part of document 33.322/2901 not disclosed to Oficemen, Cimpor and SECIL during the administrative procedure, the Commission finds in recital 49, paragraph 2, of the contested decision, in regard to the Spanish-Portuguese agreement: 'The agreement was actually implemented. The representative of SECIL stated to Hispacement ... that his firm was determined to abide by the agreement with the Spanish and that Cimpor had resisted any temptation to export even though it had received orders from customers in Spain ...' In the contested decision the Commission therefore used, as incriminating evidence against Oficemen, Cimpor and SECIL, an extract from a document to which access had not been given at the time of the SO.

371 The Commission contends, however, that there can be no question of infringement of the rights of the defence, because the whole of document 33.322/2901 was sent to the applicants on 3 May 1993.

372 However, the Court points out that on that date the hearings had already been concluded. As the applicants were not invited to submit their observations on the passages of the document which had previously been blanked out, they were not in a position to effectively make known their views on the parts of document 33.322/2901 on which the Commission relied in recital 49, paragraph 2 of the contested decision. It follows that the last part of the extract set out in recital 21, paragraph 2 of the contested decision is not admissible evidence against them. The Court, when examining the substance of the claims that Article 3(2) of the contested decision is unlawful, must therefore assess whether the infringement found therein is adequately proved without the passages from document 33.126/2901 to which access was not given during the written and oral phases of the administrative procedure (see paragraphs 2041 to 2092 and 2136 below).

373 Oficemen considers that documents 33.322/512, 513, 549, 550, 566 and 567 cited in recital 21, paragraph 8, of the contested decision are new items of evidence. They relate to telexes in 1988 and 1989 showing that Cimpor refused requests for cement from Spain using the standard response 'We have no availabilities for export'. Although those documents were identified by their numbering in the chapter of the SO relating to Portugal (see SO, Chapter 9, point 56(c) ('Refusal to sell')), it is nevertheless the case that this chapter of the SO was not sent to Oficemen during the administrative procedure. Furthermore, the documents in question were not mentioned in the international part of the SO, in particular in point 11, dealing with the Spanish-Portuguese agreement, nor were they in the Box (see paragraph 95 above). On the List (see paragraph 5 above), they were classified 'A: Cimpor. PA: third parties' amongst the block of documents numbered from 33.322/497 to 33.322/577. In those circumstances, they cannot be admitted as evidence against Oficemen. The Court, when examining the substance of the claim that Article 3(2) of the contested decision is unlawful, must therefore assess whether the infringement found therein is adequately proved without documents 33.322/512 and 513, 549, 550, 566 and 567 (see paragraphs 2068 to 2092 and 2136 below).

374 Cimpor considers that document 33.322/1399 cannot be used as evidence against it. That document, cited in recital 21, paragraph 6, of the contested decision, is a telex giving the names of persons who were to attend the Spanish-Portuguese meeting of 27 July 1988. It was neither in the Box (see paragraph 95 above) nor in the Portuguese file to which Cimpor was given access during the administrative procedure. It cannot therefore be used as evidence against Cimpor. The Court, when examining the substance of the claim that Article 3(2) of the contested decision is unlawful, must therefore assess whether the infringement found therein is adequately proved without document 33.322/1399 (see paragraphs 2068 to 2092 and 2129 below).

375 As regards the evidence adduced by the Commission to substantiate the finding of the infringement referred to in Article 3(3) of the contested decision, SFIC objects to the use in that decision of BDZ's statistical model sent by it to the Commission on 4 May 1993 (contested

decision, recital 22, paragraph 18). The Court finds that the Commission refers to those statistics in the context of the infringement referred to in Article 3(3)(b) of the contested decision. As the applicant has not been able to express its views on that evidence, it cannot be used against it. The Court, when examining the substance of the claim that Article 3(3)(b) of the contested decision is unlawful, must, if necessary, assess the effect of the inadmissibility of that evidence on the merits of the Commission's finding that the infringement was committed (see paragraph 2493 below).

376 As to the evidence adduced by the Commission to substantiate the finding of the infringement referred to in Article 4(1) of the contested decision, namely the setting-up of the ETF, Uniland, Oficemen, Italcementi and Blue Circle complain that they did not have access to document 33.126/18950 (contested decision, recital 25, paragraph 48) during the administrative procedure. That document is a fax sent on 23 February 1987 by Holderbank to various members of the ETF in order to agree dates for meetings of the Head Delegates and of the ETF and was cited by the Commission in order to show that attempts to convene the ETF were still being made at that time. It was not mentioned in the SO and was not in the Box (see paragraph 95 above). It was classified 'A: Holderbank, Ciments d'Obourg. NA: third parties' on the List (see paragraph 5 above). That document is not admissible against Uniland, Oficemen, Italcementi and Blue Circle. The Court, when examining the substance of the claim that Article 4(1) of the contested decision is unlawful, must assess whether the infringement found therein and its duration are sufficiently proved without document 33.126/18950 (see paragraph 2807 below).

377 Holderbank also refers to documents Nos 33.126/4487 to 4490 (contested decision, recital 25, paragraph 48), which correspond to the internal note of 1 June 1987 drawn up by Lafarge following the meetings in Luxembourg on 25 to 28 May 1987, a note in which it is stated, in regard to the future of the ETF: '... as the tool had been forged it might as well be kept ready for use'. Although, according to the Commission, those documents were in the Box (see paragraphs 95 and 350 above), Holderbank has firmly denied that fact during the procedure before the Court. In the absence of proof of actual communication of those documents during the administrative procedure they are not admissible against Holderbank. The Court, when examining the substance of the claim that Article 4(1) of the contested decision is unlawful, will assess whether the infringement found therein and its duration are adequately proved without documents Nos 33.126/4487 to 4490 (see paragraph 2808 below).

378 As regards the evidence used to substantiate the finding of the infringement referred to in Article 6 of the contested decision, namely the concerted practice in the context of the EPC, Blue Circle submits that the minutes of the meetings of the EPC of 12 November 1981 (documents Nos 33.126/11432 to 11440) and of 10 November 1982 (documents Nos 33.126/11417 to 11420), mentioned in recital 37, paragraph 5, of the contested decision, were not adequately referred to in the SO. The Court finds that those documents, used by the Commission in order to show that export prices were fixed collectively in the context of the EPC, are not mentioned in the SO and were not in the Box (see paragraph 95 above). They are not therefore admissible against Blue Circle. The Court, when examining the substance of the claim that Article 6 of the contested decision is unlawful, must assess whether the infringement

found therein and Blue Circle's participation in it are adequately proved without documents Nos 33.126/11417 to 11420 and 11432 to 11440 (see paragraphs 3987 and 3988 below).

6. Conclusions

379 The use in the contested decision of the documents identified in paragraphs 365 to 378 above must be held illegal on the ground that it infringed the rights of defence of the applicants concerned. The assessment of the consequences of that infringement will be carried out when the Court examines the substance of the claim that the contested decision is unlawful. All the other arguments submitted in the context of the objection in question must be rejected.

E — The failure to send to the applicants documents which were not in the investigation file

1. Preliminary observations

380 Several applicants complain that during the administrative procedure the Commission did not send to them certain documents which although not part of the actual investigation file would nevertheless have been useful in preparing their defence during the administrative procedure. Thus, they complain that they were not given access to other addressees' replies to the SO (2); to the transcripts of the hearings relating to the national agreements and concerted practices (3); to the Commission's file on the notification of the Belgian-Dutch Basing point system (4); to the Commission's file on Greek State aid and the Helleno-British inter-governmental agreement (5); to some internal notes of the Commission (6); and to the written statements of defence in the other Cement cases (7).

381 Before examining the various arguments submitted, it is necessary to distinguish two situations.

382 First, some applicants complain that the Commission did not allow them access during the administrative procedure to documents which were not in the investigation file and which were used as incriminating evidence in the contested decision. Since documents that have not been communicated to the parties concerned during the administrative procedure are not admissible evidence (judgments cited in paragraph 323 above, *AKZO* v *Commission*, paragraph 21, *Shell* v *Commission*, paragraphs 55 and 56, and T-13/89 *ICI* v *Commission*, paragraphs 34 and 35), it will be necessary, if it should prove that the Commission relied in the contested decision on documents that were not in the investigation file and were not communicated to the applicants,

to exclude those documents as evidence (*AEG* v *Commission*, cited in paragraph 364 above, paragraphs 24 to 30, T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 58, and T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraph 71).

383 Second, some applicants consider that the Commission infringed their rights of defence by not communicating to them, during the administrative procedure, documents which, although not in the investigation file, might have contained exculpatory evidence. However, in a proceeding finding an infringement of Article 85 and/or 86 of the Treaty the Commission is not required to make available, of its own initiative, documents which are not in its investigation file and which it does not intend to use against the parties concerned in the final decision. Consequently, an applicant who learns during the administrative procedure that the Commission has documents which might be useful for its defence must make an express request to the Commission for access to those documents. If the applicant does not do so during the administrative procedure, his right to do so is barred in any action for annulment brought against the final decision. The reasoning in paragraph 96 of Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, according to which an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure, relates only to access to documents which are part of the Commission's investigation file. If, during the administrative procedure, the Commission has rejected an applicant's request for access to documents which are not in the investigation file, an infringement of the rights of the defence may be found only if it is proved that the outcome of the administrative procedure might have been different if the applicant had had access to the documents in question during that procedure (*Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 56; T-30/91 *Solvay* v *Commission*, paragraph 68, and T-36/91 *ICI* v *Commission*, paragraph 78, both cited in paragraph 106 above).

2. Replies to the SO by other addressees

384 Aalborg (T-44/95), Rugby (T-53/95), Asland (T-55/95), Castle (T-56/95), Irish Cement (T-60/95), Holderbank (T-68/95), Aker (T-70/95) and EUROC (T-71/95) consider that their rights of defence were infringed because they were not given access during the administrative procedure to the replies to the SO of other addressees of that document.

385 They consider that their rights of defence have been infringed because the Commission uses extracts from various replies to the SO as incriminating evidence (2.1). Four applicants, Castle, Irish Cement, Aker and EUROC also allege that other addressees' replies to the SO might have contained exculpatory evidence (2.2).

2.1. Use of replies to the SO as incriminating evidence

386 If the Commission wishes to rely on a passage in a reply to an SO or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 85(1) of the Treaty, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence (judgments cited in paragraph 323 above, *AKZO* v *Commission*, paragraph 21, *Shell* v *Commission*, paragraphs 55 and 56, and T-13/89 *ICI* v *Commission*, paragraphs 34 and 35). In such circumstances the passage in question from a reply to the SO or the document annexed thereto constitutes incriminating evidence against the various parties alleged to have participated in the infringement.

387 The Court points out, first, that some applicants refer to documents which were mentioned in the contested decision in order to describe a fact or behaviour, but which were not used subsequently in order to make a finding of an infringement. Accordingly, those documents cannot be regarded as incriminating evidence.

388 In the present case, Castle, Irish Cement, Aker and EUROC object to the reference in the contested decision to CBR's reply to the SO in the context of recital 17 (paragraph 4) headed 'The discussions on "fair or healthy or correct" competition'. Those applicants, together with Aalborg, also refer to extracts from Cembureau's reply to the SO referred to in paragraphs 6 to 8 of recital 17 of the contested decision. Castle, Aker and EUROC also criticise the reference in recital 17, paragraph 4, of the contested decision to 'what most of the undertakings state in the replies to the statement of objections'. However, as the discussions on 'fair or healthy or correct' competition were not the subject-matter of any specific objection in the operative part of the contested decision, the documents in question cannot be regarded as incriminating evidence on which the above applicants should have had the opportunity of expressing their views during the administrative procedure.

389 Irish Cement refers to other extracts from replies to the SO which merely assert a fact not used to support the finding of an infringement in the contested decision. Thus, the extract from Titan's reply to the SO, cited in recital 16, paragraph 14, of the contested decision, merely refers to the fact that cement prices in Greece were subject to government authorisation up to May 1989. That extract cannot therefore be regarded as incriminating evidence which the Commission should have notified to Irish Cement during the administrative procedure. The same is true of the extract from Blue Circle's reply to the SO, cited in recital 24, paragraph 3, to which Irish Cement refers, which states that Mr Marshall was appointed from 1 June 1985 as Head Delegate for the United Kingdom. On any view, as a direct member of Cembureau, Irish Cement should have known that Mr Marshall had become Head Delegate for the United Kingdom with effect from that date.

390 Second, Aker, EUROC and Castle refer to extracts from other addressees' replies to the SO cited in the contested decision which support the finding of an infringement in that decision. However, inasmuch as those extracts do not relate to infringements attributed to the applicants,

they are not documents used to incriminate them. The applicants cannot therefore allege that their rights of defence were infringed. The arguments submitted to that effect by Aker and EUROC, challenging the Commission's finding of the infringements referred to in Articles 2, 3, 4(4)(a) to (g), 5, 6 and 7 of the contested decision, and those of Castle, challenging the finding of the infringements referred to in Articles 2, 3, 4(1) to (3) and 4(b) to (h), 6 and 7 of that decision, must therefore be rejected.

391 Third, the applicants refer to extracts from the replies to the SO which the Commission cites in the contested decision in order to summarise an argument adduced by an addressee of the SO during the administrative procedure and then reply to that argument in the contested decision. However, those extracts from replies to the SO cannot be considered incriminating evidence either.

392 Irish Cement cannot therefore rely to good effect on extracts from the reply of Cembureau to the SO, referred to in recital 16, paragraph 9, and recital 18, paragraphs 6 and 7, of the contested decision; that of FIC, referred to in recital 16, paragraph 10, fourth indent, and in recital 18, paragraph 7, of the contested decision; that of CBR, of SFIC and of Blue Circle, referred to in recital 18, paragraphs 7 and 8, of the contested decision; of Heracles and Ciments Français, referred to in recital 18, paragraph 8, of the contested decision; or those of the ECMEC, referred to in recital 24, paragraph 3, of the contested decision. Similarly, Castle, Aker and EUROC cannot point to the references in the contested decision to replies to the SO of Blue Circle (contested decision, recital 11, paragraph 6; recital 18, paragraphs 7 and 8; and recital 45, paragraph 3); of Cembureau (recital 18, paragraphs 6 and 7; and recital 44, paragraphs 2 and 3); of CBR (recital 18, paragraphs 7 and 8); of FIC (recital 18, paragraph 7; and recital 44, paragraphs 2 and 3); of SFIC (recital 18, paragraphs 7 and 8; recital 29, paragraph 4; and recital 44, paragraphs 2 and 3), of Heracles; of Ciments Français (recital 18, paragraph 8; recital 29, paragraph 4; and recital 53, paragraph 13); of ECMEC (recital 24, paragraph 3); of Oficemen (recital 29, paragraph 3); of ATIC (recital 44, paragraph 2); of 'a number of associations and undertakings' (recital 44, paragraph 4); of 'some undertakings' (recital 45, paragraph 8; and recital 53, paragraph 4); of BCA (recital 45, paragraph 12); of the 'Italian producers' (recital 45, paragraphs 13 and 14); of Unicem and Castle (recital 46, paragraph 2); or of the 'German undertakings' (recital 53, paragraph 6).

393 Fourth, some applicants refer to extracts from replies to the SO which were used by the Commission solely in order to prove the participation in infringements referred to in the contested decision by the addressees of the SO from whom those replies emanated. Thus, Aalborg refers to CBR's reply to the SO, mentioned in recital 28, paragraph 21, of the contested decision. The extract from that reply was used in the context of the infringement referred to in Article 4(4)(g) of the contested decision. However, Aalborg was not held responsible for that infringement. The reply to the SO in question is not therefore incriminating evidence used against it. Aalborg, Castle, Irish Cement, Holderbank, Aker and EUROC refer also to one or more extracts from the replies to the SO of CBR, Aker, EUROC, Blue Circle, Lafarge, Dyckerhoff, Heidelberger, BDZ and Asland, cited in recital 25, paragraph 9, of the contested decision. However, those extracts contain only an admission or denial by the undertaking or association of undertakings concerned of participation in the Head Delegates meeting on 9 June 1986 in Stockholm. Those extracts cannot therefore be considered incriminating evidence

against the abovementioned applicants which should have been notified to them during the administrative procedure.

394 Holderbank, Aker and EUROC refer also to a record of the ETF meeting on 19 August 1986, submitted as Annex 15 to the reply to the statement of objections of Aker and EUROC, cited in recital 25, paragraph 14, of the contested decision. By letter dated 9 July 1992, that record was sent by the Commission to all the undertakings and associations of undertakings to which the international section of the SO was addressed and they were invited to make known any comments which they might have on it (contested decision, recital 2, paragraph 3; see paragraph 5 above). Holderbank, Aker and EUROC cannot therefore contend that their rights of defence were infringed by virtue of that document.

395 In its application Asland alleges that it did not receive the latter document and was therefore unable to explain to the Commission, prior to the adoption of the contested decision, that it had not taken part in the meeting on 19 August 1986 and, accordingly, that at that time there was no link between it and the ETF. However, Asland withdrew its argument at the hearing because the Commission produced, as Annex 1 to its defence in Case T-55/95, an acknowledgement of receipt signed by Asland relating to the dispatch of the record of that meeting.

396 Lastly, Aker and EUROC refer to the extract from Blue Circle's reply to the SO, mentioned in recital 26, paragraph 9, of the contested decision, in which Blue Circle stated that it had reimbursed Holderbank its one-eighth share of the expenses incurred in setting up Interciment. However, that item of evidence was not used to incriminate Aker and EUROC in the contested decision.

397 Irish Cement refers to an extract from Cembureau's reply to the SO, cited in recital 45, paragraph 5, of the contested decision, according to which the Head Delegates are ranked on a par with 'government representatives on international bodies' and are appointed 'in order to cast votes in the general assembly'. According to Irish Cement, that extract was used by the Commission in Article 1 of the contested decision in reaching the conclusion that there was an agreement to respect home markets and to regulate sales.

398 It is, however, clear from recital 45, paragraph 5, of the contested decision that the Commission did not rely on that statement by Cembureau in finding that the Cembureau agreement existed or in holding that the direct members of Cembureau, including Irish Cement, participated in that agreement. The statement was used solely in order to show that the agreement also was binding on the indirect members of Cembureau. It is not therefore evidence used against Irish Cement in the contested decision.

399 Fifth, Aalborg and Irish Cement refer to Cembureau's reply, mentioned in recital 18, paragraph 4, of the contested decision, relating to a procedure under Article 15(1) of Regulation No 17. In that reply Cembureau had stated that the Blue Circle memorandum of 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334), which refers to 'the Cembureau agreement or Cembureau Principle of not transhipping to internal European Markets', concerned 'good neighbour rules encouraged by Cembureau', that it was a 'type of conduct which [was] desired by members but [did] not in itself contain any constraint or *a fortiori* any penalty' or 'practices and ethics that have gradually evolved through contact with businesses and economic development in various countries'. It is apparent from recital 45, paragraphs 4 and 6, of the contested decision that those extracts from Cembureau's reply were used as evidence of the infringement referred to in Article 1 of the contested decision. However, the Court finds that Cembureau's reply (documents 33.126/13568 to 13573) was referred to and that extracts from it were even cited word for word in the SO (point 9). Furthermore, the document in question was in the Box (see paragraph 95 above). There cannot therefore be any question of infringement of the rights of the defence.

400 Sixth and lastly, the applicants have pointed to some extracts from addressees' replies to the SO which were used against them in the contested decision as evidence of one of the infringements found.

401 Irish Cement refers in that regard to Annexes 2a and 2b to Cembureau's reply to the SO (contested decision, recital 16, paragraphs 11 and 17), used as incriminating evidence by the Commission to prove the infringement constituted by the periodic exchanges of price information between the members of Cembureau, an infringement referred to in Article 2(2) of the contested decision. Those documents, which correspond to the 'Cement Price Reference File' (hereinafter 'CPRF') for Luxembourg and Denmark respectively, were used in order to prove that the prices communicated by Ciments Luxembourgeois and Aalborg to Cembureau were passed on to the members of Cembureau, including Irish Cement. Irish Cement also refers to extracts from replies to the SO of FIC, cited in recital 16, paragraph 10, last subparagraph, of the contested decision; of Aalborg, cited in recital 16, paragraph 11, first paragraph; and of BDZ, cited in recital 16, paragraph 13. Those passages were also used by the Commission in finding the infringement referred to in Article 2(2) of the contested decision. Aalborg complains that the Commission did not give it access to Annex 2a to Cembureau's reply referred to in recital 16, paragraph 17, of the contested decision, that is to say, to the CPRF for Luxembourg. Aalborg also complains of the fact that during the administrative procedure it was not given access to the extracts from FIC's reply mentioned in recital 16, paragraph 10, of the contested decision and to the extract from the reply of Irish Cement referred to in recital 16, paragraph 15. Those passages were also used by the Commission in order to establish the infringement referred to in Article 2(2) of the contested decision, in which Aalborg is alleged to have participated. However, the Court finds that the above documents referred to by Aalborg and by Irish Cement were not mentioned in the SO or communicated to those applicants during the administrative procedure. In those circumstances, those documents cannot be regarded as admissible evidence against them (judgments in *AEG* v *Commission*, cited in paragraph 364, paragraphs 24 to 30, T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 58, and T-37/91 *ICI* v *Commission*, cited in paragraph 142 above, paragraph 71). The Court, when examining the substance of the claim that Article 2(2) of the contested decision is unlawful, must therefore assess whether the infringement found therein and the participation of

Aalborg and Irish Cement in it are sufficiently proved without those documents (see paragraphs 1579 to 1593, 1684 to 1691 and 1711 to 1715 below).

402 Aker and EUROC refer to the extract from Blue Circle's reply to the SO set out in the following terms in recital 26, paragraph 10, of the contested decision: '... the members [of the ETF] were entitled to examine Interciment's balance sheet, since the company was established pursuant to their instruction; in addition, Holderbank was entitled to be reimbursed regardless of the subscription of the shares'. They also refer to the extract from Blue Circle's reply to the SO, mentioned in recital 26, paragraph 15, of the contested decision, according to which Blue Circle acknowledged 'that Interciment was still ready to operate, but that it could serve any objective'. The Court finds that the Commission relied in particular on those items of evidence in making its findings as to the existence and duration of the infringement constituted by the setting-up of Interciment referred to in Article 4(2) of the contested decision. Consequently, the corresponding extracts from the reply to the SO, on which Aker and EUROC were unable to express their views during the administrative procedure, must also be excluded as evidence. The Court, when examining the substance of the claim that Article 4(2) of the contested decision is unlawful, must therefore assess whether the infringement found therein and its duration are sufficiently proved without those documents (see, respectively, paragraphs 3008 to 3014 and 3018 and paragraphs 3087 to 3098 below).

403 Rugby and Castle complain that in the contested decision (recital 28, paragraph 12, last paragraph) the Commission referred to Blue Circle's reply to the SO as incriminating evidence. The Court finds that in that part of the contested decision the Commission, after having pointed to the evidence showing that Rugby and Castle had borne some of the costs which Blue Circle had incurred on the occasion of the defensive measures allegedly adopted by it against imports of Greek cement, states as follows: 'These pointers are indirectly confirmed by Blue Circle's reply to the [SO]: it recognises that there was a practice of requesting contributions from the other undertakings; by acknowledging that this tactic was not always crowned with success, it confirms that, on other occasions, contributions were paid. Blue Circle confines itself to affirming that there was no *prior* agreement with the other producers on the occasion in question.' That extract from Blue Circle's reply was used by the Commission to show that there was a concerted practice between Rugby, Castle and Blue Circle, designed to prevent and/or reduce Greek cement imports into the United Kingdom. The corresponding infringement is referred to in Article 4(4)(a) of the contested decision. Since Rugby and Castle were not in fact able to make known their views effectively on the extract in question during the administrative procedure, that extract must also be excluded as evidence. The Court, when examining the substance of the claim that Article 4(4)(a) of the contested decision is unlawful, must therefore, if necessary, assess the effect of the inadmissibility of that evidence on the merits of the Commission's finding that the infringement was committed.

2.2. Exculpatory evidence which might have been contained in the replies to the SO

404 Four applicants, Castle, Irish Cement, Aker and EUROC allege that other addressees' replies to the SO might have contained evidence exculpating them. They submit that the Commission's decision to terminate the proceeding concerning the national agreements and concerted practices and to terminate the proceeding against 12 German undertakings and six Spanish undertakings was influenced by the content of replies to the SO. Those replies might therefore also have contained information relevant to the applicants' defence.

405 The Court points out in that regard that in the SO and in the contested decision the Commission relied on specific documentary evidence in finding the various infringements and the applicants' participation in some of those infringements. The fact that some undertakings, whose circumstances are not the subject of proceedings before the Court (*Woodpulp II*, cited in paragraph 106 above, paragraph 197, and *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraph 176), succeeded in their reply to the SO in showing that there was no adequate proof of their participation in the alleged infringements does not mean that those replies contained evidence of such a nature as to cast a different light on the specific documentary evidence on which the Commission relied in finding that Castle, Irish Cement, Aker and EUROC participated in various infringements referred to in the contested decision.

406 Finally, Irish Cement submits that the Commission seriously misused its powers in failing to take into account its reply to the SO and in failing to refute the specific evidence produced in support of that reply.

407 However, the Court finds that Irish Cement has not adduced any particulars other than those in the various pleas and arguments by which it contests the substantive legality of the contested decision in its own case. Examination of this argument is therefore indissociable from that relating to those pleas and arguments.

3. Records of the hearings relating to the national agreements and concerted practices

408 In the statements which they lodged following the measure of 2 October 1996, SFIC (T-36/95), Castle (T-56/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), l'ATIC (T-63/95), Aker (T-70/95) and EUROC (T-71/95) complain that the Commission did not give them access to the records of the hearings which took place in regard to the national agreements and concerted practices from 22 March to 1 April 1993. Holderbank (T-68/95), Aker and EUROC raised a similar objection in their applications.

409 However, the applicants concerned have not identified any passage in the contested decision in which the Commission used an extract from the record of the hearing relating to one or other national agreement or concerted practice as incriminating evidence against them. Furthermore, they have not shown that during the administrative procedure they expressly requested a copy of the record of the hearings concerning the national agreements and concerted practices, nor do they adduce any evidence to show that those documents might have contained exculpatory evidence. The relevance of the records at issue cannot be presumed, since the objections relating to the national agreements and concerted practices are not the subject-matter of the contested decision.

410 The argument based on failure to grant access to those records must therefore be rejected.

4. The Commission's file on the notification of the Belgian-Dutch Basing point system

411 Dyckerhoff (T-35/95), Aalborg (T-44/95), Rugby (T-53/95), Castle (T-56/95), Aker (T-70/95) and EUROC (T-71/95) submit that in order to prepare their defence during the administrative procedure they should have had access to the Commission's file relating to the notification of the Belgian-Dutch Basing point system. In their statements lodged following the measures of 2 October 1996 and 18 and 19 June 1997 they requested the Court to order a measure of organisation of procedure or of inquiry requiring the Commission to give them access to that file. In a separate statement of 25 July 1996 Dyckerhoff made a similar request.

412 The Court points out that the Belgian-Dutch Basing point system is a system for setting prices which had been notified to the Commission on 16 July 1981. The applicants allege that the documents in that file might have served to support their contention that only lawful methods of regulating trade between Member States had been on the agenda of the meeting of Head Delegates on 14 January 1983, in other words, that the file concerning the Belgian-Dutch Basing point system constitutes exculpatory evidence.

413 However, the Court finds that during the administrative procedure only Dyckerhoff, Rugby, Castle, Aker and EUROC made an express request that that file be disclosed to them. Aalborg cannot therefore complain before the Court that it did not have access to that file during the administrative procedure (see paragraph 383 above).

414 The Court finds, next, that the applicants have not proved that if they had had access to the file relating to the notification of the Belgian-Dutch Basing point system they would have been able to raise arguments of such a nature as to affect the outcome of the contested decision. In that

decision the Commission expressly rejected the argument that only lawful methods of regulating trade between Member States had been on the agenda of the meeting of the Head Delegates on 14 January 1983 (contested decision, recital 17, paragraph 4).

415 The applicants' argument that the fact of their not having had access to the Commission's file on the notification of the Belgian-Dutch basing point system impaired their defence must therefore be rejected. As the applicants have not adduced any other evidence to show that this file would have been useful to their defence (Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 34), the Court also rejects their applications for an order for its disclosure in the proceedings before this Court.

5. The Commission's file on State aid granted by the Hellenic Republic and on the inter-governmental agreement between Greece and the United Kingdom

416 Dyckerhoff (T-35/95), Castle (T-56/95), Aker (T-70/95), EUROC (T-71/95) and Blue Circle (T-88/95) allege that their rights of defence were infringed by the fact that they were not given access during the administrative procedure to the file on State aid granted by the Hellenic Republic or to the file on the inter-governmental agreement between Greece and the United Kingdom to limit imports into the United Kingdom of products from Greece. In its statement of 25 July 1996, Dyckerhoff requests the Court to order a measure of organisation or investigation through which the Commission would give access to its file relating to the discussions concerning the State aid granted by the Hellenic Republic. In their statements lodged following the measures of 2 October 1996 and 18 and 19 June 1997, Castle, Aker and EUROC make a similar request. Furthermore, in their statements lodged following the measures of 2 October 1996 and 18 and 19 June 1997 Rugby, Castle, Aker and EUROC request the Court to order the Commission to produce the file relating to the quota agreement apparently concluded by the United Kingdom Government and the Greek Government. By letter lodged at the Registry of the Court on 26 August 1996, Blue Circle requested disclosure of the correspondence between the Commission and the Government of the United Kingdom and the Greek Government (in particular, correspondence between Mr Clark, then President of the Board of Trade at the Department of Trade and Industry (hereinafter 'the DTI'), and Mr Sutherland, then member of the Commission with responsibility for competition policy), of all correspondence between those two governments and of all the Commission's documents relating to the 'Greek question' (level of imports into the United Kingdom of Greek cement during the period 1985-1986; State aid granted by the Hellenic Republic; restriction of imports into the United Kingdom of products from Greece).

417 The Court finds, however, that the fact of not having had access to the abovementioned documents could not have impaired the applicants' defence during the administrative procedure. Those documents either relate to lobbying of Community authorities, in which

case the Court points out that the Commission has never disputed the existence of such lobbying or that it took into consideration only measures which went beyond such awareness and/or pressure activities (contested decision, footnote 115); or they concern State aid granted by the Hellenic Republic, in which case the Court points out that the Commission expressly took that circumstance into account in the contested decision but considered that the State aid could in no way justify the private defensive measures adopted in contravention of Article 85(1) of the Treaty (contested decision, recital 53, paragraph 8); or they concern the negotiations on and conclusion of an agreement between the United Kingdom Government and the Greek Government that aimed to restrict imports of Greek products into the United Kingdom, in which case the Court points out that the Commission in fact took formal note of the fact that the restriction of imports into the United Kingdom of products from Greece was not officially agreed between the Greek and the United Kingdom producers but between the governments of the two Member States concerned (contested decision, recital 28, paragraph 13), which did not prevent it from taking the view that the purchases by certain Western European producers of Greek cement and clinker were measures intended to curb Greek imports into the other Member States of the Community and that they were the results of agreements between producers (contested decision, recital 28, paragraph 14). In those circumstances, the comments which the applicants might have made on the basis of the various exchanges of letters could not but have confirmed matters fully taken into account by the Commission and could not have led to a different outcome to the administrative procedure as regards the objections upheld against them in the contested decision. The requests for access to the documents identified in the preceding paragraph must be rejected because those documents could not have been useful to the defence of the applicants during the administrative procedure.

6. Internal notes of the Commission not included in the investigation file

418 Cimpor (T-61/95), SECIL (T-62/95) and Blue Circle (T-88/95) submit that various internal notes of the Commission would have been useful to their defence.

419 Cimpor requests the Court to order the Commission to disclose the reports, opinions, comments and notes made by officials in the Directorate General for Industry (DG III) and of DG IV, by the Advisory Committee and by the hearing officer, which, it claims, contain assessments of the SO, of the replies to the SO, of the hearings, of the criteria used for dropping objections and for applying fines, and of drafts of the contested decision. Cimpor and SECIL request the Court to order the Commission to disclose two internal notes of DG III sent to DG IV concerning the 'Cement' file, one dated the end of August 1994 and the other the beginning of November 1994.

420 The Court points out that the Commission is under no obligation to grant access to its internal documents during the procedure (*Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 54, and *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 142 above, paragraph 29). Furthermore, in proceedings before the Community

judicature the Commission's internal documents are not to be communicated to the applicants, unless the circumstances of the case are exceptional and the applicants make out a plausible case for the need to do so (order of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 11; judgment in Case T-35/92 *Deere* v *Commission* [1994] ECR II-957, paragraph 31, and order in *NMH Stahlwerke and Others* v *Commission*, cited in paragraph 196 above, paragraph 35). That restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution when it deals with infringements of the Treaty competition rules (order in *NMH Stahlwerke and Others* v *Commission*, paragraph 36).

421 However, Cimpor has not adduced any evidence to support its assertion that the reports, opinions, comments and notes drawn up by the officials in DG III and DG IV, by the Advisory Committee and by the hearing officer would be useful to its defence.

422 As regards the two internal memoranda of DG III sent to DG IV, Cimpor and SECIL seek to underpin their argument that it was economic reality and not the existence of an alleged agreement and concerted practice which restricted trade between the Member States in general and between Spain and Portugal in particular.

423 According to the contested decision, Cimpor and SECIL participated in two infringements, namely the Cembureau agreement (contested decision, Article 1) and the Spanish-Portuguese agreement (contested decision, Article 3(2)). The Court finds that both in the SO (points 9 and 61) and in the contested decision (recitals 18, 19, 45 and 46) the Commission relied not on the conduct of the undertakings concerned on the market but on specific documentary evidence to prove the existence of the Cembureau agreement and the participation of those two undertakings in it. The same is true of the Spanish-Portuguese agreement (SO, points 11 and 61(c); contested decision, recitals 21 and 49).

424 It follows that any alternative explanations of the low level of trade between the Member States in general, and between Spain and Portugal in particular, which the applicants might submit on the basis of the internal memoranda from DG III to which they seek access, are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in finding the infringements referred to in Articles 1 and 3(2) of the contested decision. Those memoranda could not therefore have been useful to the defence of Cimpor and SECIL during the administrative procedure.

425 Nor, in those circumstances, can the Court accept that there is an exception to the general rule that the Commission's internal documents are not to be made available to the applicants (order in *BAT and Reynolds* v *Commission*, cited in paragraph 420 above, paragraph 11; *Deere* v

Commission, cited in paragraph 420 above, paragraph 31; and order in *NMH Stahlwerke and Others* v *Commission*, cited in paragraph 196 above, paragraph 35).

426 It follows that the Court must reject the argument of Cimpor and SECIL that the fact of their not having had access to the Commission's internal documents referred to in paragraph 419 above impaired their defence. The requests for the disclosure of those documents must therefore be rejected.

427 Blue Circle requests the Court to order the Commission to disclose all the internal documents and guidelines which it drew up in regard to access to the file following the judgments cited in paragraph 106 above (T-30/91 *Solvay* v *Commission* and T -36/91 *ICI* v *Commission*). It explains that those guidelines are relevant to its defence inasmuch as they may show that the Commission itself accepted that the approach which it adopted in the administrative procedure, and which it continues to defend before the Court, does not tally with the principles which it laid down for itself following those judgments.

428 The Court points out that the Commission cannot be obliged to disclose its internal documents. On any view, the internal documents and guidelines drawn up by the Commission in regard to access to the file are wholly irrelevant in the context of this plea. The judgments cited in paragraph 106 above (T-30/91 *Solvay* v *Commission* and T-36/91 *ICI* v *Commission*), which led the Commission to draw up the internal documents and lay down the guidelines whose disclosure is requested, post-date the adoption of the contested decision. Consequently, the applicant's rights of defence were not infringed during the administrative procedure by failure to grant access to documents drawn up after the end of that procedure (*Baustahlgewebe* v *Commission*, cited in paragraph 415 above, paragraph 30). Nor are those documents relevant to the proceedings before the Court: internal documents of the Commission cannot alter the substance of the rights of the defence as defined in particular in the judgments cited in paragraph 106 above (T-30/91 *Solvay* v *Commission* and T-36/91 *ICI* v *Commission*).

429 It follows that the Court must reject Blue Circle's argument that the fact of its not having had access to the Commission's internal documents impaired its defence. The request for disclosure of the documents referred to must therefore be rejected.

7. The Commission's statements in defence

430 Aalborg (T-44/95) complains that the Commission did not grant its request for access to the Commission's statements in defence in cases other than Case T-44/95.

431 However, that applicant's request was for disclosure of documents drawn up by the Commission after the adoption of the contested decision. Consequently, the legality of that decision cannot be affected by the Commission's refusal to grant the access requested (*Baustahlgewebe* v *Commission*, cited in paragraph 415 above, paragraph 30).

432 Furthermore, since the various cases were not joined during the written and oral procedures, the Commission was not obliged to disclose to Aalborg the statements in defence lodged in cases other than that between it and Aalborg. Moreover, during the present proceedings Aalborg has never requested that the various pending cases be joined. On the contrary, by letter of 27 February 1996 it expressly requested the Court to treat those cases individually. Finally, by letter of 10 December 1998 Aalborg stressed that only its own pleas in law and arguments should be taken into consideration by the Court. It cannot therefore complain that the Commission did not grant it access to the statements in defence in the other cases.

433 FIC (T-30/95) alleges that the Commission replies to some of its arguments in the context of Case T-26/95 *Cembureau* v *Commission*, but in that same case defends arguments which contradict those which it defends in Case T-30/95. It considers that the Commission's arguments in Case T-26/95 cannot be used against it and that the Court cannot take them into account in order to decide on Case T-30/95.

434 However, even if they were well founded, those assertions do not prove that there was an infringement of its rights of defence during the administrative procedure. They concern the conduct of the proceedings before the Court, which cannot as such affect the legality of the contested decision (*Baustahlgewebe* v *Commission*, cited in paragraph 415 above, paragraph 30). In any event, even if the Commission contradicts itself in some of its statements in defence, it is only the contested decision which is authentic, not the Commission's interpretation of it in one or other of those statements.

8. Conclusions

435 The use in the contested decision of the extracts from the replies to the SO referred to in paragraphs 401 to 403 above must be held unlawful because it infringes the rights of defence of the applicants concerned. The consequences of that infringement of their rights of defence will be assessed when the Court examines the substance of the legality of the contested decision. All the other arguments submitted in the context of the objection in question must be rejected.

The second, third and fourth pleas: infringements of the rights of the defence, of the principle of equal treatment and of Article 190 of the Treaty as a result of the Commission's abandonment of the national objections and, as against some undertakings, of the international objections

436 It should be recalled that by decision of 23 September 1993 the Commission decided to drop the objections in the SO relating to the national agreements and concerted practices against all addressees of the SO. On the same day it also decided to drop, as against 12 German undertakings and six Spanish undertakings, the objections in the SO relating to the international agreements and concerted practices and to terminate the proceeding initiated against those undertakings (see paragraph 14 above).

437 In their challenge to that approach, the applicants identified below rely on three pleas: infringement of the rights of the defence, the principle of equal treatment and Article 190 of the Treaty. The Court will examine those pleas, drawing a distinction drawn between the dropping of the national objections (A) and the dropping of some of the international objections (B).

A — The dropping of the national objections

438 FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Ciments Français (T-39/95), Lafarge (T-43/95), BDZ (T-48/95), Rugby (T-53/95), Asland (T-55/95), Castle (T-56/95), Uniland (T-58/95), Oficemen (T-59/95), Italcementi (T-65/95), Hornos Ibéricos (T-69/95), Aker (T-70/95) and EUROC (T-71/95) submit that the Commission infringed their rights of defence during the administrative procedure by failing to grant them an opportunity to make known their views on the decision of 23 September 1993 inasmuch as it dropped the national chapters of the SO. They refer in that regard to Article 19(1) of Regulation No 17 and to Articles 2 and 4 of Regulation No 99/63 and to the judgment in *CB and Europay* v *Commission*, cited in paragraph 83 above. Since the factual and legal background was fundamentally altered by the decision of 23 September 1993, the applicants argue that the Commission should have issued a new SO during the administrative procedure, which it failed to do. That defect affects the lawfulness of the contested decision.

439 The Court points out, however, that as a matter of principle the abovementioned undertakings and associations of undertakings cannot complain that their rights of defence were infringed by the Commission's dropping of some objections during the administrative procedure: when an addressee of an SO replies to it, his specific aim is to cause the dropping of objections. Moreover, the case-law expressly recognises the Commission's power to drop objections (Joined

Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 14).

440 The argument that the dropping of the national objections wholly changed the legal and factual context of the SO must be rejected. It has already been held that, as presented in the SO, the international objections, namely the Cembureau agreement and the measures for implementing it at international level, are not at all dependent on the existence of the national agreements and concerted practices (see paragraphs 110 to 120 above). In those circumstances, the fact that the Commission did not issue a new SO after it dropped the national objections cannot constitute an infringement of Article 19(1) of Regulation No 17 and of Articles 2 and 4 of Regulation No 99/63. The observations which the applicants might have made on the dropping of the national objections would not have been useful to their defence, since the international objections, the only ones which are the subject-matter of the contested decision, were not affected by the dropping of the national objections.

441 Nor can the applicants draw support from *CB and Europay* v *Commission*, cited in paragraph 83 above. In that case, the Commission had amended the initial objections and, during the administrative procedure, had issued a supplementary SO which had not been duly served on one of the applicants. The Court therefore found that that applicant's rights of defence had been infringed. In the present case, the international objections were not amended as a result of the Commission's decision to drop the national objections. The Commission was not therefore obliged to serve a new SO on the applicants before adopting the contested decision.

442 Unicem (T-50/95), Italcementi (T-65/95) and Cementir (T-87/95) submit that, despite the dropping of the national objections, an objection contained in the national chapters of the SO relating to Italy, that is to say, the agreement on the contracts and agreements concluded between Calcestruzzi and the Italian cement producers, was 'revived' by the Commission in Article 4(3)(b).

443 The Court finds that in the international part of the SO (Chapters 2 and 10) the Commission clearly set out the objection referred to in Article 4(3)(b) of the contested decision. Thus, in point 61(h)(iv) of the SO (Chapter 10) it stated as follows: 'The pressure brought to bear on Calcestruzzi and the non-implementation of the contract on the purchase of cement from Titan are the result of agreements and/or concerted practices between the Italian producers Italcementi, Unicem and Cementir ...'. Even though the chapters of the SO relating to Italy (Chapters 3 and 13) set out the same objection, the Commission did not 'revive', in the contested decision, a national objection that it had dropped: the infringement referred to in Article 4(3)(b) of the contested decision is based on an objection which was clearly set out in the international part of the SO.

444 Unicem submits that in the contested decision the Commission also upheld the national objection concerning Italy, relating to the SIPAC agreements (SO, Chapter 3, point 35(a); Chapter 13, point 70(b), first indent).

445 The Court points out that SIPAC is a joint subsidiary set up by Cementir, Italcementi, Unicem and Calcestruzzi. In the SO the Commission had taken the view that the setting-up of SIPAC infringed Article 85(1) of the Treaty (SO, Chapter 13, point 70(b), first indent). As the Commission acknowledges, the contested decision does not uphold that objection. In that decision, the Commission does not express a view on the question whether or not SIPAC is in conformity with Article 85(1) of the Treaty. Unicem's argument must therefore be rejected.

446 Italcementi alleges that, if it had been able to submit its comments on the dropping of the national objections, it would not have failed to point out that that decision must lead to the dropping of the objections relating to the agreement which, according to Article 4(3)(b) of the contested decision, it had concluded with Unicem and Cementir with a view to preventing imports of Greek cement by Calcestruzzi, because that agreement was referred to in the SO in the national chapter dealing with the Italian market (SO, Chapter 3, point 35).

447 However, although the agreement in question was referred to in the chapter of the SO relating to Italy, it was also referred to in the international part of the SO, in the context of the objections relating to the ETF and the measures for implementing it (SO, points 19(d) and 60(h)(iv)). Consequently, the comments which the applicant might have been able to make on the dropping of the national objections would clearly not have led the Commission to drop the international objection relating to the agreement between the Italian cement producers.

448 The SFIC (T-36/95), Oficemen (T-59/95), Cimpor (T-61/95) and SECIL (T-62/95) contend that after dropping the objections relating to the national agreements and concerted practices, the Commission should also have removed from the file the documents relating to those agreements and concerted practices. However, the contested decision contains some references to 'national' documents. The SFIC refers in that regard to the minutes of the meetings of the SNFCC Bureau of 8 July, 9 September and 7 October 1986 (contested decision, recital 29, paragraph 4; documents 33.126/14828 to 14860) mentioned in Chapter 5 ('France') of the SO. Cimpor and SECIL refer to evidence cited in Chapter 9 ('Portugal') of the SO, namely documents 33.322/79, 84, 85, 88, 89, 90, 92, 93, 95, 96, 162, 163 to 166, 170, 1314, 1406 to 1408, 1410 to 1412 and 2898 to 2903, all mentioned in recital 21 of the contested decision. Cimpor refers to other documents which were also allegedly used by the Commission in the context of the Spanish-Portuguese agreement (contested decision, recital 21) and which were mentioned only in the national chapter of the SO, namely Chapter 9 ('Portugal'). Those documents are documents 33.322/59, 94, 155 to 157, 158, 159, 160, 161, 169, 171, 172, 177, 181, 252, 270 to 276, 1311 and 1397 to 1399. Finally, Oficemen criticises the fact that the Hispacement document (documents 33.322/2898 to 2903) to which the Commission refers in recital 21, paragraphs 2

and 11, of the contested decision, although reproduced in part in the chapter of the SO relating to Spain (point 55), was not mentioned in the international part of the SO.

449 The Court has already found in the course of its examination of the first plea that documents Nos 33.322/59, 94, 169 and 171, referred to by Cimpor, were not used by the Commission in the contested decision (see paragraphs 286 and 287 above). The argument which Cimpor bases on those documents is therefore founded on an error of fact. On the other hand, it has been held that document 33.322/1399, referred to in recital 21, paragraph 6, of the contested decision, is not admissible as against Cimpor (see paragraph 374 above). The other documents to which the applicants refer in the preceding paragraph were mentioned in the national chapter of the SO that was served on SFIC, Oficemen, Cimpor and SECIL during the administrative procedure. Those documents, apart from the Hispacement document (documents 33.322/2898 to 2903), which was only partially accessible (see paragraphs 369 to 372 above), were wholly accessible to them during that procedure. Furthermore, the applicants concerned could reasonably have expected that the Commission would use the documents in question in the contested decision; although mentioned in the chapters of the SO relating to the national objections, those documents contain evidence as to the international objections (as regards documents 33.322/155 to 157, see paragraph 331 above; as regards documents 33.322/2898 to 2903, see paragraphs 332 and 333 above; as regards documents 33.322/162, 163 to 166, 170, 172, 181, 252, 1311, 1314, 1406 to 1408 and 1410 to 1412, see paragraphs 334 to 337 above; as regards documents 33.322/1397 and 1398, see paragraph 340 above; as regards documents 33.322/79, 84, 85, 88, 89, 90, 92, 93, 95, 96, 158, 159, 160, 161, 177 and 270 to 276, see paragraphs 341 to 344 above; as regards documents 33.126/14828 to 14860, see paragraph 352 above). In those circumstances, there can be no question of infringement of the rights of the defence. As regards, however, the parts of the Hispacement document (documents 33.322/2898 to 2903), which were not accessible during the administrative procedure, the Court has already held (see paragraph 372 above) that when it examines the substantive pleas it will be necessary to assess whether the infringement found in Article 3(2) of the contested decision is adequately proved as against Oficemen, Cimpor and SECIL without the passages from document 33.322/2901 to which access was not given during the written and oral stages of the administrative procedure (see paragraphs 2041 to 2092 below).

450 Cimpor and SECIL, referring to the same documents mentioned in paragraph 448 above, allege that the Commission itself, in referring in the contested decision to evidence contained in the chapter of the SO relating to Portugal in support of its objection relating to the Spanish-Portuguese agreement, accepts that the content of the national chapters of the SO was relevant to an assessment of the infringements referred to in the international chapters of the SO. Similarly, SFIC complains of the alleged illogicality of the Commission's argument, which on the one hand submits that the documents in the file are not an indivisible or inextricable, which justifies its refusal to grant access to the documents relating to the national agreements and concerted practices, but on the other hand refuses to remove from the file the documents relating to the part concerning France, even though the objections relating to the French agreements and concerted practices have been dropped. It refers in that regard again to the minutes of the meetings of the SNFCC Bureau of 8 July, 9 September and 7 October 1986 (contested decision, recital 29, paragraph 4; documents Nos 33.126/14828 to 14860) used by the Commission in the context of the infringements referred to in Article 4(1) to (3)(a) of the contested decision.

451 The Court finds, however, that, as the Commission had clearly established in the SO the link between the documents to which SFIC refers and the objections relating to the ETF, together with the link between the documents to which Cimpor and SECIL refer and the objections relating to the Spanish-Portuguese agreement, and that, as those documents had been submitted for the comments of SFIC, Cimpor and SECIL during the administrative procedure, the Commission was legally entitled to refer to them in the contested decision, even though the national objections had been dropped. One and the same document may relate to different objections; in the present case, they were the national and international objections. The fact that the national objections had been dropped did not prevent the Commission from using such a document in support of the international objections referred to in the contested decision.

452 SFIC also observes that, although it actually dealt with the significance of the documents relating to the French agreements and concerted practices during the administrative procedure, its comments were formulated exclusively from the point of view of the national objections, not of the international objections. In the contested decision the Commission took no account of the observations submitted by the applicant in reply to the national objections and, in particular, those relating to the minutes of the meetings of the SNFCC Bureau on 8 July, 9 September and 7 October 1986 (documents Nos 33.126/14828 to 14860).

453 The Court points out that in the SO the Commission had clearly demonstrated the link between the documents to which SFIC refers and the objections relating to the ETF (see paragraph 352 above). SFIC was at liberty to submit comments on those documents, inasmuch as they were used by the Commission not only in the context of the national objections, but also in the context of the various infringements relating to the ETF. The argument based on a failure by the Commission to take into account observations submitted by SFIC during the administrative procedure is unsupported by any evidence. It must therefore be rejected. In any event, the Court finds that in recital 29, paragraph 4, of the contested decision the Commission discusses in detail the explanations put forward by SFIC to justify the absence of any particulars in the minutes of the three abovementioned meetings of the SNFCC concerning the issue of exports from Greece, even though that subject was on the agenda for those meetings.

454 Italcementi (T-65/95) considers that the Commission infringed the principle of equal treatment in finding that it participated in the agreements concluded between Calcestruzzi, on the one hand, and Unicem, Cementir and itself, on the other, but not finding that Calcestruzzi participated in that infringement. Similarly, Unicem (T-50/95) contends that the infringements objected to in Article 4(3)(a) and (b) of the contested decision should have been attributed to Calcestruzzi. It adds that the agreements referred to in Article 4(3)(b) of the contested decision should also have been attributed to the 11 other Italian producers called upon in the SO to reply to that objection. It also submits that this infringement of the principle of equal treatment also affected its rights of defence, since it was compelled to defend itself on its own against an objection based on conduct which involved other parties who possessed information essential to its defence.

455 Those arguments must be rejected. The fact that undertakings in a position comparable to that of the applicant were not found by the Commission to have committed any infringement cannot constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established (*Woodpulp II*, cited in paragraph 106 above, paragraph 146). The Court will examine below whether the infringements referred to in Article 4(3)(a) and (b) of the contested decision and the participation of Unicem and Italcementi in those infringements were in fact established by the Commission (see paragraphs 3138 to 3189, 3245 to 3253, 3264 to 3270 and 3343 to 3386 below). Furthermore, Unicem does not explain how the circumstances on which it relies in support of its plea of infringement of the principle of equal treatment could prevent it from gaining access to documents which might be useful to its defence and, accordingly, affect its rights of defence.

456 ENCI (T-31/95) and the VNC (T-32/95) also submit that the dropping of the proceedings in respect of the alleged national agreements and concerted practices examined in the SO caused them to suffer unequal treatment. The undertakings concerned by those alleged national agreements and concerted practices are in a more favourable situation than they are, since the proceeding concerning the analysis of the Netherlands market and of the Benelux market was not referred to in the SO and is being continued to their detriment.

457 That argument must be rejected. The SO did not contain any national chapter relating to the Netherlands. Furthermore, the applicants concerned have not shown that a proceeding concerning alleged agreements and concerted practices in the Netherlands has in fact been initiated and is being pursued. The undertakings and associations of undertakings referred to in a national chapter of the SO were not therefore in the same situation as they were. In those circumstances, the fact that only the undertakings and associations of undertakings to which the SO referred benefited from the dropping of the national objections cannot be considered to discriminate against ENCI and VNC (judgment in *Schumacker*, cited in paragraph 123 above, paragraph 30). The Belgium-Netherlands-Germany agreements and concerted practices, in regard to which the Commission considers in recital 51 of the contested decision that it should not adopt a position, are an international objection. ENCI and the VNC cannot, by referring to the pursuit of an investigation concerning an international objection, therefore allege that the decision to drop the national objections infringed the principle of equal treatment. On any view, the Commission's decision not to adopt a position in the contested decision on the subject of the Belgium-Netherlands-Germany agreements and concerted practices had the same effect on all the applicants concerned by that objection (see contested decision, recital 23), which in itself rules out infringement of the principle of equal treatment.

458 Lastly, FIC (T-30/95) submits that the Commission infringed Article 190 of the Treaty in failing to state in the contested decision reasons for dropping the national objections and for its conclusion that the dropping of those objections had no impact on the remainder of the objections upheld, even though it had initially taken the view that all the objections formed an inseparable whole and proved the existence of a single and continuous agreement. That infringement is claimed to be all the more serious in that it concerns the statement of reasons for the contested decision. FIC adds that the fact that the SO is of a preparatory nature cannot suffice to explain the dropping of the national objections and the retention of the international objections. BCA (T-54/95), Asland (T-55/95) and Italcementi (T-65/95) object also to the fact that in the contested decision the Commission did not give reasons for dropping the national

objections. Italcementi asserts moreover that there is a contradiction between the principle of the single and continuous infringement and the decision of 23 September 1993 not to continue the examination of the national objections.

459 The Court finds that it was not necessary, in order to understand the Commission's reasoning in regard to the international objections in the SO or in the contested decision, to examine the national objections set out in the SO. As presented in the SO and in the contested decision, the international objections, namely the Cembureau agreement and the measures for implementing it at international level, did not depend on the existence of the national objections (see paragraphs 110 to 120 above). Since the dropping of the national objections did not affect the international objections and was therefore extraneous to those objections — the only objections to which the contested decision relates — the Commission was not required to give reasons in the contested decision for dropping them. As regards the contradiction alleged by Italcementi, the national objections were not, either in the SO or in the contested decision, regarded as evidence of the single and continuous Cembureau agreement. The arguments of FIC, Asland and Italcementi must therefore be rejected.

460 It follows from the whole of the foregoing that the Court must reject the third plea, and the second and fourth pleas, inasmuch as they relate to the dropping of the national objections.

B — The abandonment of the international objections as against some undertakings

461 It should be recalled that by letter of 27 September 1993 the applicants were informed that the national objections had been dropped. They were not, however, informed of the Commission's decision to drop the international objections in the SO as against some German and Spanish undertakings.

462 Italcementi (T-65/95) complains specifically that the Commission did not notify it during the administrative procedure of its decision to terminate the proceeding initiated against 12 German undertakings and six Spanish undertakings. It states that it was thereby deprived of an opportunity to submit observations on that decision during the administrative procedure. It contends that those observations might have led to a different outcome to the administrative procedure, because it claims that the decision of 23 September 1993 is not consistent with the collective responsibility which the Commission attributes to the European cement producers as a whole.

463 BDZ (T-48/95) and Asland (T-55/95) allege that the Commission's decision of 23 September 1993 to drop the objections against a number of Spanish and German undertakings also fundamentally altered the legal and factual background to the complaints made in the SO.

Similarly, Aker (T-70/95) and EUROC (T-71/95) submit that when the Commission decided in September 1993 to terminate the proceeding against those undertakings, which were represented in Cembureau, but to maintain the international objections against the other undertakings addressed by the SO, it cannot but have reformulated the objections. In those circumstances, it should have given the latter addressees an opportunity to submit fresh observations in their defence.

464 The Court finds that, although the letter sent on 27 September 1993 by the Commission to the addressees of the SO did not refer to its decision of 23 September 1993 to drop the objections as against 12 German undertakings and six Spanish undertakings, the grounds now submitted by the applicants do not show that the observations which they might have made at that time concerning that decision might have led to a different outcome to the administrative procedure, whether generally or specifically in regard to them.

465 The Court points out in that regard that the fact that the Commission dropped the international objections as against a number of undertakings cannot be interpreted as a change in its assessment of the very substance of the objections formulated in the international part of the SO and upheld in the contested decision as against the applicants concerned. In any event, the comments which BDZ, Asland, Italcementi, Aker and EUROC might have made on the Commission's decision of 23 September 1993 to drop the international objections against a number of addressees of the SO could not have obscured the evidence on which the Commission relied in attributing to them the international objections alleged against them in the SO and subsequently in the contested decision.

466 As regards the argument of Italcementi, Aker and EUROC, based on alleged collective responsibility, the Court finds that the undertakings in regard to which the proceeding was terminated are all indirect members of Cembureau, that is to say, undertakings represented in Cembureau by their associations, BDZ or Oficemen. The Commission never took the view, either in the SO or in the contested decision, that all the undertakings represented by their association in Cembureau participated in the infringements referred to in the international part of the SO. In terminating the proceeding as against some indirect members of Cembureau, the Commission did not therefore amend the objections.

467 In those circumstances, the arguments of BDZ, Asland, Italcementi, Aker and EUROC must be rejected.

468 Lastly, Cembureau (T-26/95) and Italcementi observe that in the contested decision the Commission did not state its reasons for dropping the international objections as against some undertakings.

469 In line with settled case-law, the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure so that they may defend their rights and the Community judicature may exercise its supervisory jurisdiction (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 89). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

470 In order to understand the objections upheld against them in the contested decision, Cembureau and Italcementi did not need to know the reasons which had led the Commission to drop the international objections as against some German and Spanish undertakings. Nor does the Court need to know those reasons in order to review the legality of the contested decision. In any event, the applicants cannot allege that the Commission should have stated reasons in the contested decision for dropping the international objections as against some Spanish and German undertakings so that the Court can ascertain whether or not the Commission infringed the principle of equal treatment: the question whether the undertakings which are the subject of the decision of 23 September 1993 participated in the various infringements to which the contested decision relates is not before the Court. Furthermore, the fact that a trader allegedly in a position comparable to that of an applicant was not found by the Commission to have committed any infringement cannot constitute a ground for setting aside the finding that the applicant committed an infringement (*Woodpulp II*, cited in paragraph 106 above, paragraph 146). Nor, in those circumstances, is it necessary to grant Italcementi's request that the Commission produce the decision of 23 September 1993.

471 It follows from the whole of the foregoing that the second and fourth pleas, inasmuch as they relate to the abandonment of the international objections as against some undertakings, must also be rejected.

The fifth plea: procedural irregularity by the Commission in dropping some international objections as against Irish Cement

472 Irish Cement (T-60/96) argues that there is a procedural irregularity because the contested decision does not mention its participation in the infringement relating to the setting-up of Interciment (contested decision, Article 4(2)), whereas at the hearings the Commission alleged that it did participate. It also notes that the sales of clinker which the Commission alleges, in point 15 of the SO, that it made to Blue Circle, are no longer described in the contested decision as measures to implement the Cembureau agreement.

473 The Court points out, however, that the applicant cannot plead a procedural irregularity by arguing that some accusations made against it by the Commission during the administrative procedure were ultimately dropped in the contested decision: the aim of an addressee of an SO is specifically to cause the Commission to drop the objections made against him (see paragraph 439 above).

474 The fifth plea must therefore also be rejected.

The sixth plea: infringement of the rights of the defence resulting from the incomplete and imprecise nature of the SO

A — Preliminary observations

475 A number of applicants submit first of all that there are gaps in the SO (B). Some of the applicants assert, moreover, that the SO did not set out sufficiently clearly the extent to which they were alleged to have participated in the various infringements (C). Several applicants argue also that certain infringements or aspects of infringements referred to in the contested decision do not correspond to the objections in the SO. Since an assessment of whether there is discrepancy between the objections set out in the SO and the infringements found in the contested decision requires an examination of all the constituent elements of the infringements in question, the Court will carry out that examination when it considers the various substantive pleas and arguments.

476 The Court points out that the SO must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct to which the Commission objects. It is only on that basis that the SO can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see *Woodpulp II*, cited at paragraph 106 above, paragraph 42, and *Mo och Domsjö* v *Commission*, cited at paragraph 106 above, paragraph 63). The present plea must be considered in the light of those principles.

B — The allegedly incomplete nature of the SO

477 (1) FIC (T-30/95), VNC (T-32/95) and Oficemen (T-59/95) complain that the Commission did not state in the SO that it intended to impose fines on trade associations. (2) FIC, ENCI (T-31/95) and VNC criticise the method with which the SO deals with the CBS agreement concluded between the German, Belgian and Netherlands producers with regard to supply of the Dutch market. (3) Aker (T-70/95) and EUROC (T-71/95) submit that the SO did not set out all the matters of fact and law on the basis of which the Commission claims to have territorial jurisdiction to apply Article 85(1) of the Treaty to the conduct of undertakings established outside the Community. (4) Finally, Italcementi (T-65/95) and Hornos Ibéricos (T-69/95) submit that the SO did not analyse the market or precisely define the relevant markets.

1. The alleged failure by the Commission to state in the SO that it intended to fine trade associations

478 The Commission imposed fines for participation in the Cembureau agreement not only on the undertakings but also on the trade associations to which the contested decision was addressed (contested decision, Article 9). It considers it necessary to fine the trade associations also 'so as to dissuade them from taking the initiative in or facilitating such restrictive agreements and practices in future' (contested decision, recital 65, paragraph 8, first indent).

479 FIC, VNC and Oficemen assert that they were not notified during the administrative procedure of the Commission's intention to impose fines on them. Such infringement of their rights of defence should lead to the annulment of Article 9 of the contested decision in their case.

480 The Court points out that the Commission is not entitled to impose a fine on an undertaking or an association of undertakings without its having previously informed the party concerned, during the administrative procedure, that it intended to do so. The SO must make it possible for the undertaking or association of undertakings concerned to defend itself not only against a finding of an infringement but also against the imposition of a fine (*Michelin* v *Commission*, cited above at paragraph 150, paragraph 20, and Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *CMB and Dafra-Lines* v *Commission*, not yet published in the ECR, paragraph 178). In cases where, after service of the SO, the Commission decides to impose a fine that has not been mentioned in that SO, it must serve on the undertaking or the association of undertakings concerned a supplement to the SO that observes the procedural rules applicable to any SO.

481 In the present case, the SO contains a single paragraph on the fines, point 93. In it, the Commission refers first of all to the provisions of Article 15(2) of Regulation No 17, under

which the Commission may impose fines on undertakings or associations of undertakings (first paragraph of point 93 of the SO). The article in question is cited almost word for word. The wording of point 93 of the SO contains no other reference to associations of undertakings. The Commission states that 'the undertakings in question have, intentionally, or at the very least negligently, committed, as from the dates or during the periods indicated in the above outline, the infringements referred to in this Statement of Objections' (second paragraph of point 93 of the SO). Further on, as regards the gravity and duration of the infringements (third paragraph of point 93 of the SO), it refers to 'a number of the producers' and 'the undertakings concerned', but not to associations of undertakings. It also refers to the failure to cooperate on the part of 'the undertakings' during the investigation.

482 The Commission contends that, in the context of an SO which clearly describes the participation of the associations of undertakings in the Cembureau agreement, the paraphrasing of Article 15(2) of Regulation No 17 in the first paragraph of point 93 of the SO should have been sufficient to inform the associations of undertakings, during the administrative procedure, that it was likely that fines would be imposed upon them in respect of their participation in the Cembureau agreement.

483 That argument cannot be accepted. Although the SO unequivocally complained that the associations of undertakings had participated in the Cembureau agreement, the same was also true with regard to the undertakings (see paragraphs 506 to 543 below). The Commission explained in the second paragraph of point 93 of the SO that the initial conditions (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 53) to enable the imposition of fines were fulfilled with regard to the undertakings, when it stated that they had committed the infringements referred to in the SO 'intentionally or negligently'. On the other hand, it made no statement of that kind in regard to the associations of undertakings. Likewise, in the third paragraph of point 93, the Commission, when explaining how the amount of the fines would be determined, referred only to the conduct of undertakings. If the paraphrase of Article 15(2) of Regulation No 17 in the first subparagraph of point 93 had sufficed to inform the associations of undertakings that a fine would be imposed on them, it should also have sufficed for the undertakings. It is thus clear that in its statements in the SO concerning the initial conditions for the imposition of a fine and the determination of the amount of the fine, the Commission did not express its intention to impose fines also on associations of undertakings.

484 Moreover, an SO must provide the person to whom it is addressed with details of the deliberate or negligent nature of the infringement he is alleged to have committed and of the gravity and duration of that infringement relevant to determining the amount of the fine, so that he can foresee that a fine may be imposed on him (see, to this effect, *Musique Diffusion Française and Others* v *Commission*, cited above in paragraph 439, paragraph 21). Article 15(2) of Regulation No 17 deals expressly with those two separate matters (order in *SPO and Others* v *Commission*, cited above at paragraph 483, paragraph 53). However, in the present case, all the information in the SO relating to the initial conditions for the imposition of a fine and to the gravity and the duration of the infringement related only to undertakings. The associations of undertakings could not therefore foresee that the Commission was about to fine them also.

485 It is also normal practice for the Commission, where it finds that an association of undertakings and its members have participated in the same infringement, to impose a fine either on the undertakings which are members of that association of undertakings or on the association of undertakings. In the latter case, it may take the turnover of the members of the association as a basis for calculating the fine, at least where, by virtue of its internal rules, the association is able to bind its members (*CB and Europay* v *Commission*, cited at paragraph 83 above, paragraphs 136 and 137, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 253). If, for particular reasons, such as those mentioned in recital 65, paragraph 8, of the contested decision, it intends to fine both the association of undertakings and the member undertakings of that association, it must make that intention clear in the SO or in a supplement thereto. In the present case, from that point of view also, point 93 of the SO was not precise enough to enable the associations of undertakings to discern the Commission's intention to impose fines upon them.

486 Furthermore, the Commission has not refuted Oficemen's claim in its application (paragraph 60) that Oficemen had expressly pointed out in its reply to the SO that it assumed that the Commission did not intend to impose fines on the associations of undertakings. Moreover, FIC's reply to the SO (annex 6 to the application) does not contain any argument relating to the fines. Nevertheless, the Commission did not consider it necessary to warn the associations of undertakings, in a supplement to the SO, that they could be subject to a fine.

487 Thus, by not requesting FIC, VNC and Oficemen, during the administrative procedure, to submit their observations on the possible exercise of its power to impose fines under Article 15(2) of Regulation No 17, the Commission infringed an essential procedural requirement. A plea alleging breach of an essential procedural requirement may be raised by the Court of its own motion (Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 14, and *Commission* v *Sytraval and Brink's France*, cited in paragraph 469 above, paragraph 67); the Court finds that there was such a breach in the course of the actions brought by the other associations of undertakings to which the contested decision was addressed and which also received, during the administrative procedure, an SO not mentioning the Commission's intention to impose a fine upon them.

488 Article 9 of the contested decision must therefore be annulled in so far as it imposes a fine on the following associations of undertakings: Cembureau, FIC, VNC, SFIC, BDZ, BCA, Oficemen, ATIC and AGCI.

2. The method of dealing with the CBS agreement

489 FIC, ENCI and VNC complain about the Commission's method of dealing with the CBS agreement, an agreement concluded between German, Belgian and Netherlands producers with regard to the supply of the Dutch market and notified to the Commission in 1975.

490 ENCI and VNC submit that the SO indicated in footnote 10 that there would be a separate examination of the CBS agreement. Since there is no chapter on the Netherlands, the SO is incomplete. ENCI and VNC claim that the German version of the SO substantiates their contention, as footnote 10 in that language version expressly states that the CBS agreement is to be examined in another chapter of the SO yet to be drawn up.

491 That argument must be rejected. As the Commission points out, the reason for the absence of any chapter in the SO dealing specifically with the Netherlands, is that no objection was raised in respect of the Dutch market. Since ENCI and VNC have not shown that an objection specific to the Dutch market was raised against them in the contested decision, they cannot claim that the SO was incomplete without a 'Netherlands' chapter. The absence of such a chapter has not impaired their defence during the administrative procedure against the objections upheld in the contested decision. Moreover, the CBS agreement, referred to in footnote 10 of the SO and in recital 23, paragraph 2, and recital 51 of the contested decision, did not itself give rise to an objection either in the SO or in the contested decision. The fact that the Commission reserved the right to initiate a proceeding concerning the CBS agreement could not have undermined ENCI's and VNC's defence in a procedure in which no objection relating to that CBS agreement was ever expressed. Finally, the applicants cannot base any argument on the German version of the SO. Since the applicants are established in the Netherlands, the Commission sent them the Dutch version of the SO and only that version is therefore authentic as against them.

492 FIC argues that the Commission infringed its rights of defence by mentioning the CBS agreement in support of its contention that there was a Belgium-Netherlands-Germany agreement (contested decision, recital 23, paragraph 2), at a time when the Commission had not yet reacted to the notification of that agreement. In any event, the Commission sought in that way to undermine the credibility of the applicant and of the other parties concerned.

493 The Court notes that, at recital 23, paragraph 2, of the contested decision, the Commission referred to the CBS agreement in the context of the factual description of a Belgium-Netherlands-Germany agreement. None the less, in recital 51, after recalling that it had 'already stated (page 34, footnote 10, of the SO) that the CBS agreement would be examined under separate proceedings', it decided not to adopt a position on the existence of such an agreement. It therefore made no reference to the CBS agreement in the context of an objection upheld in the contested decision. In those circumstances, FIC's argument must be rejected.

3. The alleged failure to explain the Commission's territorial jurisdiction

494 Aker and EUROC submit that the SO does not set out the factual or legal grounds to support the Commission's claim of territorial jurisdiction to apply Article 85(1) of the Treaty to the conduct of undertakings established outside the Community. Accordingly, those applicants did not have the opportunity to comment on that point during the administrative procedure and their rights of defence were thereby infringed.

495 Although the SO contains no explanations as to the Commission's jurisdiction to apply Article 85(1) of the Treaty to undertakings originating in third countries, the Court points out, however, that on reading the SO, the applicants should have been aware of the specific objection which the Commission was raising against them (participation in the Cembureau agreement on non-transhipment to domestic markets — SO, points 9 and 61(a) — and participation in the ETF and its implementation measures — SO, points 16, 17, 18, 19(d), 20(f), and 61(h); see paragraphs 524 and 527 below). By letter dated 16 July 1992, the Commission also informed the two applicants that 'the SO had been sent to them because of their participation in the Cembureau Task Force or the ETF, whose object was to prevent supplies of Greek cement in the Community, to absorb Greek cement and to deflect the Greek production surplus outside Europe' (contested decision, recital 53, paragraph 11). Since they were aware of the conduct with which they were charged in the SO, Aker and EUROC therefore had the opportunity, during the administrative procedure, to submit that they had a special situation resulting from their location outside the Community, and to indicate the conclusions which, in their view, should be drawn as to the territorial scope of Article 85(1) of the Treaty.

496 Their argument must therefore be rejected.

4. The alleged failure to analyse the market and to precisely define the relevant markets

497 Hornos Ibéricos states that the Commission should have carried out an economic analysis of the market in order to verify whether there was an alternative explanation for the conduct complained of other than that of unlawful collusion (*Woodpulp II*, cited above at paragraph 106, paragraphs 71 and 72). The Commission either did not make the requisite thorough study of the market, failing thus to observe the minimum requirements as to proof, or never sent the applicant the documents concerning such a study, in which case there was an infringement of the rights of the defence.

498 The Court finds that the Commission was not required to establish whether the conduct complained of could be explained as the result of anything other than an unlawful concerted practice. The infringements were proved in the SO and in the contested decision by specific

documentary evidence and not by parallel conduct on the market (see paragraph 264 above). Moreover, the SO does contain an analysis of the market. Chapter 1 of the SO, consisting of nine pages, is entitled 'The Cement Market'. It is subdivided into four points: the Product; Characteristics of the industry; Supply; and Demand. The applicant does not deny having received that chapter during the course of the administrative procedure. Its argument must therefore be rejected.

499 Italcementi submits that the Commission has not defined the relevant geographical market in the SO. By failing so to do, it deprived it of the possibility of commenting on an essential factor for the assessment of its conduct.

500 The Court finds that point 5 of Chapter 1 of the SO, entitled 'Intra-Community trade', in which the Commission states that the low level of trade 'is due not so much to the cost of transporting a heavy product as to a long-standing tradition of not encroaching on the markets of neighbouring countries'. The Commission thus informed the addressees of the SO that the geographical market was wider than the national one, so that the practices referred to in the SO were liable to affect trade between Member States (SO, points 62, 65 and 68) and to infringe Article 85(1) of the Treaty. In those circumstances, the complaint that the geographical market was not defined must be rejected (see, to this effect, *SPO and Others* v *Commission*, cited at paragraph 485 above, paragraphs 74 and 75).

501 Italcementi also submits that in the SO the Commission made no distinction between grey and white cement. By stating in the contested decision (recital 11, paragraph 1) that white cement is not in the same market as grey cement, the Commission altered its definition of the market but did not serve a fresh statement of objections on the parties.

502 That argument must also be rejected. The SO had already made a distinction between grey and white cement (point 1). Moreover, it contained separate arguments dealing specifically with agreements and practices on the white cement market (Chapter 2, Section 3, and Chapter 11). The other agreements and practices mentioned in the SO all concerned the grey cement market. By the stage of the SO, the Commission was already of the view that white cement was not part of the same market as grey cement.

503 It follows from all the foregoing that the present plea is well founded to the extent that it relates to the Commission's failure to indicate in the SO that it intended to impose fines on trade associations (see paragraphs 478 to 488 above). All the other arguments claiming that the SO is incomplete must be rejected.

C — The alleged lack of precision in the SO as to the participation of certain applicants in various objections raised in the SO

504 Most of the applicants submit that the SO was not sufficiently precise as to the extent to which they are alleged to have participated in one or other type of unlawful conduct. The Court points out, however, that such an argument, where it proves to be well founded, can lead to a finding of infringement of rights of the defence only where the objection against the applicant concerned is insufficiently precise and is subsequently sustained in the contested decision. An infringement of the rights of the defence must therefore be assessed in the light of the objections raised by the Commission in the SO and in the contested decision (T-30/91 *Solvay* v *Commission*, paragraph 60, and T-36/91 *ICI* v *Commission*, paragraph 70, cited in 106 above). Thus, the assertion by Unicem (T-50/95) and Cementir (T-87/95) that the SO did not explain how they participated in the objection relating to the rules of fair competition can already be rejected at this stage because the discussions on 'fair or healthy or correct' competition mentioned in paragraph 17 of the contested decision were not the subject-matter of any complaint in the operative part of the contested decision.

505 The other arguments put forward by various applicants will be analysed below in the order that the infringements are found in the contested decision.

1. Participation of the applicants concerned in the infringement constituted by the Cembureau agreement and the duration of that infringement

506 According to the contested decision, at the meeting of Head Delegates held on 14 January 1983 Cembureau and its members reached an agreement on non-transhipment to domestic markets and on the regulation of sales from one country to another (contested decision, recital 45, paragraphs 1 and 9), an agreement referred to by the Commission as the 'Cembureau agreement'. According to the contested decision, the participants in that agreement were Cembureau, Cembureau's members (hereinafter referred to as 'direct members of Cembureau') and certain other undertakings not members of Cembureau but of a national association which was itself a member of Cembureau (hereinafter referred to as 'indirect members of Cembureau'). However, so far as concerns the indirect members of Cembureau, 'for the purposes of [the] Decision, the Commission [took] into consideration only the undertakings which were represented within Cembureau by their association and which, in addition to their membership of the association, [had] clearly manifested their accession to the agreement by participating' in the implementation of the Cembureau agreement (contested decision, recital 65, paragraph 3, first subparagraph). Thus, the indirect members of Cembureau which participated in one or more of the infringements referred to in Articles 3 to 6 of the contested decision were regarded in it as having participated in the Cembureau agreement. Buzzi, which is neither a direct nor indirect member of Cembureau, acceded to the Cembureau agreement through its participation in the Franco-Italian concerted practices referred to in Article 3(1) of the contested decision (contested decision, recital 65, paragraphs 3 and 4). The Commission took the view (in recital 46, paragraph 1, first subparagraph) that the 'whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts constituted a "single and continuous agreement"'. That single and continuous Cembureau agreement is the subject-matter of Article 1 of the contested decision.

507 CBR (T-25/95), ENCI (T-31/95), VNC (T-32/95), Ciments Luxembourgeois (T-34/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), Buzzi (T-51/95), Valenciana (T-52/95), Rugby (T-53/95), BCA (T-54/95), Asland (T-55/95), Castle (T-56/95), Uniland (T-58/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Hornos Ibéricos (T-69/95), Aker (T-70/95), EUROC (T-71/95) and Blue Circle (T-88/95) submit that the SO does not identify them as parties to the Cembureau agreement. They were not therefore able to defend themselves during the administrative procedure against the claim that they participated in the infringement referred to in Article 1 of the contested decision. That article should, accordingly, be annulled as against them.

508 In the context of the present plea, CBR, Vicat, Rugby and Castle also claim that the Commission did not inform them during the administrative procedure that it was going to take their membership of a national association that was a direct member of Cembureau as a ground for concluding that they had acceded to the Cembureau agreement. FIC (T-30/95), Ciments Français, Aalborg, Lafarge, Unicem, Heracles, Uniland, Italcementi (T-65/95), Hornos Ibéricos, Aker, EUROC and AGCI (T-103/95) criticise the lack of precision of the SO as to the duration of the infringement found in Article 1 of the contested decision.

509 The Court will consider, first of all (in section 1.1.), whether Chapters 2 and 10 of the SO charge the abovementioned applicants sufficiently clearly with the participation in the Cembureau agreement found in Article 1 of the contested decision. Next (in section 1.2), it will ascertain whether, and to what extent, an undertaking's membership of a national association is a factor which was taken into consideration by the Commission in determining the participation in the infringement found in Article 1 of the contested decision and whether the SO was sufficiently clear in that regard. In section 1.3 the Court will also examine the question whether the SO gives a sufficiently clear explanation of the duration of the Cembureau agreement referred to in Article 1 of the contested decision. Finally, in section 1.4, the appropriate conclusions will be drawn from the findings made.

1.1. Participation in the infringement referred to in Article 1 of the contested decision

510 A distinction should be drawn between those applicants which are members of Cembureau (1.1.1.) and those which are not members of that association or not regarded as such in the SO (1.1.2.).

1.1.1. Addressees of the SO which are members of Cembureau

511 VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, Unicem, BCA and ATIC are direct members of Cembureau.

512 The second paragraph of point 6 of Chapter 2 of the SO expressly refers to them as such.

513 The third paragraph of point 61 of Chapter 10 states:

'As may be seen from point 9, Cembureau and its members adopted the "Cembureau agreement or Cembureau principle of not transhipping to internal European markets".'

514 The first paragraph of Point 61(a) adds:

'The "Cembureau agreement or principle of not transhipping to internal European markets" (point 9) constitutes an agreement and/or a concerted practice between Cembureau and its members ...'

515 In those circumstances, the abovementioned eight applicants, direct members of Cembureau, cannot claim that the SO does not identify them as being party to the Cembureau agreement.

1.1.2. Addressees which are not direct members of Cembureau or regarded in the SO as not being direct members

516 The other applicants which have submitted the line of argument under consideration are either not direct members of Cembureau (CBR, ENCI, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Buzzi, Valenciana, Rugby, Asland, Castle, Uniland, Cimpor, SECIL, Hornos Ibéricos and Blue Circle) or are direct members but not regarded as such in the SO (Aker and EUROC). They claim that the third paragraph of point 61 of the SO, which states that 'Cembureau and its members adopted' the Cembureau agreement, shows that the SO was not sufficiently precise in regard to them so far as concerns their participation in that agreement.

517 Separate analysis is required of the position of undertakings which, according to the SO and the contested decision, participated in bilateral or multilateral agreements and concerted practices (Chapter 10, point 61 of the SO, and Articles 3 and 4 of the contested decision), namely CBR, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Buzzi, Rugby, Asland, Castle, Uniland, Cimpor, SECIL, Aker, EUROC and Blue Circle (see 1.1.2.1 below); that of

undertakings which participated in the activities of the ECEC (Chapter 12, point 66, of the SO and Article 5 of the contested decision), namely ENCI, Dykerhoff and Castle (see 1.1.2.2 below); and that of undertakings which participated in the activities of the EPC (Chapter 12, point 67, of the SO and Article 6 of the contested decision), namely Ciments Français, Lafarge, Valenciana, Hornos Ibéricos and Blue Circle (see 1.1.2.3 below).

1.1.2.1. Addressees of the SO, not direct members of Cembureau, which are alleged to have participated in bilateral or multilateral agreements and concerted practices

518 In order to ascertain whether CBR, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Buzzi, Rugby, Asland, Castle, Uniland, Cimpor, SECIL, Aker, EUROC and Blue Circle could, upon reading the SO, have realised that they were being accused of participating in the Cembureau agreement, it is necessary first of all to refer to the structure of the part of 'The Facts' of the SO relating to the Cembureau agreement and to the bilateral and multilateral agreements and concerted practices (Chapter 2, Sections 1 and 2, of the SO). The structure is as follows:

'Chapter 2 — The international cement organisations

Section 1 — Cembureau

...

9. "The Cembureau agreement or Cembureau principle of not transhipping to internal European markets"

10. Implementation of the "Cembureau agreement or Principle of not transhipping to internal European markets": France-Italy

11. Implementation of the "Cembureau agreement or Principle of not transhipping to internal European markets": Spain-Portugal

12. Implementation of the "Cembureau agreement or Principle of not transhipping to internal European markets": France-Germany

...

Section 2 — "Cembureau Task Force or European Task Force"

...'

519 Although the 'Cembureau Task Force or European Task Force' is thus dealt with in a separate section of the SO, the footnote to the title of that section states:

'Logically, this Task Force should be included in Section 1, since its creation is merely an aspect of the implementation of the "Cembureau agreement or Cembureau Principle of not transhipping to internal European markets". It is dealt with in a separate section solely because of the length of the outline required.'

520 Paragraphs 5 to 11 of Point 61 of the 'Legal Assessment' of the SO (Chapter 10), which is entitled 'Agreements and concerted practices on the home market rule', present the various bilateral and multilateral agreements as applications of the 'Cembureau agreement or Cembureau Principle of not transhipping to internal European markets'. Of the ETF, paragraph 11 states: 'The most flagrant and most serious application of the home market rule occurred in connection with the so-called "Greek problem" (see Section 2, points 16 to 20). Cembureau and all the other members mobilised in order to attack the member which had dared to infringe the home market rule: a Task Force was set up, and "market regulations", "stick actions" and "carrot actions" were taken against the Greek producers.'

521 In Chapter 10 of the 'Legal Assessment' of the SO, the parties to the bilateral and multilateral agreements (France-Italy; Spain-Portugal; France-Germany; ETF) are mentioned by name. Vicat, Ciments Français, Lafarge and Buzzi are identified as having participated in the Franco-Italian agreement (SO, point 61(b), Chapter 10), Cimpor and SECIL as having participated in the Spanish-Portuguese agreement (SO, point 61(c) of Chapter 10), Dyckerhoff, Ciments Français, Heidelberger and Lafarge as having participated in the Franco-German agreement (SO, point 61(d), Chapter 10), and CBR, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Rugby, Asland, Castle, Uniland, Aker, EUROC and Blue Circle as having participated in one or more infringements in the framework of the ETF (SO, point 61(h) of Chapter 10).

522 The first and second paragraphs of point 61 of the SO state as follows:

'This involves a set of agreements and/or concerted practices resulting originally from and conditioned by the laying down of and compliance with the home market rule and, subsequently, from bilateral or multilateral arrangements supplementing such rule or underpinning its implementation.

All the documents obtained during the investigation show that the European cement producers adopted and accepted the "home market rule" on the basis of mutual cooperation enabling the sector to be organised.'

523 It thus appears that, even though the SO states in the third paragraph of point 61 (Chapter 10) that 'Cembureau and its members adopted the "Cembureau agreement or Cembureau principle of not transhipping to internal European markets"', it also alleges sufficiently clearly that the addressees of the SO which are not direct members of Cembureau acceded to the Cembureau agreement, accusing them of participating in one or more bilateral and multilateral agreements and/or concerted practices.

524 In those circumstances, CBR, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Buzzi, Rugby, Asland, Castle, Uniland, Cimpor, SECIL, Aker, EUROC and Blue Circle could have realised, on reading the SO, that they were regarded as acceding, by dint of their participation in one or more bilateral or multilateral agreements and/or concerted practices, to the Cembureau agreement, which had itself been adopted by Cembureau and its members. They cannot therefore claim that the SO accused them only of participating in one or more of those agreements and/or concerted practices but not in the infringement referred to in Article 1 of the contested decision.

525 Vicat submits further that the SO does not adduce any evidence to show that it was a party to the conclusion of the Cembureau agreement. Its assertion cannot be accepted. The evidence adduced by the Commission in support of the objection raised against the Franco-Italian agreement between Vicat and Buzzi is expressly set out in point 10 and in point 61(b) of the SO and, according to the SO, proves that Vicat acceded to the Cembureau agreement.

526 Finally, Aker and EUROC observe that the letter of 16 July 1992 referred to in the contested decision (recital 53, paragraph 11) informed them that the SO had been addressed to them on account of their participation in the ETF.

527 However, even though that letter informed them that the SO had been addressed to them on account of their participation in the ETF, those applicants could realise, on reading the SO, that by virtue of their participation in the ETF they were deemed to have acceded also to the Cembureau agreement.

1.1.2.2. Addressees of the SO, not direct members of Cembureau, which are alleged to have participated in the activities of the ECEC

528 The fifth paragraph of point 66 of the 'Legal Assessment' of the SO states:

'The agreement on the setting-up of the ECEC and the agreements and/or concerted practices on exports to third countries constitute infringements of Article 85(1) committed by the ECMEC and by the members of the ECEC as from 1980 at least ...'

529 Among the members of the ECEC mentioned by name in point 25 of the SO are ENCI, Dykerhoff and Castle, which are not direct members of Cembureau. In their applications they complain that the SO lacks precision so far as concerns their participation in the Cembureau agreement.

530 ENCI rightly observes that the drafting of the fifth paragraph of point 66 of the Dutch version of the SO which was sent to it, and which is the only one which is authentic as against it, differs from the other language versions of the SO.

531 That passage of the SO is in fact worded as follows:

'The agreement on the setting-up of the ECEC and the agreements and/or concerted practices on exports to third countries constitute infringements of Article 85(1) committed by the ECMEC and by *the members of the ECMEC* as from 1980 at least ...'

532 However, at point 25 of 'The Facts' of the SO, the Commission lists the members of the ECEC, among which appears 'for the Netherlands, ENCI'. Furthermore, in point 24 it outlines the origin not only of the ECEC but also of the EPC, stating: 'Since at least 1980, it had been decided that [those] two Committees would have a single secretariat, and the structure providing this secretarial service has been called the ECMEC.'

533 Accordingly, on reading those two points, an addressee of the SO was able to understand that, where an objection was raised against the members of the ECMEC, it was also raised against the members of the ECEC and those of the EPC.

534 It follows that ENCI, identified as a member of the ECEC at point 24 of the SO, cannot complain of a lack of precision in the SO so far as concerns its participation in the agreements and/or concerted practices in the ECEC, even if that objection, in point 66 of the Dutch version of the SO, was directed against the ECMEC and its members.

535 It is apparent, moreover, from the SO, that through their participation in the concerted practices in the context of the ECEC the members of the ECEC/ECMEC were deemed to have participated in the Cembureau agreement. The first and fourth paragraphs of point 66 of the SO state:

'In order to assess the activities of the ECEC, it must be seen in context. As seen in points 9 and [61], Cembureau adopted the "Cembureau agreement or principle of not transhipping to internal European markets". In order to ensure that this was complied with, means had to be found of channelling Cembureau members' surplus output to other countries and ensuring that the surpluses did not end up on the European markets ... Consequently, the agreement on the setting-up of the ECEC and the agreements and/or practices relating to the commercial policy to be pursued on exports to third countries cannot be viewed in isolation, but must be seen as inseparable from the agreement on non-encroachment on respective home markets.'

536 It follows that, on reading the SO, the members of the ECEC, including ENCI, Dykerhoff and Castle, could understand that their participation in the ECEC's activities was regarded as a sign of their having acceded to the Cembureau agreement.

1.1.2.3. Addressees of the SO, not direct members of Cembureau, which are alleged to have participated in the activities of the EPC

537 Point 67 of Chapter 12 of the SO relating to the 'legal assessment' of the activities of the EPC accuses the members of the EPC of having committed an infringement of Article 85(1) of the Treaty by creating that committee and by participating in agreements and/or concerted practices concerning cooperation on exports to third countries. Among the members of the EPC mentioned by name in point 27 of 'The Facts' of the SO are Ciments Français, Lafarge, Valenciana, Hornos Ibéricos and Blue Circle, five undertakings which are not direct members of

Cembureau, which complain in their applications of the lack of precision of the SO so far as concerns their participation in the Cembureau agreement.

538 So far as concerns the activities of the EPC, point 28 of 'The Facts' of the SO, which deals with the EPC and is entitled 'Respect of home markets', states:

'Although the rule that home markets must be respected is not mentioned explicitly, it is clearly evident [in various documents].'

539 The second and fourth paragraphs of point 67 in the 'Legal Assessment' of the SO are worded as follows:

'The cooperation between the members involving market sharing, price fixing and the exchange of information, in order to channel surplus output to third countries, is merely a consequence and a means of controlling the application of the home market rule: the home market rule and cooperation on exports are, thus, closely linked.

...

[The agreement on the establishment of the EPC has] the object of restricting, through the implementation of the home market rule, the scope for the members of [the EPC] to sell within the common market.'

540 Since the Commission thus considered that the cooperation between the members of the EPC was a means of controlling the implementation of the home market rule, it was necessarily accusing them of having acceded to that rule.

541 Accordingly, on reading the SO, the members of the EPC, including Ciments Français, Lafarge, Valenciana, Hornos Ibéricos and Blue Circle, could understand that their participation in the activities of the EPC was an indication of their having acceded to the Cembureau agreement.

1.1.3. Interim conclusions

542 It follows from the foregoing that all the applicants which have pleaded lack of precision of the SO as regards their participation in the Cembureau agreement (see paragraph 507 above) could ascertain, upon reading the SO, that the Commission was accusing them of having participated in the Cembureau agreement. According to the SO, the Cembureau agreement had been adopted by Cembureau and its members; the applicants identified at paragraph 511 above, all direct members of Cembureau, should therefore have understood that that objection was being raised against them. Moreover, so far as concerns the applicants identified at paragraph 516 above, which are not direct members of Cembureau, the SO charged them sufficiently clearly with having acceded to the Cembureau agreement by virtue of their participation in one or more measures implementing that agreement.

543 Furthermore, at point 59 in the 'Legal Assessment' of the SO, the Commission described 'all these arrangements adopted within the framework of Cembureau and the bilateral and multilateral meetings and contacts ... [as] a single and continuous "agreement"'. All the applicants which have raised the present plea (see paragraph 507 above) were thus informed, during the administrative procedure, of the objection that they had participated in the single and continuous Cembureau agreement referred to in Article 1 of the contested decision. They could thus have effectively made known their views on that objection during the administrative procedure.

1.2. Membership of a national association that was a direct member of Cembureau as a criterion for attributing responsibility for the infringement referred to in Article 1 of the contested decision

544 CBR, Vicat, Rugby and Castle submit that the Commission did not inform them during the administrative procedure that it was going to take an undertaking's membership of a national association that was a direct member of Cembureau as a ground for concluding that that undertaking had acceded to the infringement referred to in Article 1 of the contested decision.

545 All the indirect members of Cembureau which have claimed in their applications that the SO was not sufficiently precise to enable them to understand that they were accused of participating in the Cembureau agreement (namely CBR, ENCI, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Valenciana, Rugby, Asland, Castle, Uniland, Cimpor, SECIL, Hornos Ibéricos and Blue Circle) also put forward the more restricted argument alleging that the SO was insufficiently precise as to the inferences which the Commission was going to draw, in the contested decision, from an addressee's membership of a direct member of Cembureau.

546 In the contested decision (recital 65, paragraph 3, first subparagraph), the Commission states:

'All the undertakings and associations of undertakings to which this Decision is addressed acceded to the agreement or principle of not transhipping to home markets (grey cement market), concluded on 14 January 1983 between the associations and undertakings which were direct members of Cembureau. As from that date, that agreement bound those undertakings and the undertakings which were members of the national associations concerned.'

547 It therefore considers that the indirect members of Cembureau were represented at the Head Delegates meeting held on 14 January 1983 by their national association, a direct member of Cembureau, so that they were bound as from that date by that agreement.

548 It takes the view (contested decision, recital 44, paragraph 5) that

'... if the associations enter into commitments, they do so in the interests of their members and in the name of their members and not in their own interest: in point of fact, the cement producers are the real actors, acting through their trade associations.'

549 However, as regards the direct and indirect members of Cembureau which, on 14 January 1983 when the Cembureau agreement was allegedly concluded, were established outside the Community, the Commission finds in the contested decision (recitals 45, paragraph 11, and 65, paragraph 4, and Article 1) that their participation in the Cembureau agreement constituted an infringement of Article 85(1) of the Treaty from the date on which it has evidence that such participation had effects within the Community.

550 Finally, in the case of Buzzi, in the contested decision (recital 65, paragraph 4, first subparagraph; see also recital 65, paragraph 3, first subparagraph) the Commission takes 11 May 1983 as the starting point of its participation in the infringement found in Article 1:

'Buzzi was not, either directly or indirectly, a member of Cembureau. It is therefore the start of the concerted practice in which Buzzi participated which must be regarded as providing evidence of its participation in the Cembureau agreement or principle of not transhipping to home markets.'

551 It follows from the foregoing that, in the contested decision, membership of a national association which was a member of Cembureau led the Commission to find that indirect members of Cembureau which took part in one or more of the measures for the implementation of the Cembureau agreement referred to in Articles 3 to 6 of the contested decision had participated in the Cembureau agreement as from 14 January 1983, the date on which it was concluded. However, contrary to the submissions of CBR and Vicat, it did not take such membership as the only ground for concluding that the indirect members of Cembureau acceded to the infringement referred to in Article 1. Indeed, it found such an infringement to have been committed only by 'the undertakings which were represented within Cembureau by their association and which, in addition to their membership of the association, clearly manifested their accession to the agreement by participating' in a measure implementing the Cembureau agreement (contested decision, recital 65, paragraph 3, first subparagraph).

552 None the less, membership of a national association that was a direct member of Cembureau was taken into consideration when determining the starting point of participation of the indirect members of Cembureau in the infringement. Thus, where indirect members of Cembureau were represented by a direct member of Cembureau at the time when the Cembureau agreement was agreed and confirmed, their participation in a measure implementing that agreement was, according to the contested decision, a manifestation of their participation in the agreement itself as from 14 January 1983.

553 The addressees of the SO in question should have been informed during the administrative procedure that that matter was being taken into consideration. Observance of the rights of the defence requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (*Hoffman-La Roche* v *Commission*, cited in paragraph 106 above, paragraph 11, *Woodpulp II*, cited at paragraph 106 above, paragraphs 40 to 53, and *CB and Europay* v *Commission*, cited at paragraph 83 above, paragraph 48). The Commission, which must state in the SO, as an essential factor, the duration of the infringement found by it (*Musique Diffusion Française*, cited at paragraph 439 above, paragraph 15), must set out in the SO all the relevant information as to the starting date of the infringement in question.

554 It is therefore necessary to examine whether the SO set out sufficiently clearly that membership of a national association that was a direct member of Cembureau was relevant in determining the date on which the indirect members of Cembureau started to participate in the infringement constituted by the Cembureau agreement.

555 Although the indirect members of Cembureau knew that they were members of a national association which was itself a direct member of Cembureau, it must be asked whether they could reasonably have deduced from the SO the conclusions which the Commission intended to draw from their membership of a direct member of Cembureau (judgments cited at paragraph 323 above: T-11/89 *Shell* v *Commission*, paragraph 56, and T-13/89 *ICI* v *Commission*, paragraph 35).

556 The Court finds first of all that the Commission, when it establishes their participation in the Cembureau agreement makes no reference whatsoever in the SO to the fact that the indirect members of Cembureau were members of a national association. Nowhere does the SO state that membership of a national association that was a direct member of Cembureau is relevant to determining the date at which the indirect members of Cembureau began to participate in the infringement constituted by the Cembureau agreement (SO points 9, 59 and 61). Moreover, the wording of the SO is inconsistent with such an interpretation.

557 In the first place, the SO states (third paragraph of point 61) that the Cembureau agreement was 'adopted' by Cembureau and its direct members. It also refers (first paragraph of point 59) to the arrangements and measures 'adopted under Cembureau's institutional structure'.

558 As regards the non-members of Cembureau, the terms used are different: the Commission refers (first paragraph of point 61) to 'compliance with the home market rule'. According to the SO, the undertakings in question were not therefore responsible for the adoption of the Cembureau agreement. They were deemed to have acceded to the Cembureau agreement by virtue of their participation in one or more measures implementing that agreement (see paragraph 542 above).

559 The organisation of the hearings during the administrative procedure reflected that approach (see paragraphs 664 to 674 below). Thus, only Cembureau and the undertakings and associations of undertakings which were regarded, in the SO, as direct members of Cembureau had the opportunity to speak during the hearings dealing specifically with the Cembureau agreement, because they were deemed to have adopted that agreement. The indirect members of Cembureau, as well as Buzzi, which were deemed to have acceded to the Cembureau agreement by virtue of their participation in a measure implementing that agreement, were given an opportunity to speak only in the course of the hearings concerning the measures implementing the Cembureau agreement (see paragraphs 665 and 666 below).

560 Since 'accession' to an agreement takes place *ex nunc*, the reference, during the administrative procedure, to the 'accession' of non-members of Cembureau confirms that, at that stage, the Commission did not intend to take Cembureau's indirect members' membership of a national association as a ground for holding them liable, from the date the Cembureau agreement was adopted, for the infringement constituted by that agreement.

561 Secondly, in point 59 of the 'Legal Assessment' of the SO, the Commission stated that 'all these arrangements adopted within the framework of Cembureau and the bilateral and multilateral meetings and contacts constituted a single and continuous "agreement", *as from the dates indicated below*'. If the Commission then considered that, because they had been represented by their national associations at the Head Delegates meeting on 14 January 1983, the participation of indirect members of Cembureau in a measure implementing the Cembureau agreement was a manifestation of their participation in that agreement as from the date on which it had been

concluded, it would not have referred in the SO to commencement '*dates*' for their participation in the single and continuous Cembureau agreement, but to 14 January 1983, as it did in recital 65, paragraph 3, first subparagraph, of the contested decision (see paragraph 546 above).

562 It follows that, in the SO, the Commission considered that undertakings which were not direct members of Cembureau acceded to the Cembureau agreement with effect from the date of their participation in a measure implementing that agreement. It drew no distinction in that regard between the indirect members of Cembureau and Buzzi, which was neither a direct nor indirect member of Cembureau. As the Cembureau agreement had been adopted by Cembureau and its direct members, all the other undertakings that were not members of Cembureau were deemed to have acceded *ex nunc* to the Cembureau agreement with effect from the date of their participation in an implementing measure. In the contested decision, however, the view that non-members of Cembureau acceded to the Cembureau agreement with effect from the date of 'their' implementation was adopted only vis-à-vis Buzzi (recital 65, paragraph 4, and Article 1). Unlike the indirect members of Cembureau, Buzzi had not been represented by a national association at the Head Delegates meeting.

563 It must therefore be concluded that, because of the inconsistency between the SO and the contested decision, the Commission was not entitled in the decision to regard membership, by indirect members of Cembureau, of a national association that was a member of Cembureau as a criterion for attributing liability for the infringement constituted by the Cembureau agreement.

564 That finding cannot, however, lead to the annulment of Article 1 of the contested decision in its entirety as against all the indirect members of Cembureau to whom the contested decision was addressed. As the fact that had not been disclosed during the administrative procedure led the Commission to find in the contested decision that the indirect members of Cembureau that had taken part in one or more of the implementation measures referred to in Articles 3 to 6 of the contested decision had participated in the Cembureau agreement with effect from 14 January 1983 (see paragraphs 551 and 552 above), the discrepancy between the SO and the contested decision affected the defence of Cembureau's indirect members only to the extent that the contested decision finds that they began to participate in the infringement referred to in Article 1 of the contested decision before the date on which they had first implemented the Cembureau agreement.

565 That conclusion is therefore of no consequence to indirect members of Cembureau which, according to the SO and the contested decision, began to participate in an infringement classified as a measure implementing the Cembureau agreement on or before the date stated in Article 1 of the contested decision to be the starting date of their participation in the Cembureau agreement. Thus, Dykerhoff, Ciments Français, Heidelberger and Lafarge were identified in the SO (point 61(d)) and in the contested decision (recital 50 and Article 3(3)(a)) as having participated in the Franco-German agreements and concerted practices which allegedly commenced on 23 June 1982. Accordingly, even though the Commission attached no importance in the contested decision to those undertakings' membership of SFIC or BDZ, it

still took 14 January 1983 as the starting date of their participation in the infringement referred to in Article 1 of the contested decision. They are deemed to have acceded to the Cembureau agreement by virtue of their participation in the Franco-German agreements and concerted practices. The present argument must also be rejected in so far as it is relied upon by Valenciana, Hornos Ibéricos and Blue Circle: according to the SO (Chapter 12, point 67) and the contested decision (recital 59 and Article 6), those undertakings participated in a concerted practice in the framework of the EPC designed to prevent incursions on respective national markets of the Community at least from 1 July 1981 so far as concerns Blue Circle, and from 1 January 1986 so far as concerns Valenciana and Hornos Ibéricos (SO, Chapter 12, point 67, and contested decision, Article 6). If, without making any reference to membership of a national association, the Commission had considered that the undertakings had acceded to the Cembureau agreement solely by virtue of their participation in a measure implementing that agreement, it would have taken 14 January 1983 for Blue Circle, and 1 January 1986 for Valenciana and Hornos Ibéricos, as the starting date of their participation in the infringement referred to in Article 1 of the contested decision. Those dates are in fact the starting dates set out in that article for those undertakings. The arguments put forward by Cimpor and SECIL must be rejected for the same reasons: according to the SO and the contested decision, they participated in a measure implementing the Cembureau agreement, namely the Spanish-Portuguese agreement, the commencement date of which was fixed in the SO and in the contested decision at 1 January 1986 (SO, Chapter 10, point 61(c)); contested decision, recital 49 and Article 3(2)). That date corresponds to the date set out for those undertakings in Article 1 of the contested decision.

566 On the other hand, for CBR, ENCI, Vicat, Rugby, Asland, Castle and Uniland, the Commission would have taken a different starting date for their participation in the infringement referred to in Article 1 of the contested decision, if it had not relied on their membership of a national association that was a direct member of Cembureau and had taken the view that they had acceded to the Cembureau agreement solely by virtue of their participation in a measure implementing the Cembureau agreement. Since all the implementing measures in which CBR, ENCI, Vicat, Rugby and Castle allegedly participated took place after 14 January 1983, it was only by relying on their membership of a national association which was a direct member of Cembureau that the Commission could have taken the view that those undertakings had participated in the infringement referred to in Article 1 of the contested decision as from that date. The Commission also took 1 January 1986 as the starting date for the participation of Asland and Uniland in that infringement by virtue of their participation in Oficemen, although the starting date of their alleged implementing measures is alleged to be after that date.

567 Article 1 of the contested decision will therefore be annulled to the extent that it holds that CBR, ENCI, Vicat, Rugby, Asland, Castle and Uniland participated in the Cembureau agreement prior to the date on which they first adopted a measure implementing that agreement. Vicat must be held to have been in a position to defend itself against the objection that it had acceded to the Cembureau agreement by virtue of its participation, as from 11 May 1983, in an alleged Franco-Italian concerted practice with Buzzi (contested decision, Article 3(1)(c)). CBR, Rugby, Asland and Uniland were able to defend themselves in regard to the question of their accession to the Cembureau agreement by virtue of their participation, as from 28 May 1986 with regard to CBR, Asland and Uniland (contested decision, Article 4(1)) and as from 16 June 1986 with regard to Rugby (Article 4(4)(a)), in one or more alleged measures taken in the framework of the ETF. Finally, ENCI and Castle were able to defend themselves against the objection that they had acceded to the Cembureau agreement by virtue of their participation, as from 14 March 1984, in alleged concerted practices in the framework of the ECEC (contested decision, Article 5).

568 It follows from the foregoing that Article 1 of the contested decision must, at this stage, be annulled to the extent that it fixes the starting date of participation in the infringement at a date prior to 11 May 1983 for Vicat, 14 March 1984 for ENCI and Castle, 28 May 1986 for CBR, Asland and Uniland, and 16 June 1986 for Rugby.

1.3. Duration of participation in the infringement referred to in Article 1 of the contested decision

569 FIC, Ciments Français, Aalborg, Unicem and Uniland (T-58/95) complain in their applications about the SO's lack of precision with regard to the starting date of their participation in the Cembureau agreement. Aker and EUROC criticise the fact that, unlike the SO, the contested decision (recital 65, paragraphs 3(a), 4 and 9(a)) took the view that they had participated directly in the adoption of the Cembureau agreement from the very beginning.

570 Those arguments, in so far as they are raised by indirect members of Cembureau, are indissociable from the argument that the Commission did not state sufficiently clearly in the SO that it was going to take the indirect members' membership of a national association as a ground for concluding that they had participated in the Cembureau agreement referred to in Article 1 of the contested decision from a date prior to the date on which they were first alleged to have implemented that agreement. The argument of Ciments Français must therefore be rejected (see paragraph 565 above), whereas that of Uniland will be upheld (see paragraphs 566 to 568 above).

571 It is still necessary to examine whether FIC, Aalborg, Unicem, Aker and EUROC could, on reading the SO, have realised that the Commission was accusing them of having participated in the Cembureau agreement as from the commencement date fixed in Article 1 of the contested decision.

572 The SO states (point 61(a)) that the '"Cembureau agreement or principle of not transhipping to internal European markets" constitutes an agreement and/or a concerted practice between Cembureau and its members, in force since at least 1983'. In point 9, referring explicitly to the Head Delegates meeting held on 14 January 1983, it observes that 'several Cembureau documents relating to Head Delegates meetings referred to the fact that the "Cembureau agreement or Principle" was developed and established within Cembureau'. It also indicates sufficiently clearly that the Cembureau agreement, subsequently referred to in Article 1 of the contested decision, was an infringement of Article 85(1) of the Treaty by Cembureau and its members at least from 14 January 1983.

573 FIC, Aalborg and Unicem, direct members of Cembureau identified as such in point 6 of the SO, cannot therefore rely on an alleged lack of clarity of the SO regarding the starting date of

the infringement found in Article 1 of the decision. Although Point 6 of the SO does not identify Aker and EUROC as direct members of Cembureau, they themselves have, however, stated in their reply to the SO that they were direct members (joint reply of Aker and EUROC to the SO, points 2.1.10 and 2.2.8; annex 2 to the applications in Cases T-70/95 and T-71/95). They cannot therefore claim that their rights of defence were infringed by the fact that in the contested decision the Commission treated them as direct members of Cembureau. The argument by Aker and EUROC must therefore be rejected.

574 As regards the end of the infringement found in Article 1 of the contested decision, Ciments Français, Lafarge, Uniland, Italcementi and Hornos Ibéricos state that recital 65, paragraph 4, of that decision holds that it ended on 26 March 1993, that is to say, after the date on which the SO was notified. The Commission thus unlawfully extended the duration of the infringement without giving the undertakings concerned an opportunity to submit their views on that matter. Unicem and AGCI complain that no final termination date was set out in the SO for the Cembureau agreement. Heracles claims that the SO does not indicate whether or not, in the Commission's view, the Cembureau agreement had ceased to be in force when the SO was drawn up.

575 The Court points out that Article 1 of the contested decision does not state when the infringement ended. In recital 65, paragraph 4, of the contested decision the Commission indicates that it has 'no certainty that the infringement ever really ceased'. The Commission took 26 March 1993 as the end of the infringement only for the purpose of calculating the fines.

576 Even at the stage of the SO, it had refrained from indicating when most of the infringements, including the Cembureau agreement, had ended. It considered at point 93 of the SO that: '... almost all of the agreements, decisions and concerted practices are continuing'. This statement thus referred to infringements in respect of which the SO did not determine a precise end date. In those circumstances, the addressees of the SO were able to understand that the Commission intended to find in the contested decision, in particular in regard to the Cembureau agreement, that the infringement had continued beyond the date of the SO. Accordingly, the rights of defence of the undertakings and associations concerned were not infringed.

577 Hornos Ibéricos further complains that, in the contested decision (recital 65, paragraph 4), the infringement with which it is charged is found to have continued until 26 March 1993, the date on which Interciment was dissolved, whereas the SO did not mention any link between it and Interciment.

578 According to the SO (see paragraphs 537 to 541 above), Hornos Ibéricos was deemed to have acceded to the Cembureau agreement by virtue of its participation in the unlawful activities of the EPC. As the SO indicated sufficiently clearly that the Commission considered that the infringement constituted by the Cembureau agreement was still continuing when the SO was drawn up, the Commission did not infringe the applicant's rights of defence by taking 26 March

1993 as a date in the contested decision. Neither the contested decision nor the SO found that the applicant participated in Interciment. The Commission merely adopted, as against all the addressees of the SO, the date of the liquidation of Interciment as the end of the reference period for calculating the fine, because it was the 'apparently final manifestation of the [Cembureau] agreement known to the Commission' (contested decision, recital 65, paragraph 4). The applicant's argument must therefore be rejected.

579 Finally, Heracles (T-57/95) submits that a reading of the second paragraph of point 37 of the SO (relations between the United Kingdom and the continent) led it to believe that the Commission took the view that its participation in the Cembureau agreement ended in 1986, when it broke the home-market rule by exporting cement to the United Kingdom.

580 The Court points out that, in the SO, the Commission took the view that the infringements for which it had not indicated a precise end date were continuing (see paragraph 576 above). Such was the case, in particular, for Heracles' participation in the Cembureau agreement. Moreover, the SO raised objections against Heracles relating to its participation in measures implementing the Cembureau agreement well beyond 1986 (participation in the framework of the ETF in the carrot actions referred to in points 20 and 61(h) and (v) of the SO; participation in the activities of the EPC referred to in points 27 and 67 of the SO). In those circumstances, the applicant cannot claim that it was misled by point 37 of the SO.

1.4. Conclusions

581 The arguments put forward by CBR, ENCI, Vicat, Rugby, Asland, Castle and Uniland to the effect that the SO is imprecise in regard to their participation in the Cembureau agreement justify the annulment in part of Article 1 of the contested decision (see paragraph 568 above). The other arguments must be rejected.

2. Precision of the SO as regards applicants' participation in the exchanges of information on prices and the duration of that infringement

582 VNC (T-32/95), Ciments Luxembourgeois (T-34/95), SFIC (T-36/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), BCA (T-54/95) and ATIC (T-63/95) complain that the Commission did not indicate sufficiently clearly in the SO whether they were held responsible for the exchanges of information on prices.

583 Point 8 of 'The Facts' of the SO is entitled 'Circulation of prices between Cembureau members' and point 60 of the 'Legal Assessment', which refers back to point 8, states that 'the circulation of information on price lists, which has been in force since 1983 at least, constitutes a concerted practice between Cembureau and its members'. VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, Unicem, BCA and ATIC were all explicitly stated in point 6 of the SO to be members of Cembureau. In those circumstances, they were in a position to understand, upon reading the SO, that the Commission was accusing them of participating in the exchanges of information at issue.

584 Unicem is also of the view that its rights of defence were infringed because the SO did not precisely state the date on which the exchanges of information within Cembureau ended. That argument must be rejected for the reasons set out in paragraph 576 above.

3. Precision of the SO as regards applicants' participation in the bilateral and multilateral agreements referred to in Article 3 of the contested decision

585 Cimpor (T-61/95) maintains that the terms of the SO did not enable it to distinguish the objection concerning the sharing of the Portuguese market from the objection relating to the Spanish-Portuguese market: the Spanish-Portuguese agreement was covered in the international chapters of the SO and both objections were included in the chapters of the SO relating to Portugal.

586 That argument must be rejected. Cimpor does not complain that there is a lack of precision in the passages of the international chapters of the SO concerning the Spanish-Portuguese agreement (Chapter 2, point 11, and Chapter 10, point 61(c)), referred to in Article 3(2) of the contested decision. Even though Chapters 9 and 19 of the SO relating to Portugal reproduce a number of aspects of that agreement under the heading 'Cement movements between Portugal and Spain' (point 56(b) and 90), such repetition and additional explanation could not have been detrimental to the applicant's defence.

587 SECIL (T-62/95) states that the terms of the SO did not enable it to discern the starting date of the Spanish-Portuguese agreement referred to in Article 3(2) of the contested decision or the date on which the Portuguese agreements and concerted practices came to an end.

588 The Court points out that in point 61(c) of the SO, which deals with the 'Spanish-Portuguese agreement', the Commission took the view that:

'The agreements entered into between the association of Spanish producers Oficemen, assisted by the member producers Valenciana, Asland, Cosmos, [Hornos Ibéricos] and Valderrivas, and the Portuguese producers Cimpor and SECIL ... not to export to their respective traditional sales territories constitute, as from 1 January 1986, restrictions of cement sales and market sharing within the meaning of Article 85(1)(c).'

589 The beginning of the infringement referred to in Article 3(2) of the contested decision was thus clearly set out in the SO.

590 The complaint that there was no indication of the date on which the Portuguese agreements and concerted practices ended is irrelevant, since the national objections were not repeated in the contested decision.

591 As regards the Franco-German agreement, Dyckerhoff (T-35/95), SFIC (T-36/95), Heidelberger (T-42/95) and BDZ (T-48/95) submit that the SO did not state sufficiently clearly the allegation that they had participated in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France, an infringement referred to in Article 3(3)(a) of the contested decision. SFIC and BDZ further complain that the Commission did not set out sufficiently clearly in the SO the objection referred to in Article 3(3)(b) of the contested decision, concerning their participation in a concerted practice involving the exchange of information designed to monitor compliance with the quantitative restrictions on exports between France and Germany and the breakdown of such exports according to the *Länder* for which they were intended. They thus claim that they were prevented from defending themselves properly as regards their participation in the Franco-German agreements and concerted practices.

592 That argument must also be rejected: Dykerhoff, SFIC, Heidelberger and BDZ were mentioned by name in point 61(d) of the SO under the heading 'The Franco-German agreements and/or concerted practices' as being party to 'agreements and/or concerted practices ... regarding French supplies to Germany and German supplies to France'.

593 Moreover, in point 61(d) (third paragraph) of the SO, it had been pointed out:

'The exchanges of statistical data between the [SFIC] and the [BDZ] constitute a concerted practice restricting competition within the meaning of Article 85(1) ... Such exchanges of

statistical information must be seen in conjunction with the agreements and/or practices on sharing the [Franco-German] market... and are designed to allow the two associations concerned to control the target quantities allowed for export and their destination by Land.'

4. Precision of the SO as regards applicants' participation in the setting-up of the ETF and in the measures adopted in the framework thereof, referred to in Article 4 of the contested decision, and as regards the duration of those infringements

594 Dyckerhoff (T-35/95), SFIC (T-36/95), Heidelberger (T-42/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), Asland (T-55/95), Uniland (T-58/95) and Blue Circle (T-88/95) claim that the SO did not allege that they had participated in the agreement on the setting-up of the ETF, an infringement referred to in Article 4(1) of the contested decision.

595 That argument must be rejected. Point 17 of 'The Facts' of the SO is entitled 'Setting up and activity of "Cembureau Task Force or European Task Force"'. The first paragraph of point 61(h) of the 'Legal Assessment' states that 'the agreements and practices entered into within the "Cembureau Task Force or European Task Force" (points 16 to 20) must be viewed as the implementation of a single plan established by ... Blue Circle ... Asland, Uniland, [... SFIC], ..., BDZ, Heidelberger, Dykerhoff, ... Aalborg ... Unicem ... against the Greek producers for having infringed the home market rule'. Those undertakings and associations must therefore have been aware that the Commission was alleging that they had established a single plan against Greek exports, a plan which, on reading point 17 in conjunction with point 61(h) of the SO, concerned in particular the agreement setting-up the ETF.

596 Dyckerhoff, SFIC, Heidelberger, BDZ, Unicem, Asland, Uniland and Blue Circle argue that the SO did not allege that they had participated in the setting-up of Interciment. They claim that they were not therefore able to defend themselves against the objection referred to in Article 4(2) of the contested decision.

597 That argument must also be rejected. The applicants concerned were identified in the fourth paragraph of point 61(h)(i) of the 'Legal Assessment' of the SO as being parties to the agreement to set up Interciment.

598 Dyckerhoff, SFIC, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Asland, Uniland and Blue Circle also claim that the SO did not allege that they had participated in concerted practices designed to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular. They submit that they were therefore unable to defend themselves against the objection referred to in Article 4(3)(a) of the contested decision. Unicem claims that it did not

have an opportunity of defending itself against the objection that it participated in the infringement referred to in Article 4(3)(b) of the contested decision relating to the agreement between Unicem, Italcementi and Cementir which aimed to prevent imports of Greek cement by Calcestruzzi.

599 It should be noted that in point 19(d) of 'The Facts' of the SO, entitled 'Measures to defend national markets: Italy', the Commission observes in the third paragraph:

'Following the signature of the contract between Titan and Calcestruzzi, the Italian cement producers, particularly Italcementi, Unicem and Cementir, brought the problem before the Cembureau Task Force and asked the other European producers for help. The problem of cement imports by Calcestruzzi was included on the agenda of all the Cembureau Task Force meetings.'

600 At point 61(h)(iv) of the 'Legal Assessment' of the SO, it states:

'The pressure brought to bear on Calcestruzzi and the non-implementation by Calcestruzzi of the contract on the purchase of cement from Titan are the result of agreements and/or concerted practices between the Italian producers Italcementi, Unicem and Cementir, and between them and the other participants in the "Cembureau Task Force", aimed at removing from the Greek producers an important customer through which they could penetrate the Italian market.'

601 The objections relating to the measures to defend the Italian market were thus expressly raised, in particular, against Unicem, which the Commission accused of having participated, first, in agreements and/or concerted practices with the other Italian producers and, secondly, in agreements and/or concerted practices with the other members of the ETF. Unicem cannot therefore complain that the SO is imprecise as regards its participation in the infringements referred to in Article 4(3)(a) and (b) of the contested decision.

602 Dyckerhoff, SFIC, Heidelberger, Lafarge, Aalborg, BDZ, Asland, Uniland and Blue Circle were all identified in the SO (first paragraph of point 61(h)) as parties to a 'single plan established ... against the Greek producers', or, in other words, as participants in the 'Cembureau Task Force or European Task Force'. They were thus in a position to understand, upon reading the SO, that the Commission was raising against them, as it was against the other participants in the ETF, the objection that pressure had been brought to bear on Calcestruzzi. They were thus able to defend themselves against the objection referred to in Article 4(3)(a) of the contested decision concerning the concerted practices to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular.

603 Titan (T-64/95) submits that the SO did not state clearly whether it was one of the European cement producers accused of having engaged in unlawful activities directed against the Greek producers or was, rather, a victim of those unlawful activities.

604 The Court points out that the SO did not accuse Titan at all of having been party to the agreement setting up the ETF (first paragraph of point 61(h)(i) of the SO) and to the measures to defend the Italian market (point 61(h)(iv) of the SO).

605 However, point 61(h)(v) of the 'Legal Assessment' of the SO clearly states:

'All the contracts listed in point 20 [some of which concerned Titan] are agreements prohibited by Article 85(1). As may be seen in points 16 to 20, such contracts form part of the "carrot actions" adopted by the Cembureau Task Force in order to deflect the Greek production surplus, and the clear condition governing the conclusion of the contracts was that the Greek producers must cease their direct supplies in Europe.'

606 On reading those parts of the SO, Titan was thus in a position to understand that, in the framework of the ETF, the Commission was accusing it of participating, by virtue of the conclusion of the contracts affecting it, as listed in point 20 of the SO, in unlawful agreements with producers which were members of the ETF, inasmuch as, in exchange for concluding those contracts, it undertook to cease its direct supplies in Europe. It follows that Titan's argument must be rejected.

607 Nor can Blue Circle claim that the SO does not set out sufficiently clearly that it participated in the carrot actions referred to in Article 4(4)(a) and (a) of the contested decision. The agreements mentioned in point 20(a) in 'The Facts' of the SO relate to a concerted practice between the various UK producers, referred to in Article 4(4)(a) of the contested decision, and to the agreement between Blue Circle and Titan, referred to in Article 4(4)(b) of that decision.

608 The Court points out that, in point 61(h)(v) of the 'Legal Assessment' of the SO, the Commission takes the view that:

'All the contracts listed in point 20 are agreements prohibited by Article 85(1). As may be seen in points 16 to 20, such contracts form part of the "carrot actions" adopted by the Cembureau Task Force in order to deflect the Greek production surplus, and the clear condition governing the conclusion of the contracts was that the Greek producers must cease their direct supplies in Europe.'

609 Blue Circle was thus in a position to understand that, in the framework of the ETF, the Commission was accusing it of participating in the carrot actions referred to in Article 4(4)(a) and (b) of the contested decision.

610 Unicem argues that its rights of defence were infringed because the SO made no mention of the date on which the infringements relating to the ETF ended.

611 It adds that the SO did not even mention a date marking the beginning of the infringements relating to the setting-up of Interciment (contested decision, Article 4(2)) and the measures to defend the Italian market (contested decision, Article 4(3)(a) and (b)).

612 It further argues that its rights of defence were infringed inasmuch as the contested decision alleged that it participated in Interciment until 26 March 1993, the date on which Intercimenti was wound up, that is to say, a date subsequent to the dispatch of the SO.

613 The Court points out that, in the SO (point 61(h)), Unicem was accused of having participated in 'agreements and ... practices entered into within the "Cembureau Task Force or European Task Force"' from 1986 onwards. Unicem was therefore able to defend itself properly against the objections relating to its participation in the setting-up of Interciment (contested decision, Article 4(2)) and to the measures to defend the Italian market (contested decision, Article 4(3)(a) and (b)) as from the beginning of 1986.

614 Its arguments that its rights of defence were infringed because the SO did not indicate the date marking the end of the various infringements referred to in Article 4 of the contested decision, and that the Commission held the infringement referred to in Article 4(2) to have ended on a date after that on which the SO was sent, must be rejected for the reasons set out in paragraph 576 above.

5. Precision of the SO as regards the applicants' participation in the concerted practices in the framework of the export committees referred to in Articles 5 and 6 of the contested decision, and as regards the duration of those infringements

615 ENCI (T-31/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Aalborg (T-44/95), BDZ (T-48/95) and Unicem (T-50/95) claim that the SO did not allege that they had participated in concerted practices in the framework of the ECEC. They were therefore unable to defend themselves against the objection referred to in Article 5 of the contested decision.

616 That argument must be rejected: in point 66 in the 'Legal Assessment' of the SO, entitled 'The agreements and practices within the ECEC', the 'ECMEC and ... the members of the ECEC' were expressly held liable for 'the agreement on the setting-up of the ECEC and the agreements and/or concerted practices on exports to third countries' (fifth paragraph of point 66). ENCI, Dyckerhoff, SFIC, Aalborg, BDZ and Unicem were named in the SO (point 25) as members of the ECEC.

617 ENCI states, however, that in the SO which it received the Commission merely stated that the agreements and/or concerted practices within the ECEC constituted an infringement of Article 85(1) of the Treaty by the ECMEC and its members. ENCI claims it was never a member of the ECMEC. It submits that, in reply to a request for details concerning the objections raised specifically against it in the SO, the Commission expressly stated that ENCI would be held responsible only for those objections in respect of which it had been specifically named (letter of 12 February 1992, annex 15 to the application). Likewise, in the application for interim relief (Case T-14/92 R, cited above), the Commission confirmed that ENCI had been held responsible only for objections in respect of which it had been specifically named in the SO (Commission's defence in Case T-14/92 R, paragraph 24, annex 17 to the application). ENCI adds that, during the hearings, it stated on several occasions that it had based its case on the belief that it was held responsible only for those objections in respect of which it had been specifically named. At those hearings, none of the Commission's representatives had indicated to it that it had misunderstood the SO and the Commission's comments in that regard.

618 That argument must be rejected for the reasons set out in paragraphs 530 to 534 above.

619 ENCI also claims that it is practically impossible to identify the specific accusations contained in the SO or the person against whom they are levelled. The contested decision is also similarly imprecise.

620 That argument must also be rejected. For the reasons set out in paragraphs 528 to 536 above, ENCI must be deemed to have been able to understand, upon reading the SO, that the Commission was accusing it of participating in the Cembureau agreement and in the agreements and concerted practices in the framework of the ECEC. Likewise, the contested

decision specifically names ENCI in the context of those two infringements (participation in the Cembureau agreement, contested decision, recital 45, paragraph 10; recital 65, paragraphs 3 and 9; and Article 1); participation in the ECEC (contested decision, recital 31, paragraph 3; recital 58, paragraphs 3 and 7; and Article 5)).

621 Unicem maintains that its rights of defence were infringed inasmuch as the SO did not indicate the date marking the end of the infringement relating to the agreements and concerted practices within the ECEC.

622 That argument must be rejected for the reasons set out in paragraph 576 above.

623 As regards the concerted practice in the framework of the EPC, referred to in Article 6 of the contested decision, Valenciana (T-52/95) and Blue Circle (T-88/95) claim that the imprecise nature of the SO prevented them from realising that they were alleged to have participated in that practice.

624 The Court points out that point 67 of the SO, in the 'Legal Assessment' of the activities of the EPC, finds that the members of the EPC infringed Article 85(1) of the Treaty by setting up the EPC and by participating in agreements and/or concerted practices concerning cooperation on exports to third countries.

625 Since Valenciana and Blue Circle were specifically named as members of the EPC in point 27 of 'The Facts' of the SO, they cannot complain that the SO is imprecise as regards the objection that they participated in the infringement referred to in Article 6 of the contested decision.

626 It is apparent from all the foregoing that the arguments alleging that the SO is imprecise must be rejected, except in so far as concerns CBR, ENCI, Vicat, Rugby, Asland, Castle and Uniland, whose rights of defence have been infringed because the SO did not allow them to realise that the Commission was going to take a date prior to the date of 'their' measure implementing the Cembureau agreement as the starting date of their participation in the infringement referred to in Article 1 of the contested decision (see paragraphs 566 to 568 above).

The seventh plea: infringements of the rights of the defence and of Article 3 of Regulation No 1 resulting from the failure to translate certain documents

627 CBR (T-25/95), ENCI (T-31/95), la VNC (T-32/95), Dyckerhoff (T-35/95), Heidelberger (T-42/95), Aalborg (T-44/95), Unicem (T-50/95), Valenciana (T-52/95), Castle (T-56/95), Heracles (T-57/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Holderbank (T-68/95), Hornos Ibéricos (T-69/95), Aker (T-70/95) and EUROC (T-71/95) consider that the Commission infringed Article 3 of Regulation No 1 and their rights of defence by failing to provide them, during the administrative procedure, with a translation of certain documents in the language of the Member State in which they were established.

628 Dyckerhoff, Heidelberger, Valenciana, Castle, Uniland, SECIL, Hornos Ibéricos, Aker and EUROC complain that the Commission failed to provide them with a translation of certain items of evidence relied upon in the SO. CBR, Dyckerhoff, Heidelberger, Aalborg, Valenciana, Castle, Oficemen, Irish Cement, Cimpor, Aker and EUROC complain that the Commission did not translate into the language of the Member State in which they were established, certain passages of the SO, in particular excerpts from the documents cited in it. Dyckerhoff, Aalborg, Valenciana, Oficemen, Cimpor and SECIL also complain of the failure to translate the minutes of the hearings.

629 Article 3 of Regulation No 1 provides:

'Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'

630 The language rules laid down in Article 3(1) apply only to documents sent by the institutions to specific addressees (*Tréfilunion* v *Commission*, cited at paragraph 223 above, paragraph 21).

631 The Commission is not required to provide a translation of annexes to the SO (*Tréfilunion* v *Commission*, cited at paragraph 223 above, paragraph 21). The documents in question are not 'documents' within the meaning of Article 3 of Regulation No 1: they do not emanate from the Commission, but are evidence on which the Commission relies.

632 Consequently, the argument that the Commission infringed Article 3 of Regulation No 1 by not providing the addressees of the SO with a translation of the supporting evidence must be rejected.

633 Nor can the documents which the Commission quotes verbatim in the SO in support of its objections be regarded as emanating from it, even though the SO is a Commission 'document' within the meaning of Article 3 of Regulation No 1 (*Tréfilunion* v *Commission*, cited at paragraph 223 above, paragraph 21). The passages from those documents cited in the SO do not emanate from the Commission but from cement producers or their trade associations. Moreover, any translation which the Commission might possibly make of a document emanating from an undertaking or an association of undertakings could never be regarded as an authentic version constituting good evidence.

634 Nor, therefore, can the fact that the SO contains various untranslated quotations from documents emanating from undertakings and associations of undertakings be considered to infringe Article 3 of Regulation No 1.

635 It should be added that, in order to assess the evidential value of the evidence relied upon by the Commission in support of its SO and, therefore, in order to prepare a defence against a SO, access must be given to the evidence itself rather than to a non-official translation of it. The observance of the rights of the defence therefore requires that addressees of the SO should have access during the administrative procedure to all the incriminating documents in their original versions (see also paragraph 323, 324 and 364 above). That principle does not however require the Commission to translate documents cited in the SO or used in support of it into the language of the Member State where the addressees of the SO are established. It follows that the Court must reject the argument of the applicants specified in paragraph 627 above, alleging that their rights of defence were infringed by the Commission's failure to provide a translation of some evidence cited in the SO or used in support of the SO.

636 As regards the failure to translate the minutes of the hearings, the Court points out that under Article 9(4) of Regulation No 99/63 the essential content of the statements made by each person heard is to be recorded in minutes which are to be read and approved by him. The only purpose of the minutes of hearings is to produce a written record of the oral submissions of the various parties in the language used by them to enable those parties to check that their own statements have been recorded correctly (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, hereinafter 'Case 48/69 *ICI* v *Commission*', paragraph 29). They are not therefore documents within the meaning of Article 3 of Regulation No 1 that emanate from the Commission. In those circumstances, the Court must reject the argument put forward by Dyckerhoff, Aalborg, Valenciana, Oficemen, Cimpor and SECIL to the effect that the Commission infringed Article 3 of Regulation No 1 by failing to provide a translation of the minutes of the hearings. Furthermore, at the hearings the applicants concerned were able to hear a simultaneous interpretation of the various statements made. They cannot therefore complain that their rights of defence were infringed.

637 Aalborg submits that, where the Commission translates a passage from a document in the SO, it must make available to the addressees of the SO a translation of the whole document in order to allow the context of the extract to be fully understood. It refers in this connection to the

statement made in Greek by Mr Kalogeropoulos at the Heracles board meeting held on 25 June 1986 (documents 33.126/19875 to 19877; see paragraph 816 below), part of which is set out in point 9 of the SO, translated into Danish, the language of the Member State in which the applicant, an addressee of the SO, is established. The rest of the document exists in Greek only.

638 That argument must be rejected. Since the Commission is not obliged to prepare translations of documents which it cites in the SO, it cannot be required to translate the entire document, of which, on its own initiative and without obligation to do so, it has translated a passage into the language of the Member State in which the addressee of the SO is established.

639 Heracles considers that the Commission should have translated its reply to the SO and its statements at the hearings in March 1993 into a language other than Greek. By failing to do so, the Commission prevented Heracles from making known its defence satisfactorily to the Members of the Commission. For the same reasons, consultation of the Advisory Committee was not satisfactory.

640 That argument must be rejected. Heracles has failed to prove, by reference to the content of the contested decision, that it has not been correctly understood. In any event, the Commission is a multilingual institution which must be deemed capable of understanding documents submitted to it in an official language of the Community. Moreover, there is no evidence to suggest that the Advisory Committee was unable to deliver its opinion on the questions before it in full knowledge of the facts.

641 Cimpor, SECIL and ATIC complain that the List (see paragraph 5 above) was not drawn up in Portuguese and was sent to them in French. They claim that this procedural document was fundamental to the exercise of their rights of defence. Cimpor and SECIL also claim that the Commission's letter of 17 February 1992, which extended the time-limit for replying to the SO until 23 March 1992 or until 27 March 1992 for those addressees of the SO which had undertaken to lodge 20 copies of the reply, was also in French. SECIL adds that the invitation to the hearings, dated 5 February 1993, was not in Portuguese either. Dyckerhoff complains that the Commission sent it the list in French rather than in German.

642 The Court finds that there was an infringement of Article 3 of Regulation No 1 so far as concerns those documents. They emanate from the Commission and should have been drawn up in the language of the Member State in which the addressee of the SO was established.

643 However, where an institution sends a person within the jurisdiction of a Member State a document which is not drawn up in the language of that State, the irregularity, however regrettable, vitiates the procedure only if it gives rise to harmful consequences for that person in the administrative procedure (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 52; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 74).

644 That is clearly not the case here. The List (see paragraph 5 above), sent in French to Cimpor, SECIL and ATIC, all of which are legal persons governed by Portuguese law, and to Dykerhoff, a company governed by German law, contained a consecutive numbering system for the documents, an indication of the nature of those documents, classification of documents as 'accessible', 'partly accessible' and 'non-accessible', and an indication of the loose-leaf binder in which the documents in question were kept (see paragraph 96 above). The applicants concerned do not deny having had access to all the documents described as 'accessible' in the List. Consequently, the fact that the List was in French did not prevent them from gaining access to the documents in the investigation file under the conditions set out in the List. Nor did the fact that the letter extending the time-limit for replying to the SO was not in Portuguese prevent Cimpor and SECIL from benefitting from an extension of the time-limit. Cimpor sent the Commission its reply to the SO on 24 March 1992 (annex 29 to the application). By letter of 20 February 1992, SECIL acknowledged receipt of the Commission's letter of 17 February 1992, noting that the Commission had extended the time-limit until 27 March 1992 (annex 12 to the application). Finally, the fact that the invitation to the hearings sent to SECIL was not in Portuguese did not prevent it from attending those hearings.

645 Accordingly, failing any harmful consequences during the administrative procedure, the argument relating to those documents cannot be upheld. For the same reasons, the argument alleging infringement of the rights of the defence must be rejected.

646 It follows from all the foregoing that the seventh plea must be rejected in its entirety.

The eighth plea: infringement of the rights of the defence resulting from mistranslation and misquotation of certain documents

647 Castle (T-56/95), Aker (T-70/95) and EUROC (T-71/95) submit that the Commission infringed their rights by mistranslating or misquoting certain documents in the SO.

648 In the first place, the statement by the chairman of Heracles on 25 June 1986 (SO, point 9; contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877) and the handwritten Italcementi note, on the Executive Committee meeting held on 14 April 1986 (SO, point 7, *in fine*; contested decision, recital 17, paragraph 9; document 33.126/3185), were not translated correctly. In particular, the statement of the chairman of Heracles, in its original version and contrary to the Commission's translation, does not refer to 'negotiations' or to the 'United Kingdom cartel'. So far as concerns Italcementi's note, the English version of the SO translated the extract 'trovare delle regole del gioco tra di noi per evitare concorrenza non corretta' as 'rules must be established between us to prevent improper competition'. However, the proper translation is 'to find rules of the game between us to prevent improper competition'.

649 It is common ground that the two documents at issue were in the Box (see paragraph 95 above). Castle, Aker and EUROC thus had the original versions available at the stage of the administrative procedure. There was therefore nothing to prevent them from drawing the Commission's attention, at that early stage, to any mistranslations in the SO. In those circumstances, there is no question of their rights of defence having been infringed.

650 Second, Castle, Aker and EUROC claim that on page 44 of the English version of the SO (point 18) the Commission alleges, in relation to subscription to Interciment's capital, that at the Head Delegates meeting on 6 November 1986 'it was agreed that non-EEC-based companies would take up their shareholding for the present', whereas the documents from which the Commission took that quotation, documents 33.126/19007 and 19008, stated that 'no EEC-based company would take up their shareholding for the present'.

651 The Court points out that documents 33.126/19007 and 19008 were in the Box (see paragraph 95 above). The applicants thus had the original versions of the abovementioned documents at their disposal during the administrative procedure, which should have enabled them to note the misquotation by the time the administrative procedure was under way and to put forward their arguments in that respect already at that stage. In any case, the misquotation was corrected in the contested decision. At recital 26, paragraph 10, of the contested decision, the Commission, referring to the two documents in question, observes that at the Head Delegates meeting in Brussels of 6 November 1986 it was decided that 'no Community company would subscribe to the capital of Interciment'. The applicants claim that it was after their statements at the hearings (application in Case T-56/95, point 5.5.3, and applications in Cases T-70/95 and T-71/95, point 4.5.3) that the Commission was forced to concede that it had made a mistake. The argument put forward by Castle, Aker and EUROC that their rights of defence were infringed must clearly be rejected, since it was precisely the effective exercise of their rights of defence which led the Commission to correct the mistake made in the SO (see Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v

Commission [1975] ECR 1663, paragraphs 94 to 99, and Case T-228 *Irish Sugar Plc* v *Commission* [1999] ECR II-2969, paragraph 34).

The ninth plea: infringements of the rights of the defence and of Article 11(1) of Regulation No 99/63 as a result of the inadequate period for replying to the SO

652 Dyckerhoff (T-35/95), Heidelberger (T-42/95), Buzzi (T-51/95) and SECIL (T-62/95) submit that the Commission infringed their rights of defence and Article 11(1) of Regulation No 99/63 in setting an inadequate period in which to prepare their reply to the SO. They observe that an initial period of two months had been set for their reply and that, shortly before its expiry, it had been extended by one month and then again by one month. They claim that they would have prepared their reply to the SO much more thoroughly if a period of four months had been set from the start. Heidelberger and Buzzi add that they were forced to draw up the reply to the SO under the constant pressure of the time-limits without ever being able to count on an extension of those time-limits when working on it. Heidelberger further submits that it refrained from translating several documents because it did not have sufficient time to assess the document in question before the expiry of the time-limit.

653 The Court points out that Article 11(1) of Regulation No 99/63, which is intended to ensure that an addressee of an SO has a sufficient period for the effective exercise of its rights of defence, provides that in fixing that period, which is to be at least two weeks, the Commission is to have regard both to the time required for preparation of comments and to the urgency of the case. The period set must be assessed specifically in relation to the difficulty of the particular case (*Suiker Unie and Others* v *Commission*, cited in paragraph 651 above, paragraphs 94 to 99, and Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 272 and 273).

654 During the administrative procedure which led to the present proceedings, the addressees of the SO were given an initial period of two months in which to prepare their reply. That period was extended on two occasions by one month, making a total period of four months, from the end of November 1991 to the end of March 1992. In view of all the particular circumstances of the cases in question, that period of four months was sufficient. As to the argument that only the initial two-month period was relevant to the assessment of the present plea, the Court held (paragraphs 94 to 99 of the judgment) in *Suiker Unie* v *Commission* (cited in paragraph 651 above), which was also a complex case, that a period of two months was reasonable. Moreover, as the Commission points out, the period initially granted was not as excessively short as the applicants concerned argue, if it is compared with the two-month period provided for in the fifth paragraph of Article 173 of the Treaty for bringing an action for annulment. Finally, even though the applicants concerned prepared a reply to the SO on the assumption that they had a period of only two months, they ultimately enjoyed, after extensions, two additional months in which to amend and elaborate their replies.

655 Heidelberger's argument that it allegedly dispensed with translations of several documents must also be dismissed. Since it does not identify the documents drawn up in a language other than German which could have been useful in its defence, it has not shown how its rights of defence were affected by the setting of the time-limit for replying to the SO.

656 It follows that the ninth plea must be rejected.

The 10th plea: infringements of the rights of the defence, of Article 19(1) of Regulation No 17 and of Article 7(1), Article 8(1) and Article 9 of Regulation No 99/63 resulting from the defective organisation of the hearings

A — Preliminary remarks

657 The hearings were held from 1 March to 1 April 1993. All the addressees of the SO were invited to take part in a 'plenary hearing' on 1 and 2 March 1993 which dealt specifically with the cement market. Hearings were held from 3 to 18 March 1993 on the international part of the SO. All the addressees of the SO which had been sent that part of the SO were able to attend. All the applicants in the present cases were thus invited to attend the hearings dealing with the cement market and with the international part of the SO. The hearings organised from 22 March to 1 April 1993 dealt with the various national chapters of the SO. Participation in those hearings was restricted to the undertakings and associations of undertakings to which the relevant national chapters of the SO had been addressed (see paragraphs 12 and 94 above).

658 The present plea in law consists of three parts. The first part (B) alleges infringement of the rights of the defence and of Article 19(1) of Regulation No 17 and Article 7(1) of Regulation No 99/63. The second part (C) claims infringement of Article 8(1) of Regulation No 99/63, and the third (D), infringement of Article 9 of Regulation No 99/63.

B — The first part: infringement of the rights of the defence and of Article 19(1) of Regulation No 17 and Article 7(1) of Regulation No 99/63

659 ENCI (T-31/95), VNC (T-32/95), SFIC (T-36/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Valenciana (T-52/95), Asland

(T-55/95), Castle (T-56/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Aker (T-70/95) and EUROC (T-71/95) consider that the organisation of the hearings during the administrative procedure infringed their rights of defence. Lafarge and Valenciana also submit that the Commission's conduct was contrary to Article 19(1) of Regulation No 17. Valenciana, Oficemen, Aker and EUROC claim that Article 7(1) of Regulation No 99/63 was also infringed.

660 Article 19(1) of Regulation No 17 provides that the Commission must give the undertakings or associations of undertakings involved in a proceeding pursuant to Article 85(1) and/or Article 86 of the Treaty the opportunity of being heard on the matters to which the Commission has taken objection. Under Article 7(1) of Regulation No 99/63, it is required to afford 'to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment'. Those two provisions enshrine the fundamental principle of Community law that the rights of the defence must be observed in all proceedings which are liable to culminate in a penalty. Accordingly, the arguments of the applicants claiming, first, infringement of the rights of the defence and, second, infringement of Article 19(1) of Regulation No 17 and Article 7(1) of Regulation No 99/63 are indissociable and must be analysed together.

661 The arguments of the applicants concerned may be grouped into four categories. They will be examined below. It is appropriate to assess (1) the argument concerning the unilateral imposition by the Hearing Officer of a programme for the conduct of the hearings. Next the Court will examine the alleged irregularities committed (2) during the hearings concerning the international objections and (3) during the hearings concerning the national objections. Finally (4), other irregularities allegedly committed during the hearings will be examined.

1. The Hearing Officer's programme for the hearings

662 SFIC, Heidelberger, Lafarge, Valenciana and Castle criticise the fact that the hearings were organised according to a programme imposed unilaterally by the Hearing Officer. In their view, the Commission's approach prevented them from freely organising their defence.

663 That argument must be rejected. The hearings were organised following the order in which the various objections are set forth in the SO. Observing that order makes it easier, in principle, for interested parties to prepare their defence. In any event, the mere fact that the Commission imposes a programme for the hearings does not of itself constitute an infringement of the rights of the defence. There can be such an infringement only where the applicants concerned prove that the organisation of the hearings prevented them from attending the hearings relating to the

objections raised against them or from putting forward orally their arguments against such objections. It is those questions which will be examined at paragraphs 664 to 701 below.

2. Alleged irregularities during the hearings concerning the international objections

664 Ciments Français, Heidelberger, Lafarge, Asland, Uniland, Aker and EUROC submit that they did not have an opportunity to comment orally on the Cembureau agreement, despite the fact that they were held to have committed that infringement in Article 1 of the contested decision. Aker and EUROC add that the only part of the hearings at which they were invited to put forward their observations was that on 11 and 12 March 1993 concerning the ETF.

665 The applicants referred to in the preceding paragraph were able to attend the hearings relating to the chapters of the SO sent to them. They were therefore all able to attend the hearings on the international agreements and concerted practices. However, only Cembureau and the undertakings and associations of undertakings which were considered in the SO to be direct members of Cembureau were able to make oral submissions during the hearings held from 3 to 5 March 1993, which dealt in particular with the conclusion of the Cembureau agreement. During the hearings held from 5 to 18 March 1993, Ciments Français, Heidelberger, Lafarge, Asland, Uniland, which are not direct members of Cembureau, and Aker and EUROC which, in the SO, were not considered to be direct members of Cembureau (see paragraph 516 above), were thus allowed to present oral argument only in the hearings dealing with the various measures implementing the Cembureau agreement in which they were alleged to have participated.

666 The Court points out that, as presented in the SO, the undertakings which were not direct members of Cembureau were considered to have acceded to the Cembureau agreement by virtue of their participation in 'measures implementing' the agreement which had been adopted by Cembureau and its members (see paragraphs 511 to 542 above). In the hearings on the measures to implement the Cembureau agreement in which they were alleged to have participated, Ciments Français, Heidelberger, Lafarge, Asland, Uniland, Aker and EUROC were thus able to comment orally not only on the truth of the facts alleged but also on the alleged link between those facts and the Cembureau agreement. Nor, at the hearings relating to the measures implementing the Cembureau agreement, was there anything to prevent them from submitting arguments challenging the very existence of that agreement. Their contention that they were unable to comment orally on the Cembureau agreement or on their participation in it is thus factually incorrect and must be rejected.

667 Heidelberger claims that it was misled by the programme for the hearings. Since it was not granted the right to present oral argument on its alleged participation in the Cembureau

agreement and in various measures to implement that agreement, it concluded that those objections did not concern it.

668 For the reasons set out in paragraphs 516 to 542 above, it must be held that Heidelberger was able to understand, on reading the SO, that the Commission was accusing it of participating in the Cembureau agreement. Moreover, the allegation that Heidelberger had participated in the Franco-German agreement and in measures adopted in the framework of the ETF was set out sufficiently clearly in the SO (see paragraphs 591 to 602 above) and they were the only implementing measures alleged against it in the contested decision. The programme for the hearings which reached it about one year after its reply to the SO was lodged, a reply which dealt with all those objections, cannot therefore have misled it in any way as to the objections alleged against it. In any event, Heidelberger could have commented orally on 8 March 1993, regarding its alleged participation in the Franco-German agreement, and on 11 and 12 March 1993 regarding its alleged participation in measures taken in the ETF. At those hearings, it could have developed its arguments relating to the existence of the Cembureau agreement and its participation in it. Its argument must therefore be rejected.

669 Heidelberger also complains that it was not granted the right to speak at the plenary session of 1 and 2 March 1993 — a session which it does not deny having attended — which dealt with the cement market.

670 That argument also must be rejected. There was nothing to prevent Heidelberger from challenging the Commission's analysis of the cement market in Chapter 1 of the SO during the hearings at which it was allowed to submit observations, in particular, at those of 8, 11 and 12 March 1993.

671 Heidelberger submits finally that, since, according to the contested decision, the Commission considered the various bilateral and multilateral actions to constitute a single and continuous agreement, it too should have had an opportunity to express its views during the hearings on all the alleged measures implementing that agreement.

672 However, the Court points out that the Commission never took the view that Heidelberger participated in all the constitutive elements of the single and continuous Cembureau agreement. According to the contested decision, the applicant participated in only two measures implementing the Cembureau agreement, namely the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)) and the ETF (contested decision, Article 4(1) to (3)(a)). It is not disputed that Heidelberger could have expressed its views during the hearings of 8, 11 and 12 March 1993 on those measures to implement the Cembureau agreement. The fact that it could not make oral submissions on objections not raised against it could not have been detrimental to its defence.

673 Lafarge further claims that it had insufficient time to cover the international part of the file during the hearings. There is an obvious discrepancy between the time allocated to it at the hearings and the overall liability ultimately attributed to it in the contested decision.

674 The Court notes that the speaking time allotted to the various undertakings and associations of undertakings at the hearings depended on the number of objections raised against them in the SO. Lafarge was allotted 30 minutes' speaking time in respect of each of the measures implementing the Cembureau agreement with which it was charged in the contested decision. In those circumstances, it cannot rely on the argument that there was a discrepancy between the time it was allotted at the hearings and the overall liability ultimately attributed to it. Nor does it adduce any specific evidence to show that the speaking time allotted was insufficient. It has not proved that the alleged lack of speaking time prevented it from formulating or developing an argument which might have led to a different outcome to the administrative procedure. Lafarge's argument cannot therefore be upheld.

3. Alleged irregularities at the hearings concerning the national objections

675 SFIC, Vicat, Ciments Français, Lafarge, Valenciana, Castle, Uniland, Oficemen, ATIC, Aker and EUROC complain that they were not able to attend the hearings on the national agreements and concerted practices in the other Member States concerned.

676 It is common ground that participation in the hearings on the national agreements and concerted practices was restricted. It was restricted to the undertakings and the association of the Member State in question and thus to the undertakings and the association to which the relevant national chapters of the SO had been sent.

677 None the less, the fact that applicants were not able to attend hearings concerning national agreements and concerted practices other than those in the Member State on whose territory they were established could not have been detrimental to their defence. It should be borne in mind that, notwithstanding the fact that point 93(b) of the SO states that the national agreements and concerted practices and the international agreements and concerted practices formed an inseparable whole, the Cembureau agreement and its implementing measures at international level do not depend at all on the existence of the national agreements and concerted practices (see paragraphs 110 to 120 above). Furthermore, the national objections

were not reproduced in the contested decision and the applicants concerned have not shown that the contested decision is based on information obtained in the course of the hearings relating to the national agreements and concerted practices.

678 In those circumstances, the argument put forward by the above 11 applicants must be rejected.

679 Heidelberger complains that, during the hearings on the national agreements and concerted practices, the undertakings and associations of undertakings concerned were not allowed to express their views on the international agreements and concerted practices. Uniland alleges that the Commission did not allow it to express a view on the international objections during the hearing on the Spanish market.

680 The Court points out that during the hearings on the international agreements Heidelberger was able to make oral submissions on all the infringements of which it is accused in the contested decision (see paragraph 668 above). According to the contested decision, Uniland participated in the infringement constituted by the Cembureau agreement (Article 1) and in infringements in the framework of the ETF (Article 4(1) to (3)(a)). It had an opportunity to express its views on those objections during the hearings relating to the ETF on 11 and 12 March 1993. In those circumstances, the fact that the applicants concerned were not able to express a view on the international objections during the hearings dealing with the national markets could not have been detrimental to their defence.

681 Lafarge complains that it had to be satisfied with 70 minutes' speaking time in making its submissions on the French agreements and concerted practices. Its argument is irrelevant, since the objection relating to the French agreements and concerted practices was not upheld in the contested decision.

4. Other irregularities during the hearings

682 Irish Cement, Cimpor, SECIL and ATIC claim that they should have been given an opportunity to participate in all the hearings. In their view, the right to be heard implies a right to hear the cases of others. However, in the absence of any evidence that in the contested decision the Commission relied on information obtained in the course of hearings in which those parties were not able to participate, and in the absence of any evidence to show that evidence exculpating those applicants might have been disclosed at those hearings, that argument must be rejected.

683 SFIC submits that the Commission relied on 'self-incriminating' replies given during the hearings in order to find that there had been an infringement involving exchanges of

information between SFIC and BDZ (contested decision, Article 3(3)(b)). In actual fact, the recital of the contested decision to which SFIC refers (recital 22, paragraph 18) mentions explanations put forward during the hearings by BDZ, rather than by SFIC. There is therefore no question of 'self-incriminating' statements made by SFIC. Nor did the Commission base the infringement referred to in Article 3(3)(b) of the contested decision on the statements made by BDZ during the hearings. After alluding to BDZ's replies during the hearings, it states (contested decision, recital 22, paragraph 18): 'Despite the arguments produced in writing and orally by BDZ, the Commission has been unable to find any valid explanation for the allocation of imports to the various Länder.' It goes on to explain (contested decision, recital 22, paragraph 18, fifth and sixth subparagraphs) why the arguments put forward by BDZ should be rejected. Therefore, far from basing the infringement in Article 3(3)(b) of the contested decision on information divulged by BDZ during the hearings, the Commission, in the passage in question of the contested decision, merely stated the reasons why it rejected the explanations proffered at the hearings by BDZ concerning the exchanges of statistics between SFIC and BDZ. SFIC's argument cannot therefore be upheld.

684 ENCI and VNC complain that the Commission was not impartial in the attitude adopted to them during the hearing of 8 March 1993 when it refused to take into consideration the arguments they had put forward. They refer in this respect to a statement made by Mr Guerrin at the hearing.

685 The Court points out that at that hearing Mr Guerrin stated as follows: '... the Commission ... is not able to follow a certain number of observations made [by the participants at the hearing].' However, although the Commission is required to give the addressees of an SO an opportunity to express a view and to defend themselves with regard to the objections raised against them, it is not obliged to accept all the arguments put forward. Accordingly, neither ENCI nor VNC can claim that their rights of defence were infringed by Mr Guerrin's statement.

686 Lafarge submits that at the hearings it was not allowed to explain its competitive strategy otherwise than in regard to the objections raised against it, even though it had expressly requested permission to do so.

687 The Court points out that Lafarge was free to organise as it wished the speaking time allotted to it. It follows that the argument examined must also be rejected.

688 Finally, Aker and EUROC complain that at the hearings they and Castle, their United Kingdom subsidiary, were not treated by the Commission as separate entities.

689 That complaint, which neither Aker nor EUROC use as the basis for any legal or factual submissions, must be rejected.

690 It follows from all the foregoing that the first part of the 10th plea must be rejected.

C — Second part: infringement of Article 8(1) of Regulation No 99/63

691 Valenciana (T-52/95) claims that the Commission infringed Article 8(1) of Regulation No 99/63 by allowing it insufficient time to prepare for the hearings.

692 Article 8(1) of Regulation No 99/63 provides that 'the Commission shall summon the persons to be heard to attend on such date as it shall appoint' but does not give any guidance as to time-limits.

693 It is common ground that Valenciana was invited by letter of 5 February 1993 (annex 12 to the application) to attend the hearings held from 1 March 1993. The Commission does not deny that the applicant received that letter on 6 February 1993. Valenciana thus had a period of 22 days between the summons and the date of the hearing.

694 Valenciana has adduced no evidence that the period of 22 days was not sufficient to prepare for the hearings. Moreover, as is apparent from its reply of 11 December 1997 to a written question put by the Court of First Instance, it did not even request the Commission, before the hearings, to postpone them on the ground that it did not have sufficient time to prepare its oral presentation.

695 It follows that the second part of the 10th plea must be rejected.

D — Third part: infringement of Article 9 of Regulation No 99/63

696 Lafarge (T-43/95) submits that the Commission infringed Article 9(3) of Regulation No 99/63 by refusing it the right to be heard separately on the objections relating to the Franco-German market. Aalborg (T-44/95) complains that, contrary to the same provision, the Commission did not allow it a separate hearing.

697 Those arguments must be rejected on the ground that they lack precision. The applicants do not explain in what way their rights of defence were infringed by the failure to grant them a separate hearing. In any event, under Article 9(3) of Regulation No 99/63, the Commission is free to hear persons separately or in the presence of other persons invited to attend (Opinion of Advocate General Darmon in *Woodpulp II*, cited above at paragraph 106, at I-1445, paragraph 155).

698 Lafarge also complains that the documents relating to the ETF which it had lodged at the hearings were not appended to the minutes of the hearing.

699 Article 9(4) of Regulation No 99/63 provides that 'the essential content of the statements made by each person heard shall be recorded in minutes'. Since Lafarge has not identified the documents which should have been appended to the minutes or explained why those documents should have been treated in the same way as the essential content of statements within the meaning of the aforementioned provision, its argument must be rejected.

700 It follows that the third part of the 10th plea must also be rejected.

701 It follows from all the foregoing that the whole of the 10th plea must be rejected.

The 11th plea: breach of the principle of ex officio *investigation*

702 Dyckerhoff (T-35/95) maintains that the contested decision fails to observe the principle that the Commission is under an obligation to investigate *ex officio*. First, the Commission failed to examine the question of Greek State aid, despite the fact that it was the only reason which led Dyckerhoff to participate in the European cement producers' meetings that were considered in the contested decision. Second, it did not properly examine the files on the discussions on the basing point system, despite the fact, that in the applicant's view, those files contain the

explanation for the Head Delegates meeting on 14 January 1983. It did not therefore fulfil its obligation to examine all the relevant evidence carefully and impartially.

703 The submission relating to Greek State aid must be rejected. The Commission took into consideration the aid granted by the Greek State to its cement industry in the 1980s, as is shown in recital 24, paragraph 2, the footnote 115 and, generally, in recital 25 of the contested decision. In recital 53, paragraph 8, of the contested decision, the Commission sets out in detail the reasons which led it to reject the submissions made by some undertakings in the course of the administrative proceedings that 'Article 85(1) was not applicable to the members of the ETF because they were acting in legitimate self-defence against exports by the Greek producers, who were receiving unlawful aid from the government of their country'. For the rest, that applicant's submissions will be assessed on their merits at paragraphs 2552 to 2561 below.

704 The other submission, concerning the basing-point system, must be rejected for the reasons set out in paragraphs 414 and 415 above.

705 It follows that the 11th plea must be rejected.

The 12th plea: the rights of the defence were infringed by the excessive length of the administrative procedure

706 Unicem (T-50/95) submits that its rights of defence were infringed because of the excessive length of the administrative procedure. Part of the Commission's objections concerned conduct notified to the Commission on 16 July 1981. Even with regard to the most recent procedure, the period which elapsed between the initial investigations (April 1989) and the adoption of the contested decision (November 1994) was too long. During that period Unicem claims that in many cases it can no longer recall events and has lost a considerable proportion of the relevant documents. In its reply, it further claims that the SO refers to facts which go back to July 1981, whereas the Commission did not carry out its initial investigations until April 1989.

707 The Court points out that it is a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative procedures relating to competition policy (*SCK and FNK* v *Commission*, cited in paragraph 485 above, paragraph 56). The question whether the duration of an administrative procedure is reasonable must be determined in relation to the particular circumstances of each case and, in particular to its

context, the various procedural stages followed by the Commission, the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties involved (*SCK and FNK* v *Commission*, cited in paragraph 485 above, paragraph 57).

708 In the present case, the notification sent to the Commission on 16 July 1981, to which Unicem refers, concerns the Belgian-Netherlands basing-point system of price setting (contested decision, recital 17, paragraph 4), a system against which no specific objection was raised either in the SO or in the contested decision. It must therefore be considered to be wholly outside the scope of the administrative proceedings initiated by the Commission. Moreover, the fact that in the SO the Commission refers to events dating from 1981 is not relevant when assessing whether the duration of the administrative proceedings, which did not commence until April 1989, was reasonable.

709 The administrative procedure lasted five years and eight months, from the initial investigations in April 1989 to the adoption of the contested decision on 30 November 1994. The duration of each of the stages of that procedure was reasonable. The period of 31 months which elapsed between the investigations in April 1989 and dispatch of the SO in November 1991 was reasonable, taking into account of the scope and the difficulties of an investigation into almost the whole of the European cement industry. The period of nearly one year which then elapsed between lodging of the replies to the SO in March 1992 and the hearings, which were held between 1 March and 1 April 1993, was also reasonable. It should be pointed out that the various undertakings and associations of undertakings brought an action before the Court in March 1992 seeking annulment of the Commission's refusal to send the full text of the SO and of the investigation file on which the Court gave judgment on 18 December 1992 (see paragraphs 6 to 11 above). The fact that it took the Commission 20 months after the end of the hearings to adopt the contested decision, on 30 November 1994, is not an infringement of the principle that the duration of administrative proceedings relating to competition policy should be reasonable, since the decision had to be sent to 42 undertakings and associations of undertakings, concerned 24 separate infringements, and had to be drawn up in the nine official Community languages.

710 Unicem's argument that because of the lengthy duration of the administrative proceedings, it could in many cases no longer recollect events and had lost a considerable proportion of the relevant documents must also be rejected. That argument is irrelevant so far as concerns the Head Delegates meetings in 1983 and 1984 at which the Cembureau agreement was concluded and confirmed, since Unicem has always denied having attended those meetings (contested decision, recital 45, paragraph 13). The measures to implement the Cembureau agreement in which Unicem is alleged to have participated are infringements committed in the framework of the ETF (contested decision, Article 4) and in that of the ECEC (contested decision, Article 5). The events complained of with regard to the activities of the ETF and the ECEC were still continuing at the time of the investigations in April 1989, so that Unicem should not have encountered any difficulty in preparing its defence in that regard.

711 It follows that the 12th plea in law must be rejected.

The 13th plea: infringement of Article 6 of the ECHR

712 Article 6 of the ECHR provides:

'... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...'.

713 Fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, paragraph 4, Case C-260/89 *ERT* v *DEP* [1991] ECR I-2925, paragraph 41, and *Bosman and Others*, cited at paragraph 155 above, paragraph 79). For that purpose, the Community judicature draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The ECHR has special significance in that respect (Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, Case C-299/95 *Kremzow* v *Republik Österreich* [1997] ECR I-2629, paragraph 14, and *SCK and FNK* v *Commission*, cited at paragraph 485 above, paragraph 53). Furthermore, according to Article F(2) of the Treaty on European Union (now Article 6 EU), 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

714 Aalborg (T-44/95), Asland (T-55/95) and Blue Circle (T-88/95) consider that their fundamental right to be heard by an independent and impartial tribunal was infringed. The requirements as to independence and impartiality which a tribunal must fulfil for the purpose of Article 6 of the ECHR preclude the Commission from performing both investigative and decision-making functions in matters of competition. The applicants state that the fine imposed by the Commission is penal in nature.

715 Asland states that its fundamental rights were infringed in two respects: first, the nature of the procedure in which the Commission applies Article 85(1) of the Treaty is contrary to Article 6 of the ECHR, as interpreted by the European Court of Human Rights, and to the constitutional traditions common to the Member States, because the Commission has overlapping investigative and decision-making duties and its decisions are not subsequently subject to review of unlimited jurisdiction; the only review subsequently carried out by the Community judicature is a review of legality. Second, the obligation to pay the fine or to lodge a bank guarantee as security for the amount of that fine before the Court of First Instance has ruled on

the validity of the contested decision also infringes its right to be heard by an impartial tribunal. Article 185 of the Treaty and Article 192 of the EC Treaty (now Article 256 EC) should, pursuant to Article F of the Treaty on European Union, be reinterpreted in the context of the ECHR and the constitutional traditions common to the Member States as meaning that the enforceability of the fines imposed depends on the Court's decision on legality.

716 Blue Circle for its part also points out that the Court is unable to investigate the whole case *de novo*.

717 It is settled case-law that the Commission is not a 'tribunal' within the meaning of Article 6 of the ECHR (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 81, and *Musique Diffusion Française*, cited at paragraph 439 above, paragraph 7; T-11/89 *Shell* v *Commission*, cited at paragraph 323 above, paragraph 39). Moreover, Article 15(4) of Regulation No 17 specifically provides that decisions of the Commission to impose fines for infringement of competition law are not of a criminal law nature (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235).

718 Even though the Commission is not a 'tribunal' within the meaning of Article 6 of the ECHR, and even though the fines imposed by the Commission are not of a criminal law nature, the Commission must nevertheless observe the general principles of Community law during the administrative procedure (*Musique Diffusion Française* v *Commission*, cited at paragraph 439 above, paragraph 8, and T-11/89 *Shell* v *Commission*, cited at paragraph 323 above, paragraph 39). However, the fact that the Commission both investigates and makes findings of infringements of Article 85 and/or Article 86 of the Treaty does not of itself constitute a breach of a general principle of Community law (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 56). Accordingly, the Court must reject the argument put forward by Aalborg, Asland and Blue Circle that the contested decision is unlawful on the ground that it was adopted under a system in which the Commission carries out both investigatory and decision-making functions.

719 The arguments put forward by Asland and Blue Circle based on alleged limits to the Community judicature's review of legality must also be rejected. When the Court of First Instance reviews the legality of a decision finding an infringement of Article 85(1) and/or Article 86 of the Treaty, the applicants may call upon it to undertake an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts. Furthermore, so far as concerns the fines, it has unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 (*Enso Española* v *Commission*, cited at paragraph 718 above, paragraphs 62 to 64).

720 Asland's argument that the enforceability of the fine imposed upon it infringes its right to be heard by an impartial tribunal calls into question the lawfulness of Articles 185 and 192 of the Treaty, which expressly provide that decisions of the Commission involving a pecuniary obligation are enforceable. It is inadmissible, because the Community judicature has no jurisdiction to examine the legality of provisions of the Treaty (order of 14 July 1994 in Case T-584/93 *Roujansky* v *Council* [1994] ECR II-585, paragraph 15).

721 SFIC (T-36/95) and Vicat (T-37/95) plead breach of the principle of impartiality on the ground that the same official carried out the investigations, acted as rapporteur, drew up the SO and prepared the draft decision. That argument cannot be upheld either: the contested decision was not taken by the official to whom SFIC and Vicat refer, but by the college of Commissioners. What is more, the procedural guarantees provided for by Community law do not require the Commission to adopt an internal organisation precluding the same official from acting as investigator and rapporteur in the same case (T-11/89 *Shell* v *Commission*, cited at paragraph 323 above, paragraph 40).

722 CBR (T-25/95) submits that the Commission's refusal to grant access during the administrative procedure to all documents, whether incriminating or exculpatory, constitutes a manifest infringement of Article 6 of the ECHR, under which it is entitled to have the competent authorities collect all information which might exculpate or enable it to have its penalty reduced. Likewise, Lafarge (T-43/95) and Blue Circle (T-88/95) consider that the fact that they were not given access to the full file and to the full text of the SO infringes Article 6 of the ECHR.

723 Those arguments are in fact indissociable from those of CBR, Lafarge and Blue Circle in the first plea, already considered by the Court, alleging infringement of the rights of the defence inasmuch as the full text of the SO and the investigation file was not accessible during the administrative procedure (see paragraphs 87 to 435 above).

724 It follows from the foregoing that the 13th plea must be rejected.

The 14th plea: breach of the principle of presumption of innocence

725 ENCI (T-31/95), VNC (T-32/95), Lafarge (T-43/95), Aalborg (T-44/95), Castle (T-56/95), Aker (T-70/95) and EUROC (T-71/95) claim that the Commission prejudged its decision that the whole of the European industry had acted contrary to Article 85(1) of the Treaty. It thus infringed the principle of the presumption of innocence. ENCI, VNC and Aalborg put forward no particular argument to substantiate that claim. Lafarge, Castle, Aker and EUROC rely on

press cuttings predating the adoption of the contested decision which reveal the tenor of that decision and on a reply from Mr Van Miert, a Member of the Commission, dated 15 September 1993, to a written question from the European Parliament (OJ 1993 C 320, pp. 31 and 32), in which he described the agreements and concerted practices referred to in the contested decision as 'cartels'.

726 The Court finds that the arguments put forward are not relevant to the outcome of the dispute: the existence of an infringement must be assessed by reference solely to the evidence gathered by the Commission. Where the commission of an infringement has actually been proved at the end of an administrative procedure, evidence that the Commission prematurely displayed, during that administrative procedure, its conviction that such an infringement exists does not render the proof of the infringement itself any less real. The only relevant question is to ascertain, on the merits, whether or not the infringement has been proved.

727 In any event, the information referred to by the various applicants set out in paragraph 725 above does not prove that the Commission prejudged its decision. The Commission deliberates, as a collegiate body, on the basis of a draft decision. It is clear that, in the present case, Commission officials were not able to prevent leaks to the press as to the content of the draft decision. Mr Van Miert's answer of 15 September 1993 to a European Parliament written question states that: '... the Commission is currently considering what action to take. It will take account of the specific position of each of the undertakings concerned, including the smaller ones, and of their individual behaviour within the cartel'. Although the choice of the word 'cartel' in the reply given by the Member of the Commission concerned might appear to be unfortunate, the extract taken as a whole directly contradicts the contention that the Commission had already prejudged its decision at that time.

728 The 14th plea, as submitted by the seven abovementioned applicants, must therefore be rejected.

729 Italcementi (T-65/95) and Blue Circle (T-88/95) claim that the Commission has not proved beyond all reasonable doubt that the accusations against them were well founded. The Commission had assumed, on the basis of a real presumption of guilt, that any actions taken by the European cement producers had been in pursuance of the Cembureau agreement. By resorting to the argument that there had been a single and continuous agreement, it attempted to avoid having to adduce sufficient evidence to prove particular allegations. Blue Circle states that the Commission was wrong to consider that, following service of the SO, the burden of proof transferred to the applicant. A number of extracts from the contested decision (recital 11, paragraph 6; recital 22, paragraph 14, third subparagraph; recital 22, paragraph 15; recital 28, paragraph 12(c); recital 28, paragraph 21, fourth subparagraph) show that the Commission considered that it was for the undertakings to prove that the allegations in the SO were

incorrect. Moreover, it did not deal with, or rejected out of hand, the explanations given by the applicant in its reply to the SO, without explaining why it considered them to be implausible.

730 In actual fact those arguments by Italcementi and Blue Circle relate to the question of proof of the infringements alleged against them. They will therefore be considered with the substantive pleas, from which they are indissociable.

The 15th plea: infringement of the right of the parties not to give evidence against themselves

731 Unicem (T-50/95) claims that the Commission infringed the principle that during administrative proceedings parties may refuse to reply in such a way as to incriminate themselves. It refers to Cembureau's reply during an investigation carried out pursuant to Article 14(2) of Regulation No 17 (contested decision, recital 18, paragraph 4; document 33.126/11525) and to Cembureau's reply to the statement of objections relating to a procedure pursuant to Article 15(1) of Regulation No 17 (contested decision, recital 18, paragraph 4; documents 33.126/13568 to 13573). Likewise, Castle (T-56/95), Aker (T-70/95) and EUROC (T-71/95) submit that in the contested decision the Commission relied to a significant extent on evidence contained in replies to requests for information sent to them pursuant to Article 11 of Regulation No 17, contrary to the right of undertakings and associations of undertakings not to give evidence against themselves. They refer in that regard to the case-law of the European Court of Human Rights, specifically to the judgment of 25 February 1993 in *Funke* v *France*, Series A, No 256-A, p. 22, which recognises the right under Article 6 of the ECHR of accused persons to remain silent under questioning and not to incriminate themselves. The principles laid down in that judgment are even at variance with the case-law of the Court of Justice and of the Court of First Instance. Castle, Aker and EUROC append to their application (annex 5.20 in Case T-56/95, annex 5.17 in Cases T-70/95 and T-71/95) a list of replies to the SO on which the Commission allegedly relied in the contested decision.

732 The Court points out that the Commission may not compel an undertaking involved in a proceeding finding an infringement of Article 85(1) and/or Article 86 of the Treaty 'to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove' (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35; Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 74; see, by analogy, the judgment of the European Court of Human Rights *Funke* v *France*, Series A, No 256-A, p. 22).

733 However, in the present case, the replies to which Unicem, Castle, Aker and EUROC refer do not emanate from them. They thus have no grounds for claiming that, during the course of the

administrative procedure, the Commission infringed their right not to give evidence against themselves.

734 In so far as, by this plea, the applicants concerned complain that the Commission used allegedly self-incriminating replies by other undertakings and associations of undertakings, the Court points out that all the replies referred to by Castle (annex 5.20 to the application), Aker (annex 5.17 to the application) and EUROC (annex 5.17 to the application) were made in response to requests for information pursuant to Article 11(1) of Regulation No 17. Undertakings and associations of undertakings are free to reply or not to questions put to them under that provision (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and Others* v *Commission* [1999] ECR II-931, hereinafter the 'PVC judgment', paragraph 456). That conclusion is not affected by the fact that the first part of Article 15(1)(b) of Regulation No 17 provides for a penalty. Such a penalty applies only where, having agreed to reply, the undertaking provides inaccurate information. Therefore, by making requests for information under Article 11(1) of Regulation No 17, the Commission cannot be regarded as compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*ibidem*, paragraph 457).

735 So far as concerns the replies to which Unicem refers (see paragraph 731 above), during the administrative procedure Cembureau was free to reply or not to questions put to it in the course of an investigation pursuant to Article 14(2) of Regulation No 17. It was likewise free to reply or not to the statement of objections sent to it in a procedure pursuant to Article 15(1) of Regulation No 17.

736 It follows that Unicem, Castle, Aker, and EUROC have not proved that during the administrative procedure the Commission infringed the right of certain undertakings and associations of undertakings not to give evidence against themselves.

737 SFIC (T-36/96) submits that an SO which does not state sufficiently precisely the objections raised against each of its addressees is likely to cause the parties concerned, through legitimate attempts to exercise their rights of defence, to admit to their participation in infringements which the Commission did not intend to attribute to them. Similarly, SECIL (T-62/95) claims that the imprecise nature of the objections transformed the inter partes stage of the procedure into an extension of the inquisitorial stage of the investigation, in which the Commission sought only to obtain new evidence against the undertakings and associations concerned. Blue Circle (T-88/95) also complains about the imprecision of the SO.

738 The Court has already held (see paragraphs 504 to 626 above) that the SO referred sufficiently precisely to the participation of SFIC, SECIL and Blue Circle in the various infringements of which they are accused in the SO and in the contested decision. In those circumstances, there is no basis for the argument put forward by those applicants and it must be rejected.

739 It follows from the foregoing that the 15th plea must be rejected.

The 16th plea: infringement of Article 10 of Regulation No 17 in that there was no proper consultation of the Advisory Committee

740 ENCI (T-31/95), SFIC (T-36/95), Vicat (T-37/95), Ciments Français (T-39/95), Lafarge (T-43/95), BDZ (T-48/95), Buzzi (T-51/95), Valenciana (T-52/95), Asland (T-55/95), Uniland (T-58/95) and Oficemen (T-59/95) claim that the Commission committed breaches of procedure in its consultation of the Advisory Committee. ENCI, SFIC, Lafarge, BDZ, Valenciana, Asland, Uniland and Oficemen also complain of the fact that the Advisory Committee was not informed of the precise amounts of the fines. Vicat, Ciments Français and Buzzi add that they believe that the Advisory Committee was consulted only as to the percentage of turnover and not as to the precise amount of the fines expressed in ecus.

741 SFIC claims moreover that it is not in a position to check whether all the members of the Advisory Committee had knowledge of the main documents in the file and had access to all the minutes of the hearings and to the Hearing Officer's report. It asks the Court to adopt measures of organisation of procedure in order to verify whether those documents were sent to the Advisory Committee.

742 The Court points out that consultation of the Advisory Committee, provided for in Article 10(3) to (6) of Regulation No 17, is an essential procedural requirement, breach of which affects the legality of the Commission's final decision if it is proved that failure to forward certain material information did not allow the Advisory Committee to deliver its Opinion in full knowledge of the facts, that is to say without being misled in a material respect by inaccuracies or omissions (Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 23).

743 In the present case, the applicants concerned, except SFIC, complain only that full information relating to the fines was not sent to the Advisory Committee. In those circumstances, the plea, should it prove to be well founded, could result only in the annulment of Article 9 of the contested decision, in so far as it imposes fines on the applicants concerned. Since that provision must already be annulled to the extent that it imposes a fine on the associations of undertakings

(see paragraphs 478 to 488 above), this plea has become devoid of purpose in the form put forward by BDZ and Oficemen. The plea relied upon by SFIC is also without purpose inasmuch as it complains that full information relating to the fines was not sent to the Advisory Committee.

744 So far as the 16th plea in law is relied upon by ENCI, Vicat, Ciments Français, Lafarge, Buzzi, Valenciana, Asland and Uniland, the Court points out, first, that the Commission has explained during the proceedings before the Court that the Advisory Committee met on 23 November 1994 in order to consider the matter of the fines. Following a written question put by the Court, it explained in a letter of 11 December 1997 that in order to avoid leaks to the press the exact amounts of the fines proposed had not been sent to the Committee. The Commission did however give an approximate overall figure in ecus, representing the total fines to be imposed, and informed the members of the Advisory Committee that it intended to impose a fine of 5% of the turnover of the undertakings mentioned in recital 65, paragraph 9(a), of the contested decision, and of 3.5% on the undertakings mentioned in recital 65, paragraph 9(b), of that decision.

745 In order to check the veracity of those statements, the Court, by a measure of organisation of procedure of 9 September 1998, asked the Commission to produce the notice convening the meeting of the Advisory Committee of 23 November 1994, the extracts from the documents concerning the fines which were submitted to the Committee at that meeting, and the minutes of that meeting.

746 In compliance with that measure of organisation of procedure, on 14 September 1998 the Commission lodged at the Court Registry the notice convening the meeting at issue and the preliminary draft of the part of the decision relating to the fines, submitted at that meeting. The documents sent are copies of documents which the members of the Committee actually received. For that reason, they contain certain handwritten notes added in the course of the meeting. The Commission also sent to the Court the Opinion delivered by the Advisory Committee at the conclusion of the meeting. That Opinion serves as the minutes of the meeting.

747 It is apparent from examination of those documents that, during its meeting of 23 November 1994, the Advisory Committee was informed of the criteria envisaged for the imposition of fines (point 1 of the Opinion). The majority of the members of the Advisory Committee considered that 'the Commission [had] applied [those] criteria concerning both the gravity and the duration of the infringements consistently' (point 2 of the Opinion). The handwritten notes made by a member of the Advisory Committee on the preliminary draft of the part of the decision relating to the fines confirm the Commission's contention that the Committee was aware that the undertakings mentioned in recital 6, paragraph 9(a), of the contested decision bore greater responsibility and should be fined 5%, while the undertakings mentioned in recital 65, paragraph 9(b), of the contested decision were to be fined 3.5%, since they bore lesser responsibility.

748 In those circumstances, even though the members of the Advisory Committee were not informed of the exact amount of the fines, in ecus, which the Commission intended to impose on the undertakings in question, the Commission sent to the Advisory Committee all the material information necessary for drawing up an opinion on the fines (see, to this effect, Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraphs 19 to 21). The fact that the Commission ultimately adopted lower percentages for the fines in the contested decision, namely 4% for the undertakings mentioned in recital 65, paragraph 9(a), of the contested decision and 2.8% for the undertakings mentioned in recital 65, paragraph 9(b), of the contested decision clearly did not damage the interests of the applicants raising the present plea.

749 SFIC's wider allegation that the members of the Advisory Committee had no knowledge of the main documents in the file must be rejected for lack of precision. As regards more specifically the minutes of the hearing, SFIC puts forward no evidence to show that it would have been necessary to send those minutes to enable the Advisory Committee to deliver its Opinion in full knowledge of the facts (*RTE* v *Commission*, cited at paragraph 742 above, paragraph 23). Finally, it should be borne in mind that it is not mandatory for the Hearing Officer's report to be passed on to the Advisory Committee (Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 40). SFIC's argument set out at paragraph 741 above must therefore be rejected and it is not necessary to adopt the measures of organisation of procedure requested.

750 It follows from all the foregoing that the whole of the 16th plea in law must be rejected.

The 17th, 18th, 19th and 20th pleas: infringement of the principle of subsidiarity, the principle of sound administration, the principle of legal certainty and the principle of legitimate expectations during the administrative procedure

751 Some applicants maintain that the administrative procedure is vitiated by the infringement of various principles, namely the principles of subsidiarity, of sound administration, of legal certainty and of legitimate expectations. In their view, such infringements warrant the annulment of the contested decision.

752 According to Ciments Français (T-39/95), by belatedly referring to the national authorities the investigation of a proceeding whose complexity and duration were excessive, the Commission infringed the principle of sound administration and increased the uncertainty of the undertakings concerned. The decision to refer the national objections to the national authorities put in question the very purpose of the proceeding. Lafarge (T-43/95) and Oficemen (T-59/95) consider that the principle of sound administration required the Commission to complete the inquiry into the national objections, instead of severing the national objections and leaving the

opening of a new case to the discretion of the national authorities. They doubt whether the dropping of the national objections without giving any reason is compatible with the principle of subsidiarity, since the matter manifestly falls within the scope of Community interest.

753 Lafarge complains that the Commission created legal uncertainty in the minds of the undertakings against which proceedings had been brought by reserving the right to send the file on the national agreements and concerted practices to the various national authorities, without, however, indicating whether or not it had actually done so. It observes that, if the Commission had actually dropped the national objections, it should have adopted a formal decision to terminate the proceedings.

754 That line of argument is unfounded. The Court points out that throughout the administrative procedure the Commission observed the principle that the duration of proceedings should be reasonable (see paragraphs 706 to 711 above). Moreover, in dropping the national objections, it did not alter the nature of the international objections which were the only objections ultimately to give rise to findings of infringements and the imposition of fines (see paragraphs 439 and 440 above). In its letter of 27 September 1993, the Commission stated that it had 'informed the competent national authorities of that decision, leaving it to them to take, if necessary, any measures they [deemed] appropriate in order to bring to an end the practices in question'. On the contrary, far from being incompatible with the principle of legal certainty or that of sound administration, the decision to allow the national authorities to take steps, if necessary, against those who had participated in any national agreements or concerted practices assured the parties concerned that, at Community level, the Commission would not penalise them for such infringements. The alleged legal uncertainty regarding the attitude which the national authorities would adopt cannot have any bearing on the legality of the findings of infringements relating to the international objections; they are wholly separate from the national objections. Moreover, claims that there was such uncertainty are at variance with Article 9(3) of Regulation No 17. Under that provision, irrespective of any 'decision to refer' which the Commission may adopt, the national authorities remain competent, where no procedure is pending before the Commission, to apply Articles 85(1) and 86 of the Treaty. So far as concerns the principle of subsidiarity, suffice it to say that neither Lafarge nor Oficemen had any interest in the Commission's completing proceedings which could also have resulted in a finding of infringements in connection with national agreements and concerted practices. Finally, the undertakings in question could not seek a Commission decision finding that their 'conduct at national level' did not infringe Article 85(1) of the Treaty, since they had not notified that conduct in order to obtain a negative clearance in accordance with Article 2 of Regulation No 17.

755 Ciments Français claims that the Commission infringed the principle of the protection of legitimate expectations by accusing the defendant undertakings of concerted action between the Head Delegates of Cembureau on dumping and the basing-point system, despite having itself to a very large extent advocated and encouraged such concerted action.

756 That plea is also unfounded: in the contested decision, the Commission does not complain that the European cement producers held discussions on dumping and on the basing-point system at certain Head Delegates meetings. The Head Delegates meetings referred to in recital 19 of the

contested decision are objected to by the Commission solely on the ground that in its view, the participants had, in parallel with those unobjectionable topics of discussion, also concluded and subsequently confirmed an anti-competitive agreement on non-transhipment to home markets and regulation of transfers of cement from one country to another.

757 It follows from all the foregoing that the 17th, 18th, 19th and 20th pleas must be rejected.

The 21st plea: infringement of the principle of collegiate responsibility when the contested decision was adopted

758 SFIC (T-36/95) doubts whether all the Members of the Commission actually had access to all the observations made by the addressees of the SO, to all the minutes of the hearings, and to the Hearing Officer's report. The principle of collegiate responsibility was thus breached. In its observations on the Report for the Hearing, SFIC asked the Court to adopt measures of organisation of procedure in order to verify whether the Members of the Commission had had access to those documents.

759 The functioning of the Commission is governed by the principle of collegiate responsibility (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 33). The Court points out that, pursuant to that principle, decisions should be the subject of collective deliberation and all the Members of the College of Commissioners should bear collective responsibility at political level for all decisions adopted (Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraph 30, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 63).

760 Under the principle of collegiate responsibility, the information on which the Commission's decisions are based must be available to all the members of the college (*Commission* v *Germany*, cited at paragraph 759 above, paragraphs 48 and 49). Since SFIC has not adduced any concrete evidence to show that the principle of collegiality was infringed, there are no grounds for its assertion that the Members of the Commission did not have access to the replies to the SO, to the minutes of hearings and to the Hearing Officer's report, before they adopted the contested decision.

761 In those circumstances, the 21st plea in law must be rejected and it is not necessary to adopt the measures of organisation of procedure requested (*BPB Industries and British Gypsum* v *Commission*, cited at paragraph 142 above, paragraph 35, and *Baustahlegewebe* v *Commission*, cited at paragraph 144 above, paragraphs 91 to 94).

The 22nd plea: improper authentication and notification of the contested decision

762 CBR (T-25/95), Heidelberger (T-42/95), Unicem (T-50/95), Valenciana (T-52/95) and Italcementi (T-65/95) consider that there were irregularities during the authentication and/or notification of the contested decision.

763 Heidelberger claims not to know, as a general matter, whether the Commission observed all its internal rules on procedure and on the adoption of decisions. It states that its fears that there may have been a procedural irregularity are reinforced by the fact that the Commission encountered problems when authenticating and notifying the contested decision.

764 Heidelberger's argument is not supported by any concrete evidence to enable the Court to assess its merits. It must therefore be rejected for lack of precision.

765 Unicem and Italcementi claim that the authentication of the Italian version of the contested decision is flawed. According to them, that flaw stems from the fact that the contested decision was notified twice, first in December 1994 and then in February 1995, and that the letter accompanying the second notification to the Italian undertakings referred to an 'error at the stage of authentication' ('un errore nella fase di autentificazione'). CBR also raises the question of the exact nature of the error made by the Commission which gave rise to the second notification of the contested decision on 2 February 1995. It therefore requests the Court to verify whether the error to which the Commission refers actually concerns the authentication of the Italian version of the decision.

766 The Court points out that authentication of a decision finding an infringement of the Community competition rules is an essential procedural requirement within the meaning of Article 173 of the Treaty (*Commission* v *BASF*, cited at paragraph 759 above, paragraph 76, and T-37/91 *ICI* v *Commission*, cited at paragraph 142 above, paragraph 89).

767 In the present case, the Court took the view that the evidence of infringement of the principle of the inalterability of the contested decision put forward by the applicants concerned (see paragraph 765 above) was sufficiently serious and convincing to justify adoption of a measure of organisation of procedure (*SPO* v *Commission*, cited at paragraph 485 above, paragraph 55). It thus requested the Commission, by letter of 11 November 1997, to explain the nature of the error in authentication referred to in the letter accompanying the second notification of the

contested decision to the Italian undertakings. The Commission was also asked to send the authenticated Italian version of the contested decision.

768 By letter of 22 December 1997, the Commission explained that the error in question occurred at the printing stage of the contested decision prior to notification. The version first notified to the Italian undertakings included a page 233 which was identical to page 231, whereas the real page 233 was missing. The authentication of the contested decision was not, however, vitiated by an error. Indeed, the Italian version of the contested decision, annexed to the minutes of the meeting of the Commission held on 30 November 1994, did not contain the error affecting the text of the contested decision notified to the Italian undertakings. With its letter of 22 December 1997 the Commission included a copy of the authenticated Italian version of the contested decision, stating that the original in its possession was at the disposal of the Court, should it wish to verify it.

769 During the hearing on 30 September 1998 in Case T-65/95, the Court asked the Commission to produce, by 6 October 1998, the original of the authenticated Italian version of the contested decision. CBR and Unicem were informed of that measure of organisation of procedure at the hearings on 14 October and 30 September 1998 respectively. The Commission complied with the Court's request within the prescribed period.

770 CBR, Unicem and Italcementi did not challenge the explanation put forward by the Commission for the two notifications following adoption of the contested decision. At the hearings in Cases T-25/95, T-50/95 and T-65/95 respectively, they none the less asked the Court to verify whether the copy of the Italian version of the contested decision annexed to the Commission's letter of 22 December 1997, and of which they had received notification, conformed to the original Italian version of the contested decision.

771 The Court finds that the two documents in are perfect conformity. Moreover, examination of the authenticated version does not disclose any irregularity which might have been committed by the Commission upon authentication.

772 In those circumstances, the argument put forward by CBR, Unicem and Italcementi must be rejected.

773 Valenciana considers that notification of the contested decision was irregular. It complains that, in the second notification, the Commission did not state clearly whether the time-limit for instituting proceedings referred to in Article 173 of the Treaty was deemed to run from the first or from the second notification. It contends that, since the explanations provided by the Commission in its letter of 13 February 1995 (annex 6 to its application) did not remove that

uncertainty, it took the view that the time-limit for instituting proceedings began to run from the first notification and, consequently, it had less time to bring its action.

774 When asked by the Court about the differences between the text of the contested decision as first notified and the text subsequently notified, Valenciana merely stated in its letter of 11 December 1997 that the text of the second notification, unlike that of the first one, did not include any figures in the tables and other particulars in recital 23, paragraphs 3 to 5, of the contested decision. It is not therefore disputed that the text of the second notification is identical, in its Spanish version, to the text of the first one, except with regard to some confidential data which was blanked out in the text of the second notification. Accordingly, even though the time-limit for bringing an action against the contested decision began to run as from the first notification, rather than from the second notification as the Commission claims, Valenciana had a period of time corresponding to that provided for in Article 173 of the Treaty, together with an extension on account of distance, for the bringing of an action against all aspects of the contested decision. Valenciana's argument must therefore be rejected.

775 It follows from all the foregoing that the whole of the 22nd plea must be rejected.

II The plea alleging misuse of powers

776 Ciments Français (T-39/95), Lafarge (T-43/95), Oficemen (T-59/95) and Halkis (T-104/95) allege misuse of powers.

777 Halkis claims that the Commission misused its powers by imposing on it a fine for an infringement in which it did not participate. Expressed in this way, the plea is indissociable from the plea alleging manifest error of assessment regarding Halkis' participation in the Cembureau agreement. The Court will therefore examine it in the context of its examination of the substantive pleas concerning that applicant's participation in the Cembureau agreement (see paragraphs 4096 to 4101 and 4210 to 4213 below).

778 Ciments Français, Lafarge and Oficemen consider that the fact that the Commission dropped the national objections can be explained only by the Commission's desire to avoid the consequences of the judgment in *Cimenteries CBR* v *Commission* (cited at paragraph 11 above) and to avoid the annulment of the contested decision on the ground that it had infringed the rights of the defence by not granting full access to the SO and to the case-file.

779 The Court points out that a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, that it was adopted with the exclusive or main purpose of achieving ends other than those stated (see Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68).

780 There is no such evidence in the present case: Ciments Français, Lafarge and Oficemen have not adduced any concrete evidence to cast doubt on the Commission's argument that its decision to terminate proceedings in respect of the national agreements and concerted practices was occasioned by the written replies to the SO and the explanations put forward orally at the hearings.

781 It follows that the present plea must be rejected.

III — *Pleas alleging infringements of Articles 85(1) and 190 of the Treaty, the principle of equal treatment and the rights of the defence in that the Commission found in Article 1 of the contested decision that there had been an agreement contrary to Article 85(1) of the Treaty and that the various applicants concerned had participated in it*

Preliminary observations

782 According to Article 1 of the contested decision, all the addressees of the contested decision 'infringed the provisions of Article 85(1) of the ... Treaty by participating in an agreement designed to ensure non-transhipment to home markets and to regulate cement transfers from one country to another'. The agreement thus found to have been concluded is also referred to as the 'Cembureau agreement'.

783 In the pleas to be considered here, a number of the applicants criticise the definition of the product market and the geographical market on which the Commission found that there had been an infringement. Some of the applicants plead inconsistency between the SO and the contested decision in regard to the Cembureau agreement. A number of applicants dispute the very existence of that agreement. All the applicants deny having participated in it.

784 Before considering whether the various arguments put forward are well founded, it is appropriate to set out the various findings of fact and of law on which the Commission relied in the contested decision in concluding that the infringement had been committed.

The infringement referred to in Article 1 of the contested decision

785 The infringement referred to in Article 1 of the contested decision is an agreement relating to the market in grey cement. The Commission considers that '[i]n terms of the relevant product market, grey cement, white cement and clinker constitute separate markets, since each product meets different requirements' (contested decision, recital 11, paragraph 1). In the contested decision the Commission thus finds infringements not only on the market in grey cement (Articles 1 to 6) but also on the market in white cement (Article 7).

786 In terms of the relevant geographic market, the Commission maintains that 'the cement market may be seen as a set of markets, centred around the various factories, overlapping one another and covering the whole of Europe' (contested decision, recital 11, paragraph 2).

787 The Commission considers (contested decision, recital 11, paragraph 7, first and second subparagraphs) that:

'All the overlapping markets are interdependent on one another, and any action taken on one market may have an impact on the most distant markets ...

It is evident from the above that Europe is the relevant market, consisting of a set of juxtaposed and interdependent markets.'

788 The infringement in question consists of an agreement which, according to the Commission, was concluded within Cembureau, the European cement manufacturers' trade association (contested decision, recitals 18, 19 and 45). The agreement was concluded at the meeting of Cembureau Head Delegates held on 14 January 1983 (contested decision, recital 45, paragraph 1). The 'Head Delegates' were the representatives of the members of Cembureau who were entitled to vote at its General Assembly (contested decision, recital 15, paragraph 4).

789 The purpose of the agreement was to 'ensure non-transhipment to home markets and to regulate cement transfers from one country to another' (contested decision, recital 45, paragraph 9, and Article 1).

790 In the contested decision the Commission relies solely on the specific documentary evidence identified and discussed in recitals 18, 19 and 45.

791 It states, first, that the purpose and the content of the Cembureau agreement are apparent from the letter convening the meeting of Head Delegates on 14 January 1983 signed by Mr Gil Braz de Oliveira (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) and from a draft introductory statement by the Chairman for that meeting (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585).

792 The letter convening the meeting states:

'...

The general recession affecting the industry's domestic sales meant that cement transfers between member countries could have harmful consequences for our industry if appropriate measures were not taken in time as in the case, for example, of the trade between Belgium and the Netherlands which is to be regulated by a protocol shortly to be published in the Official Journal of the EEC.'

793 The draft introductory statement by the Chairman states:

'— We shall ... be able to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices, before this phenomenon has had time to spread in extent and gravity.

— Our objective is not of course to take collective decisions here, to pass judgment on what we find or to act as arbiter, but rather, with your assistance, to identify possible solutions capable of modifying market developments and to propose, at least in regard to principles, certain rules of the game which it is in the interests of all of us to follow.

— What we then expect of you is that this exchange of views encourages you to spread words of wisdom around you and that, each time it is necessary, multi- or bi-lateral discussions are held, as and when the need arises.'

794 The statement concludes by stating:

'Needless to say there will be no minutes of this meeting.'

795 Similarly, the memorandum on the structure of the meeting in question (contested decision, recital 19, paragraph 6; documents 33.126/11578 and 11579) states:

'13.15/13.30 — Close of meeting — No minutes.'

796 The Commission takes the view that other documents relating to the Head Delegates meeting held on 14 January 1983 also indicate the illicit nature of the discussions at the meeting.

797 It refers in that regard to the changes made to the draft agenda for the meeting of 14 January 1983 (contested decision, recital 19, paragraph 3; documents 33.126/11558, 11559, 11565, 11580 and 11656).

798 The draft agenda dated 16 November 1982 originally contained, in particular, the following item:

'2. Intra-European Trade

A. Analysis of situation

1. Data

2. Price situation — National Prices

3. Motivation and organisation of Crossborder Trade - Expected developments

B. Possible measures to control intra-trade

...'

799 By telex of 17 November 1982 (contested decision, recital 19, paragraph 3; document 33.126/11559) Mr Van Hove, Chairman of the Liaison Committee of the Cement Industries in the EEC (hereinafter 'CLC'), was informed that the Chairman of Cembureau, Mr Bailly, sought his views on the wording of item 2 on the agenda, which should 'read sufficiently clearly without giving rise to reactions'.

800 By telex of the same date (contested decision, recital 19, paragraph 3; document 33.126/11558) Mr Van Hove replied:

'The following words contained in your telex of 17 November must be removed from any official document: ... Organisation of Crossborder Trade ... Control Intra-trade ...'

801 At the Executive Committee meeting held on 22 December 1982, item 2 on the agenda for the meeting on 14 January 1983 was in the following form (contested decision, recital 19, paragraph 3; document 33.126/11656):

'2. Intra-European trade

A. Analysis of situation

...

(iii) Motivation and nature of trade — Expected developments

B. Possible ways to maintain fair trading

...'

802 The Commission maintains that the Cembureau agreement was confirmed at the Head Delegates meeting held on 19 March 1984 (contested decision, recital 45, paragraph 2). In support of that assertion it relies on the memorandum to the Chairman for that meeting (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) and the notes on that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737).

803 The memorandum to the Chairman states under item 2, entitled 'Situation on the European market':

'— The gap between [price] extremes which is between 1 and 2 inevitably constitutes a temptation.

— It is therefore desirable gradually to reduce the gap, essentially by increasing the lowest prices... and also by moderating high price trends.'

804 It further states:

'The hot spots are still:

— Exports from Germany to the United Kingdom and Ireland;

— Exports from France to Germany;

— Exports from Spain to Ireland and the United Kingdom.

A new hot spot is exports from Italy to Switzerland.'

805 The notes on the Head Delegates meeting held on 19 March 1983 conclude:

'... it was agreed that a visual presentation of price ranges was an effective means of highlighting potential causes of conflict'.

806 The Commission considers (contested decision, recital 45, paragraph 2, first subparagraph) that the notes taken at that meeting:

'... show that Cembureau and its members re-examined jointly the tensions created by cross-frontier flows, that they pursued the objective of reducing trade in cement between Cembureau member countries and that this objective was achieved. The notes state ... that "the pressure from inter-member trade had slackened considerably through improved bilateral contacts. Exports had tended to shrink but there was still a threat from outsiders".'

807 As regards the Cembureau agreement, the Commission considers (same paragraph, second subparagraph):

'The content of the agreement was again confirmed at the meeting of Head Delegates held on 7 November 1984 ..., at which the channelling of Greek and Spanish production surpluses was endorsed by Cembureau and its members so as to avoid destabilising European markets.'

808 In support of that assertion, the Commission refers to the following extracts from the 'summary notes' of 12 November 1984 relating to the meeting held on 7 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755):

'East European imports

...

World market developments

Situation

...

Greek/Spanish Agreement

This is unanimously considered as the basic criterion if better export prices are to be achieved, and the risk of a destabilisation in Europe avoided. Negotiations have been proceeding for several months between four Spanish and three Greek companies, though the mechanism of the discussions was not described. Some results have been achieved, but there has been no effect so far on prices. Discussions have already been held also with Japan and Korea. The general sentiment, however, is that the main problem is to achieve a firm understanding between the major European exporters.

...

General conclusions

The situation was serious and export prices damagingly low. There was surplus capacity both in West Europe and the Far East, which had to be used in a responsible manner. The Greek and Spanish cement industries were to be congratulated on their efforts to reach understanding, and other member countries were prepared, if requested, to support fully their endeavours. Small quantities expected by other countries would not disturb the market if mutual confidence prevailed.'

809 In the contested decision the Commission considers that both the existence and the content of the Cembureau agreement are confirmed by certain documents not directly relating to the

abovementioned meetings of Head Delegates. It refers in that regard to two Blue Circle internal memoranda, one dated 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334) and the other undated (contested decision, recital 18, paragraph 3; documents 33.126/11335 to 11337).

810 The first, entitled 'Strategy against imports and the future of the UK cement industry', discusses the problem of surplus production in Western Europe:

'At the moment 22 million tonnes of the West European surplus is able to be channelled to overseas markets in need of the product but there is every likelihood that this figure will collapse dramatically to 15 million tonnes or less by early 1985 and under that strain it is probable that the Cembureau principle of not transhipping to internal European markets will break down.'

811 It suggests, in particular, the following defence against cement imports:

'Actually setting up silos in "enemy" territories. A credible and possible effective option to a limited degree, but (a) will be time consuming and expensive (b) may infuriate the whole target country to even greater measures thereby totally breaking the Cembureau agreement and if so [Blue Circle] will inevitably be the greatest loser.'

812 The second Blue Circle memo, entitled 'Import threat', stated:

'Assuming that the Cembureau policy of non-transhipment holds and our assumption that the West German imports are not going to prove profitable, there would appear to be only three major residual threats ...'

813 In the course of an investigation pursuant to Article 14(2) of Regulation No 17, Cembureau stated (contested decision, recital 18, paragraph 4: document 33.126/11525):

'There is no "Cembureau Agreement or Principle" or a fortiori any other document containing implementing rules. Where such an expression is used in a document, it refers not to an anti-

competitive practice but to compliance with established practices and ethics that have gradually evolved through contact with businesses and economic development in various countries.'

814 In its reply to a statement of objections pursuant to Article 15(1) of Regulation No 17, Cembureau claimed, as regards the Blue Circle memorandum of 1 December 1983 (contested decision, recital 18, paragraph 4; documents 33.126/13568 to 13573):

'This document ... refers simply to good neighbour rules encouraged by Cembureau. The reference to the "Cembureau principle of not transhipping to internal European markets" relates to a type of conduct which is desired by members but does not in itself contain any constraint or a fortiori any penalty.

The reference to a "Cembureau agreement" concerns the same principle, involving "established practices and ethics that have gradually evolved through contact with businesses and economic development in various countries".'

815 The Commission takes the view that Cembureau itself thus ultimately indirectly admitted to the existence of the Cembureau agreement (contested decision, recital 45, paragraph 4).

816 The Commission also refers (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877) to the following statement made by Mr Kalogeropoulos, Chairman of Heracles, on 25 June 1986 (not 15 June 1986, as wrongly stated in the contested decision) at a Heracles Board Meeting:

'... there has existed and continues to exist an agreement by all the European cement producers that no one must intervene within the national frontiers of the others ... Because of this way of thinking over the last 30 years and because of this tactic, the Europeans have never had to face active competition and a decrease in prices.'

817 The Commission considers finally (contested decision, recital 45, paragraph 5) that:

'... the rule on non-transhipment to domestic markets and the regulation of sales from one country to another constitute an agreement between undertakings directly or through the intermediary of their associations, in breach of Article 85(1), through the concurrence of wills

that the domestic markets of the others should be respected and cement transfers from one country to another regulated and, thus, that the commercial freedom of the undertakings should be restricted.'

818 In the Commission's view, the agreement also has direct effects on trade between Member States (contested decision, recital 52).

819 The Commission considers that 'the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts ... constituted a "single and continuous agreement"' (contested decision, recital 46, paragraph 1, first subparagraph).

820 Accordingly, not only the concurrence of wills which emerged between Cembureau and its members at the Head Delegates meetings but also the conduct referred to in Articles 2 to 6 of the contested decision constitute a single and continuous agreement.

821 That single and continuous agreement is the agreement referred to in Article 1 of the contested decision.

822 As regards the duration of the infringement, the Commission refers (contested decision, recital 45, paragraph 6) to the abovementioned statement of Mr Kalogeropoulos:

'[Mr Kalogeropoulos] suggests that the agreement not to tranship to internal markets had existed for some 30 years. Since it does not have any other evidence than this statement to indicate that the conduct in question had lasted as long as this, the Commission considers that the agreement took effect on 14 January 1983, the date of the meeting at which "certain rules of the game which it is in the interests of all of us to follow", were discussed ..., rules which were confirmed at the following meetings of the Head Delegates.'

823 As regards the date on which the infringement ended, the Commission states that it does not have any factual evidence to determine that date and that it has no real certainty that the infringement really ceased (contested decision, recital 45, paragraph 6, and recital 65, paragraph 4).

824 On this point, the Commission concludes (contested decision, recital 65, paragraph 4):

'... since the apparently final manifestation of the agreement, known to the Commission, is the liquidation of Interciment SA [the setting-up of which formed the subject-matter of the infringement referred to in Article 4(2) of the contested decision] on 26 March 1993, the Commission has used that date for determining the reference period for the fine.'

Definition of the relevant market

825 Dyckerhoff (T-35/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Unicem (T-50/95), Buzzi (T-51/95), Asland (T-55/95), Castle (T-56/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Italcementi (T-65/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95) and Blue Circle (T-88/95) consider that by taking the market in grey cement as the relevant market, a market which it alleges to be of a European dimension, the Commission committed serious errors of assessment. Lafarge and Aalborg maintain that that market does not constitute a separate market (A). Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Buzzi, Asland, Castle, Uniland, Oficemen, Irish Cement, Italcementi, Aker, EUROC, Cementir and Blue Circle maintain that the cement market is a very local market, so that Europe cannot constitute the relevant geographical market (B).

826 CBR (T-25/95), Ciments Français, Asland and Blue Circle consider that the Commission infringed Article 190 of the Treaty by failing to define the relevant product and geographical markets with sufficient clarity (C).

A — The relevant product market

827 Lafarge and Aalborg challenge the definition of the relevant product market in recital 11, paragraph 1, of the contested decision.

828 Lafarge maintains that the definition is based on the absurd economic reasoning that clinker and cement are substitute products. The definition also ignores the distinction between grey cement and white cement.

829 The Court points out that the Commission has never claimed that clinker, grey cement and white cement are substitute products. On the contrary, it states in recital 11, paragraph 1, of the contested decision that '[i]n terms of the relevant product market, grey cement, white cement and clinker constitute separate markets, since each product meets different requirements'. The Commission merely points out (same paragraph) that 'it must be borne in mind [however] that clinker may influence the other two markets, since it is the essential intermediate product used in manufacturing grey cement and white cement'. The fact that the Commission explained that clinker is used in manufacturing cement does not mean that it regards the products as substitute products belonging to the same market.

830 Aalborg argues that each country has not only different standards for cement but also its own specific uses and traditions in construction. It is therefore inaccurate to claim, as the Commission does (contested decision, recital 6, paragraph 9), that there are one or more types of standard cement common to all domestic markets. Aalborg adds that, if the Commission chose not to distinguish between the markets in the various types of grey cement, there was no reason to distinguish the grey-cement market from the white-cement market.

831 That argument must also be rejected. The arguments put forward by Aalborg, which merely contest the definition of the market in general terms without proposing an alternative definition of the relevant market or markets, do not undermine the Commission's detailed analysis of 'grey cement' and 'white cement' in recitals 6 and 7 of the contested decision, which clearly concludes that '[w]hite cement has a different market from the grey cement market' (contested decision, recital 7, paragraph 2), 'since each product meets different requirements' (contested decision, recital 11, paragraph 1).

B — The relevant geographical market

832 Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Buzzi, Asland, Castle, Uniland, Oficemen, Irish Cement, Italcementi, Aker, EUROC, Cementir and Blue Circle deny that Europe is the relevant geographical market (contested decision, recital 11, paragraphs 1 and 7). They submit that the cement market is made up of a mosaic of regional markets which are strictly delimited, with no overlapping areas, and entirely independent of each other.

833 The Court points out, however, that the approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, a proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour (Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 159) because, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been

defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (*SPO and Others* v *Commission*, cited in paragraph 485 above, paragraph 74).

834 That is why, for the purposes of Article 85, the applicants' objections to the definition of the market adopted by the Commission cannot be seen in isolation from their objections concerning the effect on trade between Member States and the impairment of competition (*SPO and Others* v *Commission*, cited in paragraph 485 above, paragraph 75; *Enso Española* v *Commission*, cited in paragraph 718 above, paragraph 232; and Joined Cases T-374/94, T-375/94, T-383/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 90 to 105).

835 The Court must therefore reserve its examination of the various submissions that the Commission committed a manifest error of assessment when it took the view that Europe was the relevant geographical market. Those submissions will be taken into consideration when the Court examines the arguments concerning the effect on trade between Member States and the adverse effect on competition put forward in connection with the plea of infringement of Article 85(1) of the Treaty (see paragraphs 1085 to 1094 below).

C — Infringement of Article 190 of the Treaty

836 Asland complains that the Commission did not conduct an economic study of the market and of the effects of the Cembureau agreement. It submits that the definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behaviour (*SIV and Others* v *Commission*, cited in paragraph 833 above, paragraph 159).

837 Asland's argument must be rejected. In recitals 6 to 14 of the contested decision the Commission made a detailed economic analysis of the cement market. The relevant markets, in terms of both product and geographical scope, were defined in recital 11 of the contested decision. Moreover, there is no need to take account of the concrete effects of an agreement once it is clear that it has as its object the restriction, prevention or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342; Case C-227/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45, summary publication; *Commission* v *Anic*, cited in paragraph 270 above, paragraph 99; *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 178; *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 122; *CB and Europay* v *Commission*, cited in paragraph 83 above, paragraphs 85 and 87; and

Case T-144/89 *Cockerill Sambre* v *Commission* [1995] ECR II-947, paragraph 67). In Article 1 of the contested decision the Cembureau agreement was in fact found to constitute an infringement because of its anti-competitive object.

838 CBR complains that the Commission favoured a European concept of the relevant market in the contested decision without considering the arguments and economic studies submitted by CBR during the administrative procedure showing that various factors, such as the existence of national agreements and obstacles to Franco-Belgian trade, the costs associated with transport and crossing borders, and the fear of reprisals by producers in the adjoining target market limited its natural geographical market. It objects in particular to the fact that the Commission rejected the economic arguments put forward during the administrative procedure because there was no agreement on the economically acceptable transport distance (contested decision, recital 11, paragraph 3, second subparagraph). CBR adds that the Commission's argument derived from the complexity of game theory (contested decision, recital 11, paragraph 6, fifth subparagraph) and the various conclusions reached by the economic studies referred to above clearly shows that it had no intention of giving serious consideration to the economic arguments put forward by CBR. CBR then complains that the Commission drew general conclusions from the few isolated and atypical examples to which it refers in recital 11, paragraph 4, of the contested decision. Last, as regards the price differences between Member States, which the Commission sees, in recital 11, paragraph 6, of the contested decision, as an incentive to export, CBR points out that the price differences between Belgium, the Netherlands and Germany were among the lowest and that prices changed over the years, and it claims that the figures put forward in recital 9, paragraph 6, and recital 11, paragraph 6, of the contested decision in relation to the Belgian market are not supported by the tables reproduced in Annex 9 thereto, because the tables cover only a single year or provide no information on the position in Belgium.

839 The Court finds that in recital 11 of the contested decision the Commission provides a detailed and consistent account of the reasons which led it to conclude that in the present case the geographical market in question was the European market, 'consisting of a set of juxtaposed and interdependent markets' (contested decision, recital 11, paragraph 7, final subparagraph), and discusses the various observations submitted during the administrative procedure by addressees of the SO, including those submitted by CBR.

840 Thus, as regards economically acceptable transport distances, the Commission, after pointing out that there is no unanimity on this question among European cement producers (contested decision, recital 11, paragraph 3, first subparagraph), states that 'for its part [it] is not in a position to determine such distance, since it must confine itself to factual findings' (same paragraph, second subparagraph).

841 As regards the existence of oligopolies on the various markets, the Commission states (contested decision, recital 11, paragraph 6, fifth subparagraph):

'The last comment concerns the existence of oligopolies in the various markets, and consequently, the fact that each operator must, before deciding to enter the market of another, take account of the reactions of competitors and of the retaliatory measures which they might take. Without wishing to enter into game theory and the "prisoner's dilemma", ... it is not certain that each operator gains more by remaining on his own market, since game theory also shows that each operator decides to enter the others' market and risk retaliation when he considers that his long-term advantages are greater if he is present on several markets rather than only one. In addition, games between oligopolists are not simple to resolve, since there are many elements of uncertainty involved, and not just the possible retaliation of one operator or another.'

842 Contrary to what CBR claims, the Commission did not, therefore, merely reject game theory because of its complexity. It merely intended to put its significance into perspective.

843 As regards the various obstacles associated with crossing borders, the Commission takes into consideration, in recital 11, paragraph 4, of the contested decision, the comments of the Belgian producers, who 'have referred to the great difficulties involved in supplying cement to France because of the costs of waiting times at customs, the different weights allowed in the two countries, the different standards, etc. (see record of the hearing of 8 March 1993, Annex VII/B, pp. 7 and 8 and Annex VIII)'.

844 As regards, moreover, the price differences between the Belgian market and its neighbouring markets, the Commission observes (contested decision, recital 9, paragraph 6, second subparagraph):

'... Tables 7, presented at the hearing on 2 March 1993 by the Italian industry and drawn up on the basis of Cembureau figures (see Annex 9), which show the trend of prices in the Community countries from 1981 to 1991, indicate that, as between United Kingdom prices and German, French and Belgian prices, there was in 1981 a difference of some ECU 30 a tonne (the British price being around ECU 70) and of ECU 15 to 20 a tonne in 1991, that the price difference between France, Belgium and Germany, which was almost zero in 1981, gradually widened as from 1982 to reach some ECU 12 a tonne in 1986, falling back to some ECU 7 a tonne in 1991 ...'

845 It should be pointed out at the outset that the mere fact that the various tables and graphs from which the Commission extracted those trends, which are not disputed by the applicant, were not all attached to the contested decision does not constitute an infringement of the duty to state the reasons on which the decision is based.

846 As to the remainder, the Commission is not required to provide in the decision a detailed answer to all the arguments formulated during the administrative procedure by the various addressees of the SO. It is sufficient that the statement of reasons allows the Community judicature to exercise its power of review as to the legality of the contested decision and provides the undertakings and associations concerned with the necessary information to be able to determine whether or not the decision is well founded (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] 4487, paragraph 72; and Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 42).

847 In the present case it follows from the above account of the contested decision that the Commission provided the undertakings concerned and the Court with all the necessary information to assess whether the definition of the relevant geographical market which it had adopted was well founded. In those circumstances, CBR's plea of breach of the obligation to state the reasons for the definition of the geographical market in question must be rejected.

848 Last, Ciments Français alleges that there is a contradiction in the definition of the geographical reference market. In its view the Commission appears to consider, in recital 11, paragraphs 2, 6 and 7 of the contested decision, that there is both a European market for cement and a multitude of local markets. The cement market is regional. Consequently, ascribing a European dimension to the relevant market amounts to including in the same market undertakings which are not current or potential competitors and, accordingly, to denying that there is a 'geographical market'. Furthermore, in finding that there is a European dimension to the relevant market, the Commission contradicts its decision to separate the domestic agreements and concerted practices from the international agreements.

849 The Court observes that the Commission states in recital 11, paragraph 2, of the contested decision that '[i]n terms of the relevant geographic market, the cement market may be seen as a set of markets, centred around the various factories, overlapping one another and covering the whole of Europe'. It then explains, on the basis of specific examples, what led it to conclude that the cement market had a European dimension (recital 11, paragraphs 3 and 4) and then to the view that the various factors (natural obstacles, transport costs and distances, low level of exports, considerations of profitability, oligopolistic structure of the markets, geographical separation of the markets) put forward during the administrative procedure by the addressees of the SO were not susceptible of invalidating its view that the market in question was a European one (contested decision, recital 11, paragraphs 5 and 6).

850 From its observations the Commission (contested decision, recital 11, paragraph 7) ultimately concludes as follows:

'All the overlapping markets are interdependent on one another, and any action taken on one market may have an impact on the most distant markets. This is demonstrated by the following facts. The meetings of the Cembureau Head Delegates ..., which brought together the whole of

the European industry, including that not directly concerned at the time, took place to ensure that the phenomenon of intra-Community trade did not spread in volume and gravity and to advise a reduction in price differences between markets so as to limit export temptations. The agreements between Greek and Spanish producers within the Cement Marketing Association were viewed as being fundamental to equilibrium within Europe. The reaction to Greek exports to the United Kingdom and Italy was a collective reaction by the European industry, because it was considered that cooperation between the entire European industry was essential to safeguard its stability and not just that of the industry in the countries threatened.

It is evident from the above that Europe is the relevant market, consisting of a set of juxtaposed and interdependent markets.'

851 It is impossible to detect any contradiction in the reasons underlying the definition of the relevant geographic market as thus presented. Nor is there any contradiction between the definition of the market in the contested decision as European and the Commission's separation of the domestic objections from the international objections during the administrative procedure. It must be pointed out that the international objections, the only ones to which the contested decision relates, do not depend on the existence of the national agreements and concerted practices which had also been called in question in the SO (see paragraphs 110 to 120 above).

Consistency between the SO and the contested decision

852 CBR (T-25/95) claims that in the SO the Commission maintained that the 'rules of the game' on which the members of Cembureau agreed at the meeting of Head Delegates held on 14 January 1983 related to the Basing point system (hereinafter 'BPS'), but then changed its approach. Following the comments which CBR made during the administrative procedure concerning the legality of that system and of the discussions which took place at the Head Delegates meeting, the Commission ultimately took the view in the contested decision that the 'rules of the game' in question referred to an agreement not to tranship to domestic markets.

853 Aalborg (T-44/95) claims that the object of the Cembureau agreement was not set out in sufficient detail in the SO. Nor was Aalborg aware during the administrative procedure that the Commission would attach major significance to the Head Delegates meetings held on 14 January 1983 and 19 March 1984.

854 The Court points out that in the SO the Commission complained of the conclusion of the Cembureau agreement and the fixing of the rules of fair competition (points 8, 9, 60 and 61) in

the framework of the Head Delegates meetings. Those rules were not, however, the subject-matter of any complaint in the contested decision.

855 Under the heading 'Agreements and concerted practices on the home market rule' the Commission, in point 61 of the SO, made the following assessment of the facts described in point 9 of the SO, which mainly related to the Head Delegates meeting on 14 January 1983:

'As may be seen from point 9, Cembureau and its members adopted the "Cembureau agreement or Cembureau principle of not transhipping to internal European markets"; they encouraged the agreements on exports to third countries so as to prevent "the risk of a destabilisation in Europe" through the exporting of surplus output to the Cembureau countries; they promoted bilateral or multilateral contacts between members so that appropriate measures could be adopted to ensure that, apart from "traditional or even structural inter-State trade, e.g. exports from Germany and Belgium to the Netherlands", "transfers of cement between member countries" did not "have harmful consequences" for the cement industry.'

856 It follows that in the SO the Commission clearly indicated that in its view the Cembureau agreement related to the principle of non-transhipment to domestic markets and the regulation of sales from one country to another and that that 'rule of the game' had been agreed at the Head Delegates meeting held on 14 January 1983. The SO therefore referred in sufficient detail to the Cembureau agreement mentioned in Article 1 of the contested decision.

857 As regards Aalborg's argument that during the administrative procedure it was unaware of the significance that the Commission was going to attach to the meetings of Head Delegates held on 14 January 1983 and 19 March 1984, the Court finds that the SO set out in detail the facts relating to those meetings, as regards both the 'circulation of prices between Cembureau members' (SO, point 8) and the 'Cembureau agreement or Cembureau principle of not transhipping to internal European markets' (SO, paragraph 9(a) and (b)). Aalborg, which does not deny having participated, as a direct member of Cembureau, in the two meetings in question, must therefore have been aware of the very special importance which the Commission attached to those meetings.

858 FIC (T-30/95) and Aalborg also claim that in the SO the Commission did not state whether the alleged rule on non-transhipment to internal markets adopted within Cembureau was an agreement or a concerted practice.

859 The Court points out that in the SO (point 61(a)) the Commission explained that '[t]he "Cembureau agreement or principle of not transhipping to internal European markets" (point 9) constitutes an agreement and/or a concerted practice'. Accordingly, the addressees of

the international chapters of the SO, including FIC and Aalborg, were informed during the administrative procedure that the 'Cembureau agreement or principle of not transhipping to internal European markets' might be characterised as an agreement in the contested decision. They were therefore put in a position to defend themselves against such a legal characterisation of the conduct in question.

860 It follows that the Court must reject the various arguments alleging inconsistency between the SO and the contested decision in regard to the infringement referred to in Article 1 of the contested decision.

The existence of the Cembureau agreement

861 CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Ciments Luxembourgeois (T-34/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Vicat (T-37/95), Cedest (T-38/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), Rugby (T-53/95), Castle (T-56/95), Heracles (T-57/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Titan (T-64/95), Italcementi (T-65/95), Holderbank (T-68/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95), Blue Circle (T-88/95), AGCI (T-103/95) and Halkis (T-104/95) submit that the Commission infringed Article 85(1) of the Treaty by finding in Article 1 of the contested decision that there was a Cembureau agreement (A). Cembureau, Dyckerhoff, SFIC and Heidelberger contend that the finding of the infringement referred to in Article 1 of the contested decision is based on inadequate or contradictory reasoning, contrary to Article 190 of the Treaty (B). Some of the applicants concerned by the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 to 168 above) relied, in the statements which they subsequently lodged, on various documents which they claim would have been of use to their defence had they been accessible during the administrative procedure. Italcementi and Blue Circle also claim that there has been a breach of their rights of defence in that they did not have proper access to the incriminating evidence in the file (C).

A — Infringement of Article 85(1) of the Treaty

862 It should be recalled that the Commission relied solely on the specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision in order to prove the existence of the Cembureau agreement.

863 A first set of arguments put forward by the applicants concerned disputes the probative value of the documents referred to in recital 18 of the contested decision: those documents point to the existence of a Cembureau agreement or principle of not transhipping to internal European

markets (internal Blue Circle memoranda (contested decision, recital 18, paragraphs 2 and 3; documents 33.126/11332 to 11334 and 11335 to 11337)) or to the existence of an agreement between European cement producers (statement made by Mr Kalogeropoulos at the Heracles board meeting held on 25 June 1986 (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877)). The applicants suggest an alternative reading of the documents in question, compatible with Article 85(1) of the Treaty. They claim that Cembureau never recognised the existence of a Cembureau agreement or principle (1). A second set of arguments relates specifically to the Head Delegates meetings during which the Cembureau agreement is alleged to have been concluded and confirmed. The applicants state that the Head Delegates were not competent to conclude such an agreement and they also dispute the probative value of a number of documents referred to in recitals 19 and 45 of the contested decision. The lawfulness of the discussions held at the Head Delegates meetings is apparent not only from the documents referred to in those two recitals but also from documents which the Commission omitted to examine. A number of the applicants further rely on specific arguments which contradict the existence of a Cembureau agreement (2). A third set of arguments disputes the unlawful nature of the alleged Cembureau agreement and criticises the Commission for not seeking an alternative explanation for the low volumes of inter-State trade in cement (3). These various arguments will be examined in turn and the Court will then draw conclusions from its findings (4).

864 First, however, the Court observes that some applicants challenge the probative value of documents relating to conduct which is not criticised in the contested decision.

865 Thus Cembureau, Blue Circle, FIC and Italcementi question the probative value of the handwritten Italcementi note on the Executive Committee meeting held on 14 April 1986 (contested decision, recital 17, paragraph 9; document 33.126/3185). Blue Circle also refers to the draft record of the Executive Committee meeting held on 9 November 1983 (contested decision, recital 17, paragraph 5; documents 33.322/286 to 294).

866 Irish Cement claims that the Commission cannot infer from the draft record of the Executive Committee meeting held on 9 November 1983 (contested decision, recital 17, paragraph 5; documents 33.322/286 to 294), and in particular from what was said at the meeting by Mr Bertrán and Mr Van Hove, that the Cembureau agreement was confirmed at that meeting.

867 The Court finds that in order to establish the existence, the conclusion or the confirmation of the Cembureau agreement the Commission did not rely on any of the documents referred to by the applicants. Those documents were referred to in recital 17, paragraphs 5 and 9, of the contested decision purely to illustrate the discussions held between the European cement producers during the period in question on 'fair or healthy or proper' competition. Those discussions were not the subject-matter of a complaint in the contested decision. The arguments concerning the probative value of the corresponding documents therefore have no relevance to the assessment of the legality of Article 1 or of any other article of the contested decision.

868 Heidelberger states that the handwritten notes to which the Commission refers at the end of recital 19, paragraph 6, of the contested decision (documents 33.126/11587 to 11592) give no indication of the identity of their author and are largely illegible. That deprives them of any probative value. Furthermore, the notes relate to the preparations for a Head Delegates meeting held on 14 January 1982 and therefore have no connection with the Head Delegates meeting called in question in recital 19(a) of the contested decision.

869 The Court observes, however, that, as those notes are not included in the documentary evidence on which the Commission relied in recitals 18, 19 and 45 of the contested decision (see paragraphs 790 to 817 above) in order to prove the existence of the Cembureau agreement, there is no need to examine their probative value in relation to the infringement referred to in Article 1 of the contested decision.

870 Heidelberger also claims that the conclusions which the Commission draws in the SO (p. 20, footnote 5) from the handwritten notes entitled 'Preparation Meeting of Head Delegates 7.11.84' (contested decision, recital 19, paragraph 15; document 33.126/11758) relating to the existence of collaboration within Cembureau on the 'restructuring and reduction of production capacities in some surplus countries' are not supported by the 'summary notes' of 12 November 1984 relating to the Head Delegates meeting held on 7 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755).

871 The Court points out that in the SO the Commission, after stating that the handwritten notes in question 'show[ed] that the restructuring and reduction of production capacities in some surplus countries [had been] agreed within Cembureau', none the less went on to say that it '[did] not have any proof of such collaboration apart from these items of evidence and some others' (SO, p. 20, footnote 5). Furthermore, the objection that there was collaboration within Cembureau on the restructuring and reduction of production capacities was not pursued in the contested decision. It follows that Heidelberger's argument is irrelevant.

1. Documents referred to in recital 18 of the contested decision

872 In recital 18, paragraphs 2 and 3, of the contested decision, headed 'The Cembureau agreement or Cembureau principle of not transhipping to internal European markets', the Commission refers first of all to two internal Blue Circle memoranda, one dated 1 December 1983 (documents 33.126/11332 to 11334) and the other undated (documents 33.126/11335 to 11337), which are the only documents mentioned in the contested decision that refer expressly to a Cembureau agreement or principle of not transhipping to internal European markets. In the same recital, paragraph 5, the Commission also mentions the statement made by Mr Kalogeropoulos, Chairman of Heracles, at the Heracles board meeting held on 25 June 1986 (documents 33.126/19875 to 19877), which refers to the existence of 'an agreement by all the

European cement producers that no one must intervene within the national frontiers of the others'. The Commission also refers (paragraph 4) to statements by Cembureau itself concerning the Cembureau agreement or principle (documents 33.126/11525 and 13568 to 13573).

873 In its legal assessment of the conduct referred to in Article 1 of the contested decision the Commission relies directly on the abovementioned documents (contested decision, recital 45). The Commission regards those documents as key evidence of the existence of the Cembureau agreement.

874 It is necessary to examine in turn the various arguments put forward by the applicants in respect of those documents.

1.1. Internal Blue Circle memoranda

875 First, Italcementi disputes the probative value of the Blue Circle memoranda (documents 33.126/11332 to 11334 and 11335 to 11337). The memoranda set out unilateral statements by one producer, which refer neither to the parties to, nor the subject-matter of, the alleged agreement. Cembureau maintains that the Blue Circle memoranda do not refer to the existence of a Cembureau agreement: the author apparently has in mind the solutions to a number of trade problems. Lafarge also disputes the probative value of those memoranda, on the grounds that Blue Circle is not a member of Cembureau and the author of the memoranda did not attend the Head Delegates meetings. Aalborg, Uniland and Oficemen also point out that the author of the memoranda was not present at the Head Delegates meeting held on 14 January 1983.

876 The Court points out that, contrary to what Italcementi and Cembureau claim, both internal memoranda refer to an agreement, a principle or a policy of not transhipping to internal European markets which the memoranda link to Cembureau.

877 Furthermore, although Blue Circle is not a direct member of Cembureau, it did in fact have a role within that association. It is common ground that between 1975 and 1985 its chairman, Sir John Milne, acted within Cembureau as Head Delegate for the United Kingdom cement industry before he became Chairman of Cembureau. In his capacity as Head Delegate he participated in the three Head Delegates meetings at which the Cembureau agreement was concluded and confirmed. Mr G. Marshall, the deputy managing director of Blue Circle, succeeded Sir John Milne as United Kingdom Head Delegate when he became Chairman of Cembureau. As regards Mr Reiss, the author of the internal memoranda, it is apparent from Blue Circle's answer to a written question put by the Court which was lodged at the Court Registry on 12 December 1997 that when the memoranda were drafted he held the post of

regional director in Blue Circle's export division. It is also common ground that he participated in numerous meetings of the EPC (contested decision, recital 45, paragraph 3; documents 33.126/11339, 11417 to 11440, 11442 to 11455, 13845 to 13850, 14035 to 14042, 14062 to 14085, 14094 to 14097, 14148 to 14154 and 14401 to 14418), frequently accompanied by Mr Marshall, the deputy managing director (documents 33.126/11365, 11447 and 14062). Although, as Blue Circle claims, documents 33.126/11417 to 11440 and 13845 to 13850 cannot be used against it because it did not have access to them during the administrative procedure, the fact that Mr Reiss was present at various EPC meetings is sufficiently clear from the other documents referred to in recital 45, paragraph 3, of the contested decision.

878 In those circumstances, the Commission was entitled to take the view that the Blue Circle memoranda were 'valid evidence because of Blue Circle's role within Cembureau and Mr Reiss's role within Blue Circle' (contested decision, recital 45, paragraph 3, first subparagraph). Having regard to the leading role which the Blue Circle management played within Cembureau and Mr Reiss's position within Blue Circle, it could be concluded that the author of the memoranda had, with full knowledge of the facts, indicated that there was an agreement, a principle or a policy of not transhipping to internal European markets and connected that agreement, principle or policy with Cembureau.

879 It is true, however, as Italcementi maintains, that the Blue Circle internal memoranda do not identify the parties which subscribed to the Cembureau agreement, principle or policy of not transhipping to internal European markets. It will be necessary later to consider whether the participation of the various undertakings and associations of undertakings in the agreement referred to in Article 1 of the contested decision is actually established.

880 Second, CBR, FIC, Ciments Français, Oficemen and Blue Circle submit that the expressions 'Cembureau principle' or 'Cembureau agreement' used by the author of the internal memoranda could in reality be 'shorthand' referring to economic circumstances which naturally limit transhipment of cement between producer countries. Ciments Français adds that the marginal nature of flows within the Community was the consequence of the actual features of the European cement industry and not of an agreement between European producers.

881 That argument cannot be accepted. Words or expressions such as 'agreement', 'principle' or 'Cembureau policy' cannot refer to an economic fact. Furthermore, if the author of the memoranda had actually been referring to an economic fact which naturally limited the transhipment of cement he would not have mentioned the danger that the 'Cembureau agreement' would be totally broken as a result of retaliatory measures which might be taken by a 'target' country in response to Blue Circle's presence on its territory (memorandum of 1 December 1983, point 4) or that the 'Cembureau policy of non-transhipment' would not hold (undated memorandum; see paragraphs 809 to 812 above).

882 Third, Cementir claims that both the internal memoranda concern dumped imports from Eastern Europe and Spain. Blue Circle claims that they concern dumped imports from countries which subsidise their cement production.

883 The Court finds that the Blue Circle memorandum of 1 December 1983 concerns, *inter alia*, dumped imports from Spain. Point 1 mentions a measure already taken against those imports: '[a]nti-dumping suit which if successful in 1984 may be useless in the long term if Spain joins the EEC'.

884 The undated memorandum refers to imports from East Germany and Poland. It cannot be ruled out that those imports were dumped.

885 However, those findings are not of such a nature as to affect the Commission's conclusion that an agreement on non-transhipment to internal European markets was concluded within Cembureau or to preclude the possibility that both the Blue Circle internal memoranda referred to that agreement. The memoranda, entitled 'Strategy against imports and the future of the UK cement industry' and 'Import threat', both concerned the general problem of cement imports into the United Kingdom. It was therefore natural that they should deal both with the problem of imports from Cembureau countries and the problem of imports from other countries. In any event, even imports from countries outside Cembureau represented a threat to the principle of non-transhipment to internal European markets as described in the Blue Circle memoranda. Dumped imports threatened to increase European production surpluses, which would then have to be channelled outside Europe in order to safeguard the Cembureau principle of non-transhipment to internal European markets. In that regard, the memorandum of 1 December 1983 clearly stated that owing to the impossibility of finding outlets in overseas markets for West European surplus the principle was in danger of breaking down. Last, even dumped imports from countries which did not then belong to the Community could amount to a breach of the Cembureau principle of not transhipping to internal *European* markets. The entire European cement industry was represented within Cembureau. Thus the Spanish Head Delegate participated in the Head Delegates meeting held on 14 January 1983 (contested decision, recital 19, paragraph 4; document 33.126/11581) and the one held on 19 March 1984 (contested decision, recital 19, paragraph 8; documents 33.126/11699 and 11700). For that reason the Commission considered that the Spanish producers were bound by the Cembureau agreement with effect from 14 January 1983, although their participation did not then constitute an infringement of Article 85(1) of the Treaty (contested decision, recital 45, paragraph 11) because their conduct did not produce any significant effects within the Community.

886 It follows that even if the Blue Circle memoranda related to problems of dumped cement imports from Spain and Eastern Europe, such a circumstance would not have affected the legality of Article 1 of the contested decision, because the memoranda connected the cement

imports with the survival of the Cembureau agreement, principle or policy of not transhipping to internal European markets.

887 There is no factual basis to Blue Circle's contention that the memoranda concerned dumped cement imports from countries that subsidised their cement production. The problem of State aid to producers in other countries was referred to only once in the memorandum of 1 December 1983 (point 4) and only in connection with the possible reaction of a 'target' country in which Blue Circle had decided to set up silos as a counter-measure to cement imports from that country.

888 Fourth, FIC and Blue Circle pointed out at the hearing that the author of the memoranda, Mr Reiss, dealt with Blue Circle's exports. His memoranda therefore refer to an agreement concerning the non-European market whose aim was to ensure that European cement exported to non-European countries was not re-imported into Europe. FIC also stated that the use of the word 'transhipment' in the memoranda corroborates that interpretation. 'Transhipping' refers to 'transit countries', that is, non-European countries. Furthermore, the reference in point 4 of the memorandum of 1 December 1983 to 'non-oil producing latin economies' is to the economies of South America and thus confirms that the Cembureau agreement or principle did not concern the Community market.

889 The Court observes, first of all, that the applicants never submitted such an explanation of the Blue Circle memoranda before the oral procedure in Cases T-30/95 and T-88/95 was opened.

890 The argument must in any event be rejected and there is no need to determine whether it is admissible.

891 The agreement relating to the non-European market to which the applicants refer would have required the approval of traders from non-European countries who bought cement produced in Europe. Where cement produced in Europe is sold in an overseas market, the purchaser is at liberty to re-export it to the Community. In those circumstances, an agreement such as that alleged by Blue Circle and FIC, which would have involved the consent of parties outside Cembureau, would not have been described by the author of the memoranda as the 'Cembureau' agreement, principle or policy.

892 Moreover, irrespective of the reference to Cembureau, if FIC's and Blue Circle's interpretation were correct it would have been natural for the author of the memoranda to have described the

object of the agreement to be non-transhipment to the European market, since that agreement would have been an agreement designed to ensure that cement produced in Europe and exported to non-European countries was not re-imported into Europe. In those circumstances, the reference to non-transhipment to internal European markets, in the plural in the memorandum of 1 December 1983, confirms the Commission's reading of the memoranda as meaning that the Cembureau agreement, principle or policy related to trade within Europe.

893 Furthermore, FIC's and Blue Circle's interpretation is contradicted by the following extract from the memorandum of 1 December 1983:

'At the moment 22 million tonnes of the West European surplus is able to be channelled to overseas markets in need of the product but there is every likelihood that this figure will collapse dramatically to 15 million tonnes or less by early 1985 and under that strain it is probable that the Cembureau principle of not transhipping to internal European markets will break down.'

894 If FIC's and Blue Circle's interpretation were correct, a fall in demand in the overseas market would not have presented any problem for the Cembureau agreement. The smaller the quantities of cement imported, the lower the risk that the exported cement would be re-imported into the European market. Furthermore, FIC does not establish that at the material time cement imports from South American countries represented a threat to the European cement industry. The reference to 'non-oil producing latin economies' must therefore be interpreted as referring to latin European economies. That interpretation is borne out by the reference to cement imports from Spain in point 1 of the memorandum of 1 December 1983.

895 In any event, the various interpretations suggested by Blue Circle and FIC are contradictory, as the 'economic fact' which would 'naturally limit the transhipment of cement' (see paragraph 880 above) would not prevent cement sold by European cement producers in overseas markets, in particular in the South American market, from being re-imported into Europe.

896 Fifth, Irish Cement and Cementir consider that the reference in the undated Blue Circle memorandum (contested decision, recital 18, paragraph 3; documents 33.126/11335 to 11337) to imports from West Germany is inconsistent with the existence of the Cembureau agreement.

897 The Court finds, however, that the existence of imports from West Germany is not such as to shed a different light on the express and unequivocal reference by the author of that memorandum to the 'Cembureau policy of not transhipping to internal markets'. Furthermore, it is clear that in the memorandum to the Chairman concerning the Head Delegates meeting held on 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728

and 11729) exports from Germany to the United Kingdom and Ireland, which are described as a 'hot spot', were seen as problematical (see paragraph 804 above). It must therefore be concluded that the Cembureau agreement, principle or policy of not transhipping to internal European markets to which the Blue Circle memoranda refer was not successful everywhere. However, the fact that an agreement is not observed by everyone does not mean that it does not exist (see, to that effect, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 135).

898 Sixth, FIC observes that the author of the Blue Circle memorandum of 1 December 1983 paints a very negative picture of the situation, despite the fact that the memorandum was drafted only four months before the meeting of 18 March 1984, which, on its reading of the contested decision, found that the alleged Cembureau agreement had been a success. That undermines the probative value of the documents in question.

899 That argument must also be rejected. The content of the documents relating to the Head Delegates meeting held on 19 March 1984 is along the same lines as that of the two Blue Circle memoranda. Although the notes on that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) stated that '[p]ressure from inter-member trade had slackened considerably through improved bilateral contacts' and that '[e]xports had tended to shrink', there was 'still a threat from outsiders' (see paragraph 806 above). Furthermore, in the memorandum to the Chairman concerning the meeting on 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) various 'hot spots' are identified, one of which is also mentioned in the undated Blue Circle memorandum, namely exports from Germany (see paragraph 897 above). In the same document it is also stated (see paragraph 803 above) that '[t]he gap between [prices in the various Cembureau countries], which is between 1 and 2, inevitably constitutes a temptation. It is therefore desirable ... to reduce that gap'. The first paragraph of the Blue Circle memorandum of 1 December 1983 refers to the problem of high prices in the United Kingdom as follows: 'The one and only reason we are suffering imports ... is our price .... the cause is basically our ex works price of about £40 against a large European surplus available at £17 FOB or £25 into silo in the [United Kingdom]'. It is not surprising, therefore, that Blue Circle should paint a rather negative picture of the situation a few months before the Head Delegates meeting on 19 March 1984.

900 Seventh, and last, Cementir disputes the probative value of the undated Blue Circle memorandum, in particular on the ground that it is undated.

901 That argument must also be rejected. The mere fact that a document is undated does not mean that it cannot contain evidence of the existence of an infringement. Furthermore, the other Blue Circle memorandum, which is dated 1 December 1983, and the documents relating to the Head Delegates meetings (see paragraphs 790 to 808 above) make it possible to date the 'Cembureau policy of not transhipping to internal markets' referred to in the undated memorandum.

1.2. Statement by Mr Kalogeropoulos at the Heracles Board Meeting held on 25 June 1986

902 First, CBR, FIC, Ciments Français, Lafarge, Aalborg, Heracles, Uniland, Oficemen, Irish Cement and Blue Circle claim that the statement made by Mr Kalogeropoulos, the Chairman of Heracles, at its Board Meeting on 25 June 1986 (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877) is not susceptible of establishing, and even contradicts, the existence of the alleged Cembureau agreement. They maintain that the statement concerns an alleged agreement which had existed for 30 years. It cannot therefore be the agreement referred to in Article 1 of the contested decision, which is alleged to have existed since 14 January 1983. The applicants in question submit that the statement makes no reference to Cembureau. They state that Mr Kalogeropoulos was a politician who had just become Chairman of Heracles and who was unfamiliar with the reality of the cement industry. In order to justify the grant of State aid to his undertaking, he was attempting to find external reasons for the internal problems experienced by his undertaking, which were in fact due to certain strategic errors.

903 The Court observes that although the statement made by Mr Kalogeropoulos does not refer to Cembureau it contains an unequivocal reference to the existence of an agreement between European cement producers designed to protect internal markets. He stated that 'there ha[s] existed and continue[s] to exist an agreement by all the European cement producers that no one must intervene within the national frontiers of the others'.

904 As regards the starting date of the infringement referred to in Article 1 of the contested decision, the Court points out that the fact that the Commission took 14 January 1983 as the starting date of the infringement, rather than an earlier date in view of the 30-year period for which Mr Kalogeropoulos claims the agreement had been in existence, does not adversely affect the applicants and does not impair the evidential value of the statement as regards the actual existence of an agreement between European cement producers.

905 In the contested decision the Commission explains that, in the absence of any evidence other than the statement by Mr Kalogeropoulos to indicate that the Cembureau agreement had lasted as long as he claimed, it 'considers that the agreement took effect on 14 January 1983, the date of the meeting at which "certain rules of the game which it [was] in the interests of all ... to follow" were discussed' (contested decision, recital 45, paragraph 6).

906 That approach by the Commission cannot be challenged. The fact that in 1986 an agreement between European cement producers not to tranship to internal markets had been in force for some 30 years does not preclude the possibility that at the Head Delegates meeting on

14 January 1983 a concurrence of wills was re-affirmed in regard to non-transhipment to internal markets and the regulation of sales from one country to another.

907 As regards the argument that Mr Kalogeropoulos was not familiar with the reality of the cement industry, it is not credible that he should make a statement to the board of his undertaking without being informed of the industrial and commercial environment in which that undertaking operated. Furthermore, the document in question contains no reference to State aid to Heracles or any indication that the criticisms which Mr Kalogeropoulos directed at the United Kingdom and European producers was intended to conceal past strategic errors. In any event, the statement by the Chairman of Heracles does not seek to justify its earlier conduct. It outlines the company's current strategy regarding exports to the United Kingdom market and explains why those cross-border sales provoked such sharp reactions on the part of other European producers.

908 Second, Lafarge also relied at the hearing on the document 'Exports of Greek cement to England' (document 33.126/11116) of 3 October 1986, signed by Mr Kalogeropoulos on behalf of Heracles and by Mr Canellopoulos on behalf of Titan. Lafarge maintains that in that document Mr Kalogeropoulos denied that cement exports from Greece had been subsidised. As it contains a 'gross untruth,' that document undermines his credibility. It follows that the statement which he made on 25 June 1985 cannot be regarded as having any probative value.

909 The document entitled 'Exports of Greek cement to England' (document 33.126/11116) is a document sent to British producers or the British authorities in which the Greek producers put into perspective the threat which their exports represented to British producers. The Court points out that the document does not comment on whether the Greek producers received State aid. On that point, it merely states: 'it is beyond any doubt that the Greek cement industry possesses, by international standards, modern, high-efficiency installations, whereas its British counterpart is to a large extent technologically obsolete, burns approx. 30% more fuel per ton of cement and employs twice as much staff. Consequently, Greek competitiveness relies on modern technology and efficiency, which were achieved with heavy investment and hard work'. The document does not state, however, whether the Greek industry received State aid to carry out those heavy investments. Lafarge's argument is therefore unsubstantiated and must be rejected.

910 Third, Cementir emphasises that the statement by the Chairman of Heracles was made more than three years after the alleged conclusion of the Cembureau agreement. It cannot therefore constitute evidence of the infringement referred to in Article 1 of the contested decision.

911 That argument must also be rejected. The circumstance relied on by Cementir does not affect the probative value of the statement as regards the existence of an agreement between all European cement producers not to tranship to home markets. On the contrary, the fact that the Chairman of Heracles stated in June 1986 that 'there ha[s] existed and continue[s] to exist an agreement by all the European cement producers that no one must intervene within the national frontiers of the others' is perfectly consistent with the conclusions which the Commission drew as to the unlawfulness of the purpose of the Head Delegates meetings held in 1983 and 1984.

912 Fourth, and last, Aalborg maintains that in his statement the Chairman of Heracles must have been referring to an agreement which was binding on some but not all European cement producers.

913 The Court finds that in reality the statement made by the Chairman of Heracles shows the existence of two closely connected agreements: first, the specific agreement reached in 1986 between the United Kingdom producers and a number of other European cement producers designed to deal with the threat which exports from Greece had represented since 1986 and, second, the general and longstanding agreement between 'all European cement producers' that 'no one must intervene within the national frontiers of the others', which explains precisely why support was given to the United Kingdom producers by the other West European producers in their fight against imports of cement from Greece. Aalborg's argument must therefore be rejected.

1.3. Admission by Cembureau

914 Cembureau claims that it has never acknowledged the existence of the Cembureau agreement. Contrary to what the Commission alleges in recital 45, paragraph 4, of the contested decision, it has argued throughout the administrative procedure that there 'is no "Cembureau agreement or Principle" or *a fortiori* any other document containing implementing rules' (reply provided by Cembureau in the course of an investigation pursuant to Article 14 of Regulation No 17; contested decision, recital 18, paragraph 4; document 33.126/11525). Any other comment which Cembureau may have made concerning the alleged Cembureau agreement was pure speculation on its part. Ciments Français, Uniland, Oficemen and Cementir also maintain that Cembureau has always denied the existence of the Cembureau agreement.

915 The Court observes, however, that although Cembureau has formally denied the existence of the Cembureau agreement, it has none the less stated in the context of an investigation pursuant to Article 14 of Regulation No 17 (contested decision, recital 18, paragraph 4; document 33.126/11525) as follows:

'Where such an expression is used in a document, it refers not to an anti-competitive practice but to compliance with established practices and ethics that have gradually evolved through contact with businesses and economic development in various countries.'

916 Similarly, in response to a statement of objections pursuant to Article 15(1) of Regulation No 17, Cembureau stated with regard to the Blue Circle memorandum of 1 December 1983 (contested decision, recital 18, paragraph 4; documents 33.126/13568 to 13573):

'[This document] refers simply to good neighbour rules encouraged by Cembureau. The reference to the "Cembureau principle of not transhipping to internal European markets" relates to a type of conduct which is desired by members but does not in itself contain any constraint or a fortiori any penalty.

The reference to a "Cembureau agreement" concerns the same principle, involving "established practices and ethics that have gradually evolved through contact with businesses and economic development in various countries".'

917 It follows from the foregoing that Cembureau has merely denied the existence of a formal Cembureau agreement but not the existence of a concurrence of wills on the part of Cembureau and its members. Thus it acknowledged during the administrative procedure that the Cembureau agreement or principle referred to compliance with good neighbour rules which had been 'encouraged by Cembureau' itself and which, moreover, were 'desired by members' (contested decision, recital 18, paragraph 4; documents 33.126/13568 to 13573). A concurrence of wills between an association and its members concerning good neighbour rules or established practices and ethics constitutes an agreement within the meaning of Article 85(1) of the Treaty, even if the binding element of the agreement is lacking (*Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraphs 85 and 86).

918 Cembureau cannot claim that its description of the Cembureau agreement is pure speculation on its part. Where it describes the content of the good neighbour rules which it 'encouraged', it does so in full knowledge of the facts. In the light of the documents already examined (see paragraphs 875 to 913 above) and the documents relating to the Head Delegates meetings (see

paragraph 929 to 1095 below), it cannot be claimed that the good neighbour rules or the established practices and ethics concerned anything other than non-transhipment to internal markets.

919 The Court therefore concludes that the Commission was justified in taking the view in the contested decision that through the periphrases which it used in the course of an investigation pursuant to Article 14 of Regulation No 17 and in a reply to a statement of objections pursuant to Article 15(1) of Regulation No 17 Cembureau 'acknowledge[s] the existence of the agreement on non-transhipment and on regulation of sales' (contested decision, recital 45, paragraph 4).

1.4. Conclusions

920 It follows from all the foregoing that none of the circumstances invoked by the applicants are such as to affect the probative value of the two internal Blue Circle memoranda, the statement by Mr Kalogeropoulos, the Chairman of Heracles, on 25 June 1986, or the statements by Cembureau during the administrative procedure. It must be observed, on the contrary, that those documents constitute objective and consistent evidence of the existence of an agreement between European cement producers having as its object non-transhipment to internal markets and the regulation of sales from one country to another.

2. Conclusion of the Cembureau agreement at the Head Delegates meeting held on 14 January 1983 and confirmation of that agreement at the Head Delegates meetings held on 19 March and 7 November 1984

921 According to the Commission, the Cembureau agreement was concluded by Cembureau and its members at the meeting of Head Delegates held on 14 January 1983 (contested decision, recital 45, paragraph 1). It was an agreement that restricted competition and affected trade between Member States, contrary to Article 85(1) of the Treaty (contested decision, recital 45, paragraph 5, recital 52 and Article 1). The content of the agreement was confirmed at the meetings of Head Delegates held on 19 March and 7 November 1984 (contested decision, recital 45, paragraph 2).

922 Before considering the arguments relating to the documentary evidence on which the Commission's findings are based and all the other arguments relating to the Head Delegates meetings in question, the Court will consider the argument that the Head Delegates were not competent to conclude a commercial agreement.

2.1. The competence of the Head Delegates to conclude the Cembureau agreement

923 CBR, Cembureau, FIC, VNC, Dyckerhoff, SFIC, Vicat, Heidelberger, Lafarge, BDZ, Rugby, Castle, ATIC, Italcementi, Aker, EUROC and Cementir state that the object, structure and activities of Cembureau were perfectly legitimate and claim that the Head Delegates were not competent to conclude an agreement contrary to Article 85(1) of the Treaty. Under Cembureau's Articles of Association only decisions of the General Assembly are binding on the members of that association. Lafarge states that no Cembureau organ, whether the General Assembly or the Head Delegates, was authorised to adopt commercial or industrial policy decisions capable of binding the cement industry. VNC states that the Head Delegates meetings were not a Cembureau organ. Those meetings were merely a forum for informal discussion.

924 The Court points out that the first subparagraph of paragraph 6 of Cembureau's Articles of Association applicable during the period to which the contested decision relates states:

'Members' privileges to decide on the activities of the Association are exercised in the General Assembly, which is constituted by representatives appointed by Members. Before each Meeting of the General Assembly, Members shall nominate the representative of the country who shall cast the votes.'

925 The Members' representatives who cast the votes at the General Assembly are called 'Head Delegates'.

926 That name was confirmed by Cembureau in its reply to the SO, page 7 (contested decision, recital 15, paragraph 4):

'As is the case with government representatives on international bodies, and despite the fact that the title "Head Delegates" is not provided for in the Articles ..., a person was appointed "Head Delegate" in order to cast votes in the General Assembly. Cembureau kept an up-to-date list of such "Head Delegates".'

927 Although the Head Delegates were not as such an organ provided for in Cembureau's Articles of Association, they were, throughout the period to which the contested decision relates, of considerable and even predominant importance within Cembureau, since they cast the votes at its General Assembly. Furthermore, they were the de facto representatives of the cement industry of the various Cembureau member countries. The Head Delegates meetings were

therefore a de facto framework within which an agreement such as that referred to in Article 1 of the contested decision could be concluded.

928 The argument that neither Cembureau nor the Head Delegates were empowered by the Articles of Association to conclude the Cembureau agreement must therefore be rejected. Accordingly, it is necessary only to examine whether the Head Delegates actually concluded an agreement contrary to Article 85(1) of the Treaty at the meeting held on 14 January 1983 and whether that agreement was confirmed at the meetings held on 19 March and 7 November 1984. To accept the argument of the applicants concerned would in effect deprive Article 85(1) of the Treaty of all practical effect, since the Articles of Association of an undertaking or association of undertakings never permit the conclusion of agreements with an unlawful purpose.

2.2. Conclusion of the Cembureau agreement at the Head Delegates meeting held on 14 January 1983

929 CBR, Cembureau, FIC, ENCI, VNC, Ciments Luxembourgeois, Dyckerhoff, SFIC, Vicat, Cedest, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Rugby, Castle, Heracles, Uniland, Oficemen, Irish Cement, Cimpor, SECIL, ATIC, Titan, Italcementi, Holderbank, Aker, EUROC, Cementir, Blue Circle and AGCI maintain that the documents on which the Commission relies do not prove that the Cembureau agreement was concluded at the meeting of Head Delegates on 14 January 1983. Their association is based on an examination of the various documents relating to that meeting referred to in recitals 19 and 45 of the contested decision.

2.2.1. Letter convening the Head Delegates meeting on 14 January 1983

930 Cembureau, Ciments Français, Lafarge, Irish Cement and Cementir criticise the Commission for having included, among the evidence relating to the conclusion of the Cembureau agreement, the letter dated 16 November 1982 from Mr Gil Braz de Oliveira convening the Head Delegates meeting on 14 January 1983 (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553).

931 In recital 19, paragraph 2, of the contested decision the Commission sets out the following extract from that letter:

'At the recent Executive Committee meeting on 5 November, a matter was raised which, in the unanimous opinion of members, required careful consideration by Head Delegates at an exceptional meeting. The general recession affecting the industry's domestic sales meant that cement transfers between member countries could have harmful consequences for our industry if appropriate measures were not taken in time as in the case, for example, of the trade between Belgium and the Netherlands which is to be regulated by a protocol shortly to be published in the Official Journal of the EC ...'

932 In the Commission's view it follows from that letter that it was envisaged that the Head Delegates meeting on 14 January 1983 would deal with the problems raised by trade within Europe and that it would be necessary to find 'rules of the game' to limit and regulate those transfers (contested decision, recital 45, paragraphs 1 and 9, and recital 46, paragraph 2).

933 Cembureau, Ciments Français, Lafarge, Irish Cement and Cementir claim, however, that the letter convening the meeting was sent by its author, acting in a personal capacity, only to the Danish Head Delegate (Mr Larsen) and his Irish counterpart (Mr Dempsey). The 'official' letter convening the meeting of Head Delegates on 14 January 1983, which was also dated 16 November 1982 (documents 33.126/11554 to 11557), enclosed by Cembureau as Annex 3.3 to its application, does not include the passage set out in recital 19, paragraph 2, of the contested decision and shows that the purpose of the meeting held on 14 January 1983 was lawful.

934 As the applicants in question point out, there are in fact two versions of the letter convening the meeting. The version quoted in the contested decision is signed by Mr Gil Braz de Oliveira, Delegate to Cembureau's Executive Committee (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553). It is common ground that that letter was sent to Aalborg and to Irish Cement. In that letter Mr Gil Braz de Oliveira informed them of the proposed date of the next Head Delegates meeting, 14 January 1983, 'at the request of the Cembureau Chairman, Mr Jean Bailly'. In those circumstances, the applicants cannot reasonably contend that Mr Gil Braz de Oliveira wrote to them in his personal capacity.

935 The 'official' letter convening the meeting is not in any way inconsistent with the tenor of the letter from Mr Gil Braz de Oliveira.

936 Although it does not refer expressly to 'cement transfers between member countries', the letter states that 'at the meeting of the Executive Committee and Coordinating Group last week, ... it

has been made clear that the European cement makers are facing serious problems' and that 'appropriate measures need to be taken to avoid that the cement industry follows the same disastrous path of some other heavy and traditional industries in Europe'.

937 Furthermore, the fact that it was envisaged that the meeting on 14 January 1983 would deal in particular with cement transfers between member countries of Cembureau is confirmed by the telex which Mr Collis and Mr Dutron, Directors of Cembureau, sent to Mr Van Hove (contested decision, recital 19, paragraph 3; document 33.126/11559) on 17 November 1982, the day after the letter convening the meeting was sent by Mr Gil Braz de Oliveira.

938 In that telex Mr Van Hove was asked to give his view on item 2 on the agenda, which had to read 'sufficiently clearly without giving rise to reactions'.

939 Item 2 on the original agenda referred expressly to 'intra European trade' and one of its subdivisions referred to possible measures to control intratrade (contested decision, recital 19, paragraph 3; documents 33.126/11559 and 11580; see paragraphs 942 to 954 below).

940 It follows from the foregoing that the arguments disputing the probative value of the letter from Mr Gil Braz de Oliveira convening the meeting cannot be accepted. The Court finds, on the contrary, that the letter is relevant evidence, inasmuch as it stated that the members of the Cembureau Executive Committee considered that intra-European cement transfers could 'have harmful consequences' for the cement industry and that it was necessary to convene an exceptional meeting of Head Delegates on 14 January 1983 in order to take the 'appropriate measures'.

941 A number of the applicants claim, however, that the 'appropriate measures' envisaged concerned the basing point system, not the principle of non-shipment to internal markets. That argument will be considered in paragraphs 977 to 987 below.

2.2.2. Amendments to the agenda for the Head Delegates meeting held on 14 January 1983.

942 Item 2 on the original agenda of the Head Delegates meeting held on 14 January 1983 was amended following the intervention of Mr Van Hove at the request of the Chairman of Cembureau, Mr Bailly (see paragraphs 797 to 801 above).

943 Cembureau, FIC, Ciments Luxembourgeois, SFIC, Lafarge, Aalborg and Irish Cement claim that the amendments proposed by Mr Van Hove to item 2 ('Intra European Trade') on the draft agenda for the meeting of Head Delegates on 14 January 1983 were purely formal and of no significance. Those amendments were not intended to conceal the true content of the meeting. FIC states also that their sole aim was to tighten up the wording of the agenda for the meeting on 14 January 1983 so that it might properly reflect the topic that Mr Van Hove was to deal with at the meeting. The desire to avoid 'giving rise to reactions', referred to in the request to Mr Van Hove (contested decision, recital 19, paragraph 3; document 33.126/11559), was, according to FIC and Irish Cement, the consequence of the existence of considerable tension between certain members of Cembureau, more particularly between the Spanish and Irish members. Irish Cement adds that at the time the Chairman of Cembureau was afraid of the reactions of the Spanish member to the filing of an anti-dumping complaint by the Irish industry with the support of the CLC, of which Mr Van Hove was Chairman.

944 The Court points out that the telex of 17 November 1982 from Mr Collis and Mr Dutron, Directors of Cembureau, to Mr Van Hove states that the Chairman of Cembureau, Mr Bailly, 'would welcome your views on the wording of item 2 which should read sufficiently clearly without giving rise to reactions' (contested decision, recital 19, paragraph 3; document 33.126/11559).

945 In the original draft agenda dated 16 November 1982 (contested decision, recital 19, paragraph 3; documents 33.126/11559 and 11580), item 2 was drafted as follows:

'2. Intra European Trade

A. Analysis of situation

1. Data

2. Price situation — National Prices

3. Motivation and organisation of Crossborder Trade — Expected developments

B. Possible measures to control intratrade

1. Government support against dumping

2. Justification of reasonable price agreements. Intervention of Liaison Committee

3. Studies and Seminars — Dumping, profitability

4. Other measures'.

946 The discussions thus envisaged within an association bringing together direct competitors from all the Member States, concerning measures designed to 'control' or 'organise' intra-European trade, were clearly likely to fall foul of Article 85(1) of the Treaty. In that regard, it should be pointed out that on Cembureau's own admission (Case T-26/95, application, point 3.1) Mr Van Hove was Cembureau's expert on Community competition law.

947 Next, it must be emphasised that the request to Mr Van Hove related only to item 2 on the draft agenda (see paragraph 944 above). The other items on the agenda, '1. Imports from Eastern Europe', '3. World market conditions' and '4. Conclusions and decisions', were vague in comparison with item 2 and did not raise problems under Article 85(1) of the Treaty.

948 It must be held that the amendments suggested by Mr Van Hove to item 2 on the agenda related only to wording which was liable to disclose that the participants in the meeting of 14 January 1983 pursued an anti-competitive objective.

949 By telex dated 17 November 1982 (contested decision, recital 19, paragraph 3; document 33.126/11558) Mr Van Hove suggested as follows:

'The following words contained in your telex of 17 November must be removed from any official document:

... Organisation of Crossborder Trade

... Control Intratrade

... Justification of reasonable price agreements ...'

950 The amendments suggested by Mr Van Hove and adopted in the final agenda (see paragraphs 797 to 801 above) were therefore designed to eliminate the risk that the agenda would reveal the true content of the discussions which were to take place between the Head Delegates.

951 Furthermore, other documents bear witness to the same desire by Cembureau to conceal the true content of the meeting of Head Delegates held on 14 January 1983. The draft introductory statement by the Chairman for the Head Delegates meeting on 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) states that '[n]eedless to say there will be no minutes of this meeting', while the memorandum on the structure of the meeting (contested decision, recital 19, paragraph 6; documents 33.126/11578 and 11579) states '13.15/13.30 — Close of meeting — No minutes' (see paragraphs 962 to 976 below).

952 The argument that tension existed between the Spanish and Irish producers owing, in particular, to alleged dumping by the Spanish producers, must be rejected. All the references to dumping in the original draft were retained in the agenda adopted following the amendments suggested by Mr Van Hove. Moreover, the latter amendments were unlikely to have a more beneficial effect on relations between the Spanish and Irish producers than the original draft agenda.

953 The Court must also reject FIC's argument that the amendments to item 2 made at Mr Van Hove's suggestion were intended to give a correct description of the topic that Mr Van Hove was to deal with. Neither the original draft, the suggested amendments nor the final agenda mentioned the titles of the reports to be given at the meeting or a fortiori the various speakers.

954 It follows from all the foregoing that the Commission was justified in taking the view that the amendments to the agenda of the meeting held on 14 January 1983 aimed to conceal the true content of the scheduled discussions, which related in particular to measures to control the intra-European cement trade (contested decision, recitals 19, paragraph 3, 45, paragraph 1, and 65, paragraph 5).

2.2.3. Content of the documents relating to the conduct of the Head Delegates meeting on 14 January 1983

955 First, CBR, Cembureau, FIC, Ciments Luxembourgeois, Dyckerhoff, Heidelberger, Lafarge, Aalborg, Castle, Heracles, Aker, EUROC, Cementir and AGCI claim that it is apparent from the draft introductory statement of the Chairman for the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) that the object of that meeting was not to decide upon particular collective conduct on the market or to prescribe such conduct to the direct and indirect members of Cembureau. Far from establishing the existence of the Cembureau agreement, the draft introductory statement proves that no such agreement existed. In that regard, the applicants refer to the following extract from that document: 'Our objective is not of course to take collective decisions here.'

956 Cembureau also refers to the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]' (contested decision, recital 17, paragraph 3; documents 33.126/11630 to 11633), in particular to point 4, entitled 'Questions for consideration by Executive Committee', which, it claims, confirms that no decision or specific action was adopted at the meeting of 14 January 1983.

957 FIC also states that none of the documents relating to the Head Delegates meetings refers to or mentions the establishment of an agreement not to tranship to internal markets.

958 The Court observes that, for there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their joint intention to conduct themselves on the market in a specific way (judgments cited in paragraph 270 above, *Commission* v *Anic*, paragraph 130, and *Montecatini* v *Commission*, paragraph 162; Case

T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 95). Thus the Community judicature has taken the view that a 'gentlemen's agreement' constitutes an agreement within the meaning of Article 85(1) of the Treaty (*ACF Chemiefarma* v *Commission*, cited in paragraph 643 above, paragraphs 106 to 114, and *Tréfileurope* v *Commission*, paragraph 96). An agreement does not therefore have to be binding in order to be classified as an agreement within the meaning of Article 85(1) of the Treaty.

959 In the present case the Chairman stated in his draft introductory statement for the meeting of Head Delegates on 14 January 1983:

'Our objective is ... to identify possible solutions capable of modifying market developments and to propose ... certain rules of the game which it is in the interests of all of us to follow.'

960 Even if the Chairman did not thus propose that formal decisions or a formal agreement be adopted within Cembureau, he expressed the wish that those participating in the meeting should agree on 'rules of the game'. Where economic operators establish 'rules of the game' for their conduct on the market, then, in the light of the case-law cited in paragraph 958 above, that undeniably constitutes an agreement within the meaning of Article 85(1) of the Treaty.

961 As regards Cembureau's argument based on point 4 of the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]', the Court points out that the questions for consideration by the Executive Committee related to 'imports from Eastern Europe' and 'world market conditions', which correspond to items 1 and 3 of the agenda of the Head Delegates meeting on 14 January 1983. However, the passage from the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]' invoked by the applicant contains no reference to the Executive Committee in relation to point 2 of the agenda, entitled 'Intra-European Trade', which confirms that the Head Delegates themselves took 'appropriate measures' at their meeting on 14 January 1983 to resolve the problems associated with trade in cement between member countries of Cembureau.

962 Second, CBR, Cembureau, FIC, Heidelberger, Lafarge, Aalborg, Irish Cement, Cementir and Blue Circle claim that the Commission cannot conclude from the passage in the draft introductory statement for the Head Delegates meeting on 14 January 1983, in which the Chairman states that there will be no minutes of the meeting, that the participants intended to shroud their actions and/or decisions in secrecy and that, accordingly, the purpose of the meeting was unlawful.

963 CBR, Cembureau and Irish Cement claim that the preparatory nature of the draft introductory statement by the Chairman deprives it of any evidential value.

964 The Court points out that it is common ground (Cembureau's application in Case T-26/95, point 2.5) that the draft introductory statement was drawn up by directors of Cembureau, Mr Dutron and Mr Collis. There is no reason to conclude that it did not reflect the views of Mr Bailly, the Chairman of Cembureau. On the contrary, it is apparent from the telex dated 17 November 1982 from Mr Collis and Mr Dutron to Mr Van Hove (contested decision, recital 19, paragraph 3; document 33.126/11559) that there was close collaboration between the Chairman of Cembureau and the authors of the Chairman's draft introductory statement in preparation for the meeting on 14 January 1983. The telex states: 'Mr Bailly would welcome your views on the wording of item 2 which should read sufficiently clearly without giving rise to reactions' (contested decision, recital 19, paragraph 3; document 33.126/11559). Since Mr Dutron and Mr Collis normally drafted the minutes of meetings organised within the framework of Cembureau, and in particular of meetings of the Executive Committee (Cembureau's application in Case T-26/95, points 2.5 and 2.15), it must be accepted that the passage in the draft introductory statement in which it was stated that there would be no minutes of the meeting reflected the intention of the Chairman of Cembureau. Since it has not been shown that formal minutes of the meeting were none the less taken (see paragraphs 970 to 976 below), the appropriate conclusion is that the Chairman of Cembureau did in fact announce at the meeting on 14 January 1983 that there would be no minutes of the meeting and that that announcement received the, at least tacit, approval of the participants.

965 Heidelberger and Aalborg claim that the words of the Chairman at issue can be explained by the fact that it was not envisaged that any decisions would be adopted.

966 That argument must be rejected. It follows from various documents (letter from Mr Gil Braz de Oliveira convening the meeting (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553); 'official' letter convening the meeting of Head Delegates on 14 January 1983 (documents 33.126/11554 to 11557); draft introductory statement by the Chairman (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)) that the meeting of Head Delegates on 14 January 1983 was an extraordinary meeting designed to deal with extremely serious problems, in particular those associated with trade in cement between member countries of Cembureau. The purpose of the meeting was to establish 'rules of the game' aimed at 'modifying market developments' (draft introductory statement by the Chairman). Moreover, even assuming that it was not envisaged that decisions would be taken at the meeting, that circumstance would not have explained why minutes of the meeting were not to be taken. The minutes of a meeting are not confined to reproducing the decisions taken at the meeting, but normally reflect the content of the various contributions to the meeting.

967 Cembureau and Irish Cement state that the Head Delegates meetings were of an informal nature in comparison with those of the Executive Committee, at the end of which formal and detailed minutes were always taken on the basis of tape recordings. In announcing that there would be no minutes of the meeting held on 14 January 1983, the Chairman therefore merely

wished to indicate that the meeting was of a different nature from a meeting of the Executive Committee. Lafarge maintains that in reality the Chairman's announcement reflected the desire to reduce, by not expressly acknowledging it, the tension within Cembureau caused by the problems of dumping associated, in particular, with imports from Spain and East Germany.

968 The Court must, however, also reject the explanations based on the informal nature of the meeting of 14 January 1983. Unlike in the case of the meeting of 14 January 1983, the other Head Delegates meetings referred to in the contested decision were the subject of 'notes on [the] meeting' or 'summary notes' (notes on the meeting of Head Delegates on 19 March 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737); 'summary notes' dated 12 November 1984 relating to the meeting of Head Delegates on 7 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755)).

969 Similarly, as regards Lafarge's explanation that there were tensions within Cembureau, the Court points out that the references at the Head Delegates meetings on 19 March and 7 November 1984 to the tension caused by exports from Spain and East Germany did not prevent 'notes on [the] meeting' or 'summary notes' from being drawn up.

970 Next, Cembureau, FIC, Aalborg, Irish Cement, Cementir and Blue Circle claim that, contrary to what the Commission alleges, one or more minutes of the Head Delegates meeting of 14 January 1983 exist. That shows that what the Chairman proposed in his draft introductory statement was to no avail.

971 Cembureau, FIC, Irish Cement and Blue Circle rely in that regard on the document 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]' (contested decision, recital 17, paragraph 3; documents 33.126/11630 to 11633), drawn up on 18 January 1983 by Mr Collis, the Director of Cembureau. Cembureau, FIC, Ciments Français and Irish Cement also refer to a five-page document called the 'Cimpor Note' in the contested decision, which was also distributed to the participants in the meeting of the Executive Committee of Cembureau held on 25 March 1983 (contested decision, recital 17, paragraph 2; documents 33.322/308 to 312). Aalborg claims that minutes of the Head Delegates meeting held on 14 January 1983 exist and refers to an untitled document (contested decision, recital 17, paragraph 3; documents 33.126/11617 to 11629). Cembureau maintains that there is a reference to the meeting of 14 January 1983 in the minutes of the meeting of the CLC held on 17 March 1983 (annex 3.17 to the application in Case T-26/95). Cementir merely states that minutes of the meeting exist, without referring to any specific document.

972 The Court points out that there are two documents that refer to the intention not to take minutes of the meeting of Head Delegates on 14 January 1983. Like the passage in the Chairman's draft introductory statement (see paragraph 962 above), the memorandum on the structure of the meeting of 14 January 1983 states: '13.15/13.30 — Close of meeting — No minutes.'

973 Furthermore, none of the documents referred to in paragraph 971 above can be regarded as official minutes of the meeting. The document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]', contains, as its title indicates, notes for the attention of the Chairman of Cembureau. It does not therefore constitute minutes of the Head Delegates meeting intended for those participating in the meeting. Second, contrary to what Cembureau claims, the minutes of the meeting of the CLC held on 17 March 1983 do not contain any reference to the discussions at the meeting of 14 January 1983. The untitled document to which Aalborg refers, although its content largely corresponds to the 'Notes for the [Chairman]', contains no express reference to the Head Delegates meeting on 14 January 1983 and cannot therefore be regarded as official minutes of that meeting. As regards the 'Cimpor note', it contains only a handwritten reference to the Head Delegates meeting on 14 January 1983 and it is common ground that it was distributed at the meeting of the Executive Committee on 25 March 1983. Had they existed, the official minutes of the meeting of Head Delegates of Cembureau would have been distributed in an different way, that is to say, to the Head Delegates themselves, and Cembureau, or a member of Cembureau, would therefore have been in a position to produce a document thus distributed.

974 CBR admits that there are no formal minutes of the Head Delegates meeting held on 14 January 1983. None the less, a number of documents reveal the content of the presentations made at that meeting. Even in the absence of a reliable transcript of the report on the basing point system given at the meeting on 14 January 1983, the document on the basis of which the report was given, namely the notes of Mr Van Hove (contested decision, recital 17, paragraph 3; documents 33.126/11602 to 11613) was circulated among the members of Cembureau. The Commission also followed the same practice at its hearings, for example at the hearings in March 1993, when it distributed documents relating to the reports of Professor Encaoua and the expert witness, Mr Bensaid, and called them 'minutes of the hearing'.

975 The Court points out that CBR itself admits that the basing-points system was not the only topic discussed at the Head Delegates meeting on 14 January 1983 (reply in Case T-25/95, point 19). Mr Van Hove's notes cannot therefore be regarded as even informal minutes of the meeting.

976 On the basis of all the foregoing, it must be concluded that the announcement that there would be no minutes of the meeting of Head Delegates on 14 January 1983, as evidenced by the draft introductory statement for that meeting and by the memorandum on the structure of the meeting, was made at the Head Delegates meeting on 14 January 1983 and received the at least tacit approval of the participants at the meeting. Since the other Head Delegates meetings

referred to in the contested decision, that is to say, those held on 19 March and 7 November 1984, gave rise to 'notes of [the] meeting' or 'summary notes', and since the agenda of the meeting of 14 January 1983 was subject to amendments which aimed to conceal the true content of the discussions (see paragraph 954 above), the Commission was justified in taking the view that the absence of minutes of the meeting of 14 January 1983 reflected the intention of the participants to shroud their actions and/or decisions in secrecy and, accordingly, the illicit purpose of the meeting in question (contested decision, recitals 19, paragraph 3, and 65, paragraph 5).

977 Third, CBR, Cembureau, FIC, Dyckerhoff, Ciments Luxembourgeois, SFIC, Vicat, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Castle, Heracles, Oficemen, Irish Cement, Cimpor, SECIL, Titan, Italcementi, Aker, EUROC, Cementir, Blue Circle and AGCI stress that the subject-matter of the discussions at the meeting of 14 January 1983 was lawful. Thus CBR, Cembureau, FIC, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Castle, Heracles, Oficemen, Irish Cement, Cimpor, SECIL, Titan, Italcementi, Aker, EUROC, Cementir and AGCI maintain that the participants in the meeting in question sought solutions, such as the basing point system, which would, given the background of recession in the European cement industry, ensure conditions of healthy competition, compatible with the rules of the Treaty. The discussions concerned, in particular, the possible introduction of a general basing point system comparable with that notified to the Commission on 16 July 1981 by the Belgian and Netherlands cement producers, which had been favourably received. CBR, Cembureau, FIC, Dyckerhoff, SFIC, Vicat, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Castle, Heracles, Irish Cement, Cimpor, SECIL, Aker, EUROC, Cementir and Blue Circle add that at the meeting of 14 January 1983 consideration was given to the problems caused by imports of cement — frequently dumped — from countries which were not members of the Community, in particular Spain and East European countries, and also to the preparation of an anti-dumping complaint. SFIC and Unicem also maintain that the Head Delegates meeting on 14 January 1983 also concerned the protection of members against imports subsidised by a Member State.

978 In support of their arguments the following applicants refer, not only to the letter from Mr Gil Braz de Oliveira convening the meeting of 14 January 1983 (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) and the memorandum on the structure of the meeting (contested decision, recital 19, paragraph 6; documents 33.126/11578 and 11579), but also to a number of other documents:

— Ciments Français, Heracles, Irish Cement, Cementir and Blue Circle: the 'Cimpor note' distributed to the participants in the Cembureau Executive Committee held on 25 March 1983 (contested decision, recital 17, paragraph 2; documents 33.322/308 to 312);

— Cembureau, Lafarge, Irish Cement and Unicem: the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]' (contested decision, recital 17, paragraph 3; documents 33.126/11630 to 11633);

— Cembureau (annex 3.17 to its application) and Aalborg (annex 13 to its application): draft minutes of the meeting of the CLC held on 17 March 1983;

— Aalborg and Unicem: untitled document relating to the Head Delegates meeting held on 14 January 1983 (contested decision, recital 17, paragraph 3; documents 33.126/11617 to 11629);

— Cembureau (annex 3.1 to its application), Irish Cement (point 3.2.5.2.1. of its application) and Cementir (annex 14 to its application): draft minutes of the meeting of the Executive Committee held on 5 November 1982;

— Cembureau (annex 3.16 to its application) and Irish Cement (paragraph 3.2.5.2.2. of its application): draft minutes of the meeting of the Executive Committee held on 25 March 1983;

— Cembureau and Irish Cement: letter from Irish Cement to Cembureau dated 5 January 1983 stating that an anti-dumping complaint had been submitted (contested decision, recital 19, paragraph 6; document 33.126/11572);

— Cembureau, Unicem, Cementir and Blue Circle: data distributed at the Head Delegates meeting held on 14 January 1983 (information on prices, production and volumes of exports of a number of countries in Eastern Europe and the Middle East; tables relating to 'Imports from Eastern Europe', to 'Domestic Prices (taxes excluded)' and to 'Member trade data: imports (intra-trade)'; contested decision, recital 19, paragraph 6; documents 33.126/11593 to 11601);

— Unicem: document entitled 'Preparatory note for the Head Delegates meeting on 14 January 1983' (contested decision, recital 16, paragraph 2; document 33.126/11590) and Mr Van Hove's notes for the Head Delegates meeting on 14 January 1983 (contested decision, recital 17, paragraph 3; documents 33.126/11602 to 11613);

— Cembureau: letter dated 7 January 1983 from Cembureau to the Head Delegates concerning the meeting on 14 January 1983 (annex 3.9 to its application) and letter dated 28 December 1982 from Cembureau concerning the Head Delegates meeting on 14 January 1983 (annex 3.7 to its application), with which the final draft agenda of the meeting of 14 January 1983 was enclosed;

— FIC (annex 15 to its application): letter dated 18 February 1983 from the Chairman of the CLC and of the FIC in preparation for the 88th meeting of FIC's Board.

979 It is clear from the letter from Mr Gil Braz de Oliveira convening the meeting and from the amendments to the agenda of the meeting of 14 January 1983 that that meeting was convened, in particular, in order to discuss intra-European transfers of cement which could have 'harmful consequences' for the cement industry, so that 'appropriate measures' might be taken (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) in order to 'control intratrade' (contested decision, recital 19, paragraph 3; document 33.126/11559).

980 The draft introductory statement by the Chairman for the meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) confirms that it was envisaged that 'trade between members' would be examined. It is apparent from that draft statement that it was necessary to assess 'the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices, before this phenomenon has had time to spread in extent and gravity'. The purpose of the meeting was to 'identify possible solutions capable of modifying market developments and to propose, at least in regard to principles, certain rules of the game which it [was] in the interest of [all those participating in the meeting] to follow'. The draft introductory statement went on: 'What we then expect of you is that this exchange of views encourages you to spread words of wisdom around you and that, each time it is necessary, multi- or bi-lateral discussions are held, as and when the need arises.'

981 According to the Commission, the 'rules of the game' which it was 'in the interests' of all the cement producers to 'follow' were non-transhipment to home markets and the regulation of sales from one country to another, that is to say, market-sharing (contested decision, recital 45, paragraphs 1 to 6 and 9).

982 The correctness of the Commission's interpretation is shown by the body of evidence referred to in recitals 18, 19 and 45 of the contested decision and, in particular, by the following: the internal Blue Circle memoranda (contested decision, recital 18, paragraphs 2 and 3; documents 33.126/11332 to 11334 and 11335 to 11337; see paragraphs 875 to 901 above); the statement of Mr Kalogeropoulos, the Chairman of Heracles, dated 25 June 1986 (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877; see paragraphs 902 to 913 above); Cembureau's admission (contested decision, recital 18, paragraph 4; documents 33.126/11525 and 13568 to 13573; see paragraphs 914 to 919 above); the desire of the participants in the meeting held on 14 January 1983 to shroud their actions and/or decisions in secrecy, as is apparent from the draft introductory statement by the Chairman for that meeting (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585; see paragraphs 962 to 976 above) and the amendments to the agenda of that meeting (contested decision, recital 19, paragraph 3; documents 33.126/11558, 11559 and 11656; see paragraphs 942 to 954 above); and also the documents relating to the Head Delegates meeting held on 19 March 1984 (see paragraph 1004 to 1027 below).

983 It should be observed that the latter meeting also concerned, in particular, the situation on the European market.

984 Thus the memorandum to the Chairman regarding the meeting of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) and the notes on that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) mention as item 2 on the agenda: 'Situation on the European market'. The memorandum to the Chairman refers to a number of 'hot spots', namely '[e]xports from Germany to the United Kingdom and Ireland, [e]xports from France to Germany, [e]xports from Spain to Ireland and the United Kingdom and ... exports from Italy to Switzerland'. The same document reports that: 'The gap between [prices in the various countries] which is between 1 and 2 inevitably constitutes a temptation. It is therefore desirable gradually to reduce the gap, essentially by increasing the lowest prices ... and also by moderating high price trends.' As regards the notes on the meeting, they conclude: 'Pressure from inter-member trade had slackened considerably through improved bilateral contacts. Exports had tended to shrink but there was still a threat from outsiders.' It had earlier been stated in the notes that 'a visual presentation of price ranges was an effective means of highlighting potential causes of conflict'.

985 It is, therefore, clear from that evidence that the Head Delegates' objective was to establish 'rules of the game' in order to 'control intratrade'. The purpose of exchanging price information was to place the 'potential causes of conflict' into perspective. Exports which had none the less taken place, apart from 'traditional or even structural inter-state trade, e.g. exports from Germany and Belgium to the Netherlands' (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), or, in other words, controlled trade, were, described as 'hot spots'. The objective of reducing cement exports between the member countries of Cembureau was to be achieved through 'improved bilateral contacts' (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), a measure suggested by the Chairman of Cembureau in his draft introductory statement for the meeting of 14 January 1983 to ensure that the 'rules of the game' were followed.

986 The documents to which the applicants refer (see paragraph 978 above), are only capable of showing that the basing point system and the problems of imports from Eastern Europe and Spain were also discussed at the meeting held on 14 January 1983, a fact which the Commission has never disputed (contested decision, recital 19, paragraphs 2 to 15). They do not show that the discussions were limited to those two topics. Accordingly, they do not shed a different light on the body of documentary evidence examined in paragraphs 979 to 985 above, which shows that at the meeting on 14 January 1983 the participants agreed on the principle of non-transhipment to home markets and the regulation of sales from one country to another.

987 Last, SFIC and Unicem adduce no evidence whatsoever to support their contention that the Head Delegates meeting on 14 January 1983 also dealt with the protection of producers against

imports subsidised by a Member State. In any event, the fact that the discussions may have also related to subsidised imports is not such as to shed a different light on the body of documentary evidence examined in paragraphs 979 to 985 above.

988 Fourth, Dyckerhoff, Irish Cement and Blue Circle maintain that it is clear from the 'Cimpor note' distributed to the participants in a meeting of the Executive Committee of Cembureau on 25 March 1983 that the participants in the meeting on 14 January 1983 evidently wished to comply with Articles 85 and 86. In that regard, Dyckerhoff, Irish Cement, and FIC also refer to the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]', which was written on 18 January 1983 by Mr Collis, a Director of Cembureau. SFIC submits that Mr Van Hove's presence at the meeting held on 14 January 1983 confirms that the participants in the meeting intended to comply with the Community competition rules.

989 The Court notes that both documents in question state that 'Articles 85 and 86 concerning competition policy are clear, and no actions which contravene these articles can be envisaged'. However, neither document can be regarded as the official minutes of the meeting held on 14 January 1983. Even if it were established that the matter had been considered at the meeting, that would not make it possible to discount the body of specific documentary evidence, gathered together in the contested decision (see paragraphs 979 to 985 above), which shows that the Head Delegates agreed at that meeting not to tranship to home markets and to regulate sales from one country to another, and therefore concluded an agreement within the meaning of Article 85(1) of the Treaty with an anti-competitive object. Thus, far from demonstrating the lawfulness of the discussions which took place at the Head Delegates meeting, the documents relied on are of such a kind as to demonstrate the deliberate nature of the infringement.

990 Fifth, Cembureau and Lafarge claim that, according to the Chairman's draft introductory statement for the meeting of 14 January 1983, Cembureau's role was to be limited to providing special assistance in finding the necessary documentation.

991 The Court points out that the draft introductory statement is intended to be more precise than those two applicants make out, since it is stated that Cembureau's role would be limited to providing documentation 'for the time being' (*'à ce moment'*), that is to say, on each occasion that the participants deemed it necessary to hold multi- or bi-lateral discussions to ensure that the agreed rules of the game were followed. That reference to Cembureau's future role in subsequent multi- or bi-lateral discussions cannot conceal either the role which Cembureau played in organising the meeting held on 14 January 1983 or the manifestation at that meeting of a concurrence of wills on the rule of non-transhipment to home markets and the regulation of sales from one country to another.

992 Sixth, FIC and SFIC stress that there is a distinction between trade between members of Cembureau and intra-Community trade. The documents on which the Commission relied in the contested decision to demonstrate the existence of the alleged Cembureau agreement relate to trade between members of Cembureau, not to intra-Community trade.

993 The Court finds that the documents referred to in recitals 19 and 45 of the contested decision contain no evidence that the discussions on trade between members did not relate to intra-Community trade. On the contrary, it is clear from the 'hot spots' identified in the memorandum to the Chairman concerning the Head Delegates meeting on 19 March 1984 and from the notes on that meeting that the discussions did in fact relate to intra-Community trade (see paragraph 984 above). The argument must therefore be rejected.

994 Seventh, Cembureau, Aalborg, Irish Cement and Cementir state that the Commission did not consider that the discussions at the Head Delegates meeting on 30 May 1983 were unlawful, even though that meeting had the same purpose as the meeting of 14 January 1983. Cembureau and Aalborg refer in that regard to the letter of 5 April 1983 convening the meeting of 30 May 1983 (document 33.126/11643). Irish Cement refers to the minutes of that meeting (annex 3.20 to its application). They claim that the discussions on 14 January 1983 should therefore also be considered lawful.

995 The Court observes that the letter convening the meeting of 30 May 1983 stated as follows: 'The executive committee has decided that a special meeting of head delegates be held during the general assembly in Kerkyra to up-date the situation in connection with the questions examined at the meeting on 14 January 1983.' The draft agenda for that meeting (document 33.126/11655) included three items: '1. Imports from Eastern Europe, 2. World markets and 3. Other questions.'

996 The fact that there is no evidence that the principle of non-transhipment to internal European markets was discussed at the Head Delegates meeting on 30 May 1983 does not necessarily mean that there were no such discussions. Having regard to the Head Delegates' intention to shroud their actions and/or decisions on that subject in secrecy (see paragraph 976 above), it cannot be ruled out that discussions on intra-Community trade took place in the context of the discussions relating to the item on the agenda '3. Other questions'. In particular, even if such discussions had not taken place, that would provide no grounds for excluding the specific documentary evidence examined in paragraphs 979 to 985 above and referred to in recitals 18, 19 and 45 of the contested decision, from which it is apparent that at the meeting of 14 January 1983 a concurrence of wills emerged as to the principle of non-transhipment to home markets and the regulation of sales from one country to another.

997 Eighth, Dyckerhoff, Heracles and Titan maintain that the absence of any reference, in the various documents relied on by the Commission in connection with the Head Delegates meetings held on 19 March and 7 November 1984, to an agreement concluded on 14 January 1983 contradicts the claim that the Cembureau agreement was concluded at the meeting on 14 January 1983. CBR, FIC, Heidelberger, Lafarge and AGCI assert that the discussion of 'hot spots' at the meeting held on 19 March 1984 (memorandum to the Chairman for the Head Delegates meeting on 19 March 1984) also contradicts that claim.

998 That argument must be rejected. The Commission has never claimed that a formal Cembureau agreement was concluded at the meeting on 14 January 1983. The Cembureau agreement to which it refers is an informal concurrence of wills that constitutes an agreement within the meaning of Article 85(1) of the Treaty (see the case-law cited in paragraph 958 above) on 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9). It is unequivocally clear from the specific documentary evidence referred to in paragraphs 979 to 985 above and examined in recitals 18, 19 and 45 of the contested decision that this concurrence of wills emerged at the meeting on 14 January 1983. The absence of any reference to that concurrence of wills in the documents relating to the meetings held on 19 March and 7 November 1984 does not suffice to shed a different light on that specific documentary evidence.

999 As regards the reference to 'hot spots', it is apparent from the memorandum to the Chairman for the Head Delegates meeting on 19 March 1984 that trade in cement between the member countries of Cembureau, with the exception of traditional or even structural inter-state trade, was described as a 'hot spot'. The following were thus identified as 'hot spots': '[e]xports from Germany to the United Kingdom and Ireland, [e]xports from France to Germany, [e]xports from Spain to Ireland and the United Kingdom [and] ... exports from Italy to Switzerland'. These 'hot spots' do not shed a different light on the body of documentary evidence gathered by the Commission showing that the Cembureau agreement was concluded at the meeting held on 14 January 1983. They do not show that there was no Cembureau agreement, but merely that the rule of the game concerning non-transhipment to home markets and the regulation of sales from one country to another was not universally successful. The fact that an agreement is not observed by everyone does not mean that it does not exist (*Mayr-Melnhof*, cited in paragraph 897 above, paragraph 135).

1000 Ninth, Dyckerhoff submits that two facts contradict the argument that an agreement not to tranship to home markets was concluded on 14 January 1983:

— the fact that at the meeting on 19 March 1984 the Chairman of Cembureau considered it 'desirable gradually to reduce' the gap between extremes, by which he was referring to the prices in force in the various member countries of Cembureau (memorandum to the Chairman); and

— the fact that at that same meeting a number of participants considered that it was 'pointless to continue the discussion within Cembureau' (notes on the meeting, dated 2 April 1984).

1001 Like Dyckerhoff, Aalborg states that the participants in the meeting held on 19 March 1984 considered it pointless to discuss intra-European trade in that forum (notes on the meeting, dated 2 April 1984).

1002 The Court points out that Dyckerhoff cannot claim that the Chairman would have had no further need to express the desire that price gaps be gradually reduced if the Cembureau agreement had in fact been concluded on 14 January 1983: that agreement does not concern price-fixing arrangements between European cement producers. The discussions by the European cement producers during the period in question on 'fair or healthy or correct' competition (contested decision, recital 17) were not found to be an infringement in the contested decision. The object of the agreement was 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9). Since the gap between extremes, which was between 1 and 2, inevitably constituted a 'temptation' (contested decision, recital 19, paragraph 9; memorandum to the Chairman) for intra-European trade, and therefore a direct threat to the Cembureau agreement, the desire expressed by the Chairman to see that gap gradually reduced confirms the contention that the Cembureau agreement was concluded at the meeting held on 14 January 1983. The reference in the notes on the meeting of 2 April 1984 to the fact that it was pointless to 'continue the discussion within Cembureau' relates, according to the notes on that meeting, exclusively to the question of '"random" additional exports [from Germany] to the Netherlands and Belgium,' since 'previous discussions between Head Delegates had not altered this state of affairs'. At the very most, that reference shows that there had been a breach of the principle of non-transhipment to home markets, to which no solution had been found at the Head Delegates meetings. Such a finding cannot refute the body of documentary evidence assembled by the Commission (see paragraphs 979 to 985 above).

2.2.4. Conclusions regarding the Head Delegates meeting on 14 January 1983

1003 The evidence set out by the Commission in recitals 18, 19 and 45 is such that it was entitled to conclude that an agreement within the meaning of Article 85(1) of the Treaty had been concluded at the Head Delegates meeting on 14 January 1983, 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' (contested decision, recital 45, paragraph 9).

2.3. Confirmation of the Cembureau agreement at the meeting of Head Delegates on 19 March 1984

1004 The Commission considers that the Cembureau agreement was confirmed at the meeting of Head Delegates held on 19 March 1984 (contested decision, recital 45, paragraph 2). It relies on the memorandum for the Chairman for the meeting of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) and the notes on that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737).

1005 First, Cembureau, FIC, Aalborg, Irish Cement and Cementir claim that it follows from the draft record of the Executive Committee meeting held on 9 November 1983 (contested decision, recital 17, paragraph 5; documents 33.322/286 to 294) that the meeting of 19 March 1984 was convened in order to deal with the problems considered at the earlier Head Delegates meeting on 30 May 1983, namely dumped imports from Eastern Europe and Spain and developments on the world cement markets. It could not therefore have been a question of confirming an agreement concluded at the meeting held on 14 January 1983. CBR, Cembureau, Ciments Luxembourgeois, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Unicem, Heracles, Oficemen, ATIC, Titan, Italcementi and AGCI assert that no measure or decision was adopted at the meeting of 19 March 1984. They therefore deny that the alleged Cembureau agreement was confirmed at that meeting. At the very most, the documents relating to the meeting show the existence of bilateral contacts between certain producers, but not the existence of an agreement involving the entire European cement industry.

1006 The Court points out that the draft record of the Executive Committee meeting of 9 November 1983 states:

'It was agreed that a special meeting of Head Delegates should be called to take place before the 4th Market Development Meeting (19 March 1984) to discuss problems examined at the previous meetings.'

1007 The use of the words 'previous meetings', in the plural, shows that the meeting on 19 March 1984 also dealt with the points discussed not only at the meeting of 30 May 1983 but also at the Head Delegates meeting of 14 January 1983.

1008 As regards the question whether or not the memorandum to the Chairman for the Head Delegates meeting on 19 March 1984 and the notes on that meeting show that the concurrence of wills which arose on 14 January 1983 was confirmed at the meeting of 19 March 1984, it should be pointed out that the fact that exports from Germany to the United Kingdom and

Ireland, from France to Germany, from Spain to Ireland and the United Kingdom and from Italy to Switzerland are described as 'hot spots' in the memorandum to the Chairman in itself shows that those exports, unlike traditional or structural inter-State trade, or in other words controlled inter-State trade, were considered not to comply with a rule of conduct desired by the participants at the meeting. Moreover, in the notes on that meeting, non-traditional or non-structural exports are referred to as '"random" exports'. The explanation given for the 'hot spots' in the memorandum to the Chairman is as follows: 'The gap [between prices in the various member countries of Cembureau] which is between 1 and 2 inevitably constitutes a temptation. It is therefore desirable gradually to reduce the gap, essentially by increasing the lowest prices... and also by moderating high price trends.' The notes on the meeting state that it was agreed that the exchange of price information would place 'potential causes of conflict' in perspective.

1009 It follows that, like the participants in the meeting held on 14 January 1983, the participants in the meeting held on 19 March 1984 sought to reduce and control the quantities of cement exported between member countries of Cembureau. Although there were still some 'hot spots', it is clear from the general conclusions to the notes on the meeting held on 19 March 1984 that the participants in that meeting found that '[p]ressure from inter-member trade had slackened considerably through improved bilateral contacts. Exports had tended to shrink but there was still a threat from outsiders.' The objective of reducing cement exports between the member countries of Cembureau was therefore achieved through 'improved bilateral contacts', which was one of the measures suggested by the Chairman of Cembureau in his draft introductory statement for the meeting held on 14 January 1983 to ensure that the 'rules of the game' were followed.

1010 It is therefore plain from the extracts from the memorandum to the Chairman for the meeting of 19 March 1984 and from the notes on that meeting that the concurrence of wills which had arisen at the meeting of 14 January 1983 was confirmed at the meeting of 19 March 1984. Even if, as a number of applicants claim, no formal decision was taken at the meeting in question, that concurrence of wills constituted an agreement within the meaning of Article 85(1) of the Treaty (*ACF Chemiefarma* v *Commission*, cited in paragraph 643 above, paragraph 112; *Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraph 86; *Commission* v *Anic*, cited in paragraph 270 above, paragraph 130; *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 162; and *Tréfileurope* v *Commission*, cited in paragraph 958 above, paragraph 95).

1011 Second, CBR claims that there is no evidence to support the Commission's assertion that, in order to implement the Cembureau agreement, action was necessary only by those undertakings involved in a 'hot spot' (contested decision, recital 45, paragraph 8, fifth subparagraph).

1012 The Court points out that in the draft introductory statement by the Chairman for the meeting of Head Delegates on 14 January 1983 it was suggested that the participants at that meeting should establish certain 'rules of the game', 'spread words of wisdom' around them and, each

time it was necessary, hold 'multi- or bilateral discussions'. Furthermore, in the notes dated 2 April 1984 on the meeting held on 19 March 1984 it was stated that '[p]ressure from inter-member trade had slackened considerably through improved bilateral contacts'.

1013 In the light of these various items of documentary evidence, the Commission was entitled to conclude in recital 45, paragraph 8, fifth subparagraph, of the contested decision as follows:

'It was inherent in the proposal made at the meeting held on 14 January 1983 that action should be taken only by those undertakings involved in a "hot spot". i.e. by non-compliance with the home market principle, with such sources of friction being dealt with in bilateral discussions ...'

1014 Third, Cembureau maintains that, when the memorandum to the Chairman for the Head Delegates meeting on 19 March 1984 is compared with the notes on the meeting of 2 April 1984, it is apparent that the discussions, in particular those on price-fixing, did not take place at the meeting as envisaged in the memorandum drawn up for the Chairman.

1015 The Court points out, however, that the contested decision contains no specific complaint relating to a price-fixing agreement (see paragraph 1002 above). The applicant's observations do not therefore shed a different light on the specific documentary evidence on which the Commission relies (see paragraphs 1008 to 1010 above), which unequivocally shows that there was a concurrence of wills on non-transhipment to home markets and the regulation of sales from one country to another at the meeting of Head Delegates on 19 March 1984.

1016 Fourth, Cembureau relies on the data distributed at the Head Delegates meeting of 19 March 1984 in order to demonstrate the inaccuracy of the Commission's allegation that the Cembureau agreement was confirmed at that meeting. It points out that the data was made up of three categories: data on cement prices; data on production, imports and exports between European producers; and data on imports from Eastern Europe. The first category consisted of general data, which were not therefore capable of influencing trade or distorting competition. The second consisted of data which were in the public domain and which were provided by a special department of Cembureau which gathered statistical data produced by the customs authorities of the Member States and other European countries; they were comparable to the data which had been distributed at the meeting on 14 January 1983 and showed an increase in

trade between member countries of Cembureau which was at variance with the content of the alleged Cembureau agreement. The data in the third category were analogous to the data distributed at the meeting on 14 January 1983.

1017 The Court points out, however, that the documents showing that various types of information were distributed at the meeting on 19 March 1984 do not shed a different light on the specific documentary evidence which shows that at that meeting, as well as engaging in what may have been a lawful exchange of information, the Head Delegates reaffirmed their concurrence of wills concerning transhipment to home markets and the regulation of sales from one country to another (see paragraphs 1008 to 1010 above).

1018 The argument alleging that there was an increase in intra-Community cement trade must also be rejected, because trade might have developed differently if there had been no restrictive agreement (*Consten and Grundig*, cited in paragraph 837 above).

1019 Fifth, Cembureau and Irish Cement maintain that the references to 'potential causes of conflict' and 'pressure from inter-member trade' in the notes on the meeting of 2 April 1984 refer essentially to the danger represented by the conduct of the Spanish cement industry at that time and the general preoccupation with it. Similarly, Ciments Français maintains that where the notes on the meeting deal with trade between member countries they refer mainly to flows of cement from Spain to Ireland and the United Kingdom.

1020 As regards, first, the references to 'potential causes of conflict' and to 'pressure from inter-member trade' in the notes on the meeting of 2 April 1984, the Court points out that in both cases they are to be found in general conclusions which relate not just to imports from Spain but to the general situation on the European market (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). The very content of the notes on the meeting shows that the evaluation of the situation on the European market was not limited to the problem of exports from Spain. It is apparent from those notes that, in addition to Spanish imports into certain countries of the Community, '"random" exports' from Germany to the Netherlands and Belgium and the 'dispute between Switzerland and Italy' were discussed at the meeting. In any event, the interpretation proposed by Cembureau, Ciments Français and Irish Cement is not such as to shed a different light on the various passages from the memorandum to the Chairman for that meeting or on the notes on the meeting, which unequivocally show that the Cembureau agreement was confirmed in the course of the discussions (see paragraphs 1008 to 1010 above).

1021 Sixth, Lafarge states that in Article 2 of the contested decision, the Commission made a separate finding on the exchange of price information referred to in the memorandum to the

Chairman for the meeting of 19 March 1984 and the notes on that meeting. Those documents cannot therefore be linked to the alleged agreement on non-transhipment to home markets.

1022 That argument must be rejected. One item of evidence may relate to a number of infringements. In any event, the Commission's proof that the Cembureau agreement was confirmed at the meeting on 19 March 1984 was not based solely on the passages from the documents relating to that meeting which refer to the exchange of price information. It is clear from recital 45, paragraph 2, of the contested decision that the Commission took into account principally the discussions on tensions created by cross-frontier flows, the 'hot spots' referred to in the memorandum to the Chairman, and the conclusions set out in the notes on the meeting dated 2 April 1984, which stated that pressure from inter-member trade had slackened considerably through improved bilateral contacts and that exports had tended to shrink, although there was still a threat from outsiders.

1023 Seventh, Lafarge points out that in the notes on the meeting dated 2 April 1984 there is a reference to the desire not to set up information exchanges that would be contrary to Community competition law.

1024 That argument is irrelevant. The objection upheld in Article 1 of the contested decision does not concern the exchange of information but an agreement on non-transhipment to home markets and the regulation of sales from one country to another (see paragraph 1017 above).

1025 Eighth, and last, Unicem states that the information enclosed with the letter convening the meeting of 19 March 1984 was intended for use in a possible anti-dumping action in respect of imports from Eastern Europe.

1026 The Court points out that the first item on the agenda of the meeting of 19 March 1984 was entitled 'Imports from Eastern Europe' (document 33.126/11716). However, notwithstanding the fact that the documents to which Unicem refers may have been intended for use in an anti-dumping action in respect of those imports, the Cembureau agreement was confirmed in the context of the discussions relating to the second item on the agenda, concerning the 'position on the European market' (document 33.126/11716).

1027 The Court therefore concludes that the evidence presented by the Commission in recitals 18, 19 and 45 of the contested decision was such that it was entitled to conclude that the concurrence of wills in respect of the principle of non-transhipment to home markets and the regulation of sales from one country to another was reaffirmed at the Head Delegates meeting on 19 March 1984 (contested decision, recital 45, paragraph 9).

2.4. Confirmation of the Cembureau agreement at the meeting of Head Delegates on 7 November 1984

1028 The Commission maintains that the Cembureau agreement was confirmed once more at the Head Delegates meeting held on 7 November 1984 (contested decision, recital 45, paragraph 2, second subparagraph). In that regard, it relies on the 'summary notes' dated 12 November 1984 relating to that meeting (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755).

1029 First, CBR, Cembureau, FIC, Ciments Luxembourgeois, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Heracles, Oficemen, Irish Cement, ATIC, Titan, Cementir and AGCI dispute the validity of that assertion. They argue that it follows from the documents referred to in recital 19, paragraphs 12 to 14, of the contested decision that the meeting was devoted to East European imports and world cement market developments. The Greek/Spanish agreement referred to in the 'summary notes' of 12 November 1984 relating to the Head Delegates meeting on 7 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755) is an agreement whose sole purpose was to stabilise the prices of exports outside Europe. In addition to the documents mentioned in recital 19, paragraphs 12 to 14, of the contested decision, Cembureau refers to various tables distributed at the meeting of 7 November 1984 (contested decision, recital 19, paragraph 15; documents 33.126/11774 to 11789) and to the draft record of the meeting of the Executive Committee held on 8 November 1984 (annex 4.11 to Cembureau's application). FIC also refers to the note dated 12 November 1984 sent to its administrative board by Mr Van Hove (contested decision, recital 44, paragraph 3, *in fine*; documents 33.126/2063 to 2069 and 2436 to 2447), which states, in regard to the meetings of the Executive Committee and of the Head Delegates on 7 and 8 November 1984, that 'no internal EEC problem was dealt with or raised'.

1030 The Court points out that, unlike the meetings held on 14 January 1983 and 19 March 1984, intra-European trade was not a separate item on the agenda of the meeting held on 7 November 1984. The two items on the agenda of that meeting were: '1. East European imports ... 2. World market developments'. Similarly, the draft record of the Executive Committee meeting held on 8 November 1984 states that the meeting on 7 November 1984 was 'devoted to imports from Eastern Europe and the continued threat of their increase as well as the deterioration in the situation on the world market'. As regards the note dated 12 November 1984 to which FIC refers, it states that 'no internal EEC problem was dealt with or raised' at the meeting held on 7 November 1984.

1031 However, it is clear from the 'summary notes' dated 12 November 1984 that the participants in the meeting held on 7 November 1984 supported the conclusion of an agreement between Greek and Spanish exporters.

1032 The 'summary notes' state in respect of that agreement:

'This is unanimously considered as the basic criterion if better export prices are to be achieved, and the risk of a destabilisation in Europe avoided.'

1033 The notes then conclude:

'The situation was serious and export prices damagingly low. There was surplus capacity both in West Europe and the Far East, which had to be used in a responsible manner. The Greek and Spanish cement industries were to be congratulated on their efforts to reach understanding, and other member countries were prepared, if requested, to support fully their endeavours. Small quantities expected by other countries would not disturb the market if mutual confidence prevailed.'

1034 By supporting the Greek/Spanish agreement the Head Delegates therefore pursued a double objective.

1035 They sought, first, to obtain better export prices. Cement prices on the world market were considered damagingly low. The low level of export prices was caused not only by surplus capacity in Europe and in the Far East but also by the conflict between Greek and Spanish producers on the export markets. In that regard, the note dated 12 November 1984 from Mr Van Hove states that the conflict between Greek and Spanish producers 'affected prices on the external markets'. That is why the Greek/Spanish agreement was unanimously considered the basic criterion if better export prices were to be achieved. Similarly, the draft record of the meeting of the Executive Committee held on 8 November 1984 states that '[t]he president stressed the importance of the efforts being made by the Spanish and Greek exporters to restore prices to reasonable levels and the striking evidence that had been shown at the meeting of the support that other members were willing to give them to this end'.

1036 In supporting the Greek/Spanish agreement the Head Delegates also sought to avoid 'the risk of a destabilisation in Europe'. In their general conclusions they linked the risk of destabilisation in Europe with the existence of 'surplus capacity', which, according to them, had to be used 'in a responsible manner'. At a time when prices on the world market were falling significantly, there was a real risk that European producers who normally exported their surplus production outside Europe would be tempted to seek outlets in Europe for at least part of their excess production. The objective of the meeting of Head Delegates was therefore to restore prices on the world market to 'reasonable levels' (draft record of the meeting of the executive committee held on 8 November 1984) in order to avoid such a diversion. Thus, as was also apparent from the Blue Circle internal memorandum dated 1 December 1983 (contested decision, recital 18,

paragraph 2; documents 33.126/11332 to 11334), non-transhipment to home markets and the channelling of exports went hand in hand.

1037 Accordingly, although the problem of cement trade between Member States was not on the agenda of the meeting held on 7 November 1984, the Commission was entitled, after properly evaluating the evidence relating to that meeting, to conclude as follows in regard to the Cembureau agreement (contested decision, recital 45, paragraph 2, second subparagraph):

'The content of the agreement was again confirmed at the meeting of Head Delegates held on 7 November 1984 ..., at which the channelling of Greek and Spanish production surpluses was endorsed by Cembureau and its members so as to avoid destabilising European markets.'

1038 Second, Heidelberger and Unicem claim that the references in the 'summary notes' dated 12 November 1984 to the need to 'achieve a firm understanding between the major European exporters' and to '[n]egotiations ... between four Spanish and three Greek companies' (see paragraph 808 above) are at variance with the existence of the Cembureau agreement.

1039 That argument must be rejected. The agreement and negotiations in question concern the major export markets and are not at variance with the prior existence and conclusion of an agreement not to tranship to internal European markets. On the contrary, it follows from the foregoing analysis (see paragraphs 1030 to 1037 above) relating to the meeting held on 7 November 1984 that by supporting the conclusion of an agreement between Greek and Spanish exporters the Head Delegates wished to ensure that the Cembureau agreement did not break down.

1040 Third, AGCI claims that in order to establish the existence of an unlawful agreement on non-transhipment to home markets the Commission could not rely on the fact that information had been exchanged at the meeting of 7 November 1984 on the Greek/Spanish agreement relating to the Cement Marketing Association (hereinafter 'the CMA'). First, Greek and Spanish exporters have been competing on the major export markets since the beginning of the 1970s, so that the presence of the producers of those two countries on those markets cannot be seen as evidence of the implementation of the Cembureau agreement in the form of the channelling of their product to non-European countries; second, the agreement on the CMA was not called in question in the contested decision. Consequently, the Commission cannot rely on the existence of a lawful agreement in order to demonstrate the existence of another, unlawful, agreement. Titan also complains that the Commission had 'given to believe' that a lawful agreement could constitute evidence of the existence of an unlawful agreement. AGCI refers to the intervention of its representative at the meeting of the Cembureau executive committee on 9 November 1984 (contested decision, recital 17, paragraph 6) and states that to encourage cooperation in overseas markets is not objectionable under Article 85(1) of the Treaty.

1041 The Court finds that the argument that there had been competition between Greek and Spanish producers since the 1970s does not shed a different light on the 'summary notes' dated 12 November 1984, which show that the Head Delegates supported the Greek/Spanish agreement so that 'the risk of a destabilisation in Europe [could] be avoided' and thus confirmed the Cembureau agreement (see paragraphs 1030 to 1037 above).

1042 As regards the argument that the Commission established the existence of the Cembureau agreement on the basis of the CMA agreement, the Court points out that the Commission did not rely on the discussions at the meeting held on 7 November 1984 as proof of the very existence of the Cembureau agreement. In the contested decision it merely claimed that the content of the Cembureau agreement had been confirmed at that meeting. Thus it asserted that the concurrence of wills on 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9), which had already come into being on 14 January 1983 and 19 March 1984, had again been confirmed on 7 November 1984, not because the discussions which had taken place at the latter meeting concerned the CMA but because those discussions sought to avoid 'the risk of a destabilisation in Europe' (contested decision, recitals 19, paragraph 14, and 45, paragraph 2, second subparagraph).

1043 Last, AGCI's observations that cooperation between undertakings on the major export markets outside the Community did not infringe Article 85(1) of the Treaty are irrelevant because the CMA was not the subject-matter of a specific objection in the contested decision.

1044 Fourth and last, Halkis considers that the reference to the Greek/Spanish agreement could not be used by the Commission as evidence to show that the Cembureau agreement had been confirmed at the meeting of 7 November 1984: quite apart from the fact that that agreement never existed, it was not even identified in the contested decision as a manifestation of the principle of non-transhipment to home markets.

1045 That argument must also be rejected. It should be pointed out that the Commission did not rely on the actual existence and application of the Greek/Spanish agreement in concluding that the Cembureau agreement had been confirmed at the meeting held on 7 November 1984, but only on the fact that, according to the 'summary notes' dated 12 November 1984, the participants in that meeting had unanimously considered the Greek/Spanish agreement to be the basic criterion if 'the risk of a destabilisation in Europe [was to be] avoided'.

1046 It must be concluded that on the basis of the evidence presented in recitals 18, 19 and 45 of the contested decision the Commission was entitled to conclude that the concurrence of wills in regard to the principle of non-transhipment to home markets and the regulation of sales from one country to another was reaffirmed at the meeting held on 7 November 1984 (contested decision, recital 45, paragraph 9).

2.5. Failure to take other Head Delegates meetings into consideration

1047 Cembureau, FIC, Irish Cement and Cementir complain that, although its argument is based on the predominant role which the Head Delegates meetings played in the conclusion and implementation of the alleged Cembureau agreement, the Commission failed to take into consideration the Head Delegates meetings held on 30 May 1983 and 10 June 1985 and the fact that the question of intra-Community trade was not raised at those meetings. This shows that the Commission adopted an arbitrary and biased approach to selecting and analysing the evidence at its disposal. Titan complains that the Commission ignored the Head Delegates meeting of 30 May 1983, at which none of the questions at issue were raised.

1048 In support of the assertion that intra-Community trade was not discussed at the meetings held on 30 May 1983 and 10 June 1985, the applicants refer, as regards the first meeting, to the letter of 5 April 1983 convening the meeting (document 33.126/11643), the draft agenda of the meeting dated 17 May 1983 (documents 33.126/11654 and 11655) together with the report of that meeting given at the meeting of the executive committee held on the same date (annex 3.20 to Cembureau's application) and, as regards the second meeting, to the letter convening it and the documents enclosed therewith (documents 33.126/11793 and 11796) and the documents distributed at the meeting (documents 33.126/11799 and 11800).

1049 However, the Court finds that the Commission cannot be criticised for not taking into consideration factual information that did not provide additional evidence corroborating the body of specific documentary evidence which it had to show that the Cembureau agreement was concluded and confirmed at the meetings held on 14 January 1983, 19 March and 7 November 1984. In any event, even assuming that intra-Community trade was not discussed at the meetings held on 30 May 1983 and 10 June 1985, that circumstance is not such as to shed a different light on the body of documentary evidence showing that an agreement not to tranship to home markets was concluded, and then confirmed, at the meetings held on 14 January 1983, 19 March and 7 November 1984 (see paragraphs 872 to 1046 above).

2.6. General arguments relating to the evidential value of the documents referred to in recitals 18 and 19 of the contested decision

1050 First, a number of applicants question the evidential value of some of the evidence on the ground that they were not aware of it before the administrative procedure.

1051 Thus Vicat contends that the Commission did not seek to establish that it was aware of the various documents relating to the Head Delegates meetings. Cementir and AGCI state that the two Blue Circle internal memoranda (contested decision, recital 18, paragraphs 2 and 3;

documents 33.126/11332 to 11334 and 11335 to 11337) do not emanate from them and that at the material time neither they nor the other members of Cembureau were aware of them. AGCI adds that at the material time it was not aware of the correspondence between the Chairman of Cembureau and Mr Van Hove (contested decision, recital 19, paragraph 3; documents 33.126/11558 and 11559) or of the existence or content of the memorandum to the Chairman concerning the Head Delegates meeting of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729).

1052 In the same context, VNC maintains that the documents and statements on which the Commission relies cannot be used against it. The documents in question either come from cement producers with which VNC had no connection, do not come from Cembureau, or do not refer to VNC by name. BDZ claims that its own documents contain no record of the Head Delegates meetings called in question by the Commission or the slightest reference to the content of the alleged Cembureau agreement. Ciments Français claims that the French Head Delegate was not aware of either the letter from Mr Gil Braz de Oliveira convening the meeting of Head Delegates on 14 January 1983 (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) or the exchange of telexes between the secretariat of Cembureau and Mr Van Hove on 17 November 1982 (contested decision, recital 19, paragraph 3; documents 33.126/11558 and 11559) or the draft introductory statement of the Chairman for the meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585). Titan also claims that at the time it was not aware of the letter from Mr Gil Braz de Oliveira convening the meeting of Head Delegates on 14 January 1983 or of the draft introductory statement of the Chairman for that meeting.

1053 The Court finds, however, that the circumstances referred to in paragraphs 1050 to 1052 above do not affect the evidential value of the documents referred to in recitals 18, 19 and 45 of the contested decision as regards establishing the actual existence of an infringement. The evidential value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-869, at II-956; Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraphs 31 to 38, and Case T-157/94 *Empresa Nacional Siderúrgica* v *Commission* [1999] ECR II-707, paragraph 312). The circumstances invoked by the applicants concerned may be taken into consideration at the most in assessing their participation in the infringement. The Court will consider below whether their participation in the Cembureau agreement was proved sufficiently in fact and in law in the contested decision.

1054 Second, Blue Circle maintains that in relying on parts of documents in the contested decision the Commission clearly distorted the sense of some of them.

1055 Blue Circle's argument is not supported by any specific evidence which would allow the Court to assess its substance. It must therefore be rejected as lacking in precision.

1056 Third, Cembureau, Ciments Français, Heidelberger, Lafarge, Unicem, Heracles, Uniland, Oficemen and Irish Cement contend that in order to prove that the Cembureau agreement had been concluded at the meeting held on 14 January 1983 the Commission relied on preparatory documents, namely the letter convening that meeting (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553), the draft agenda of the meeting (contested decision, recital 19, paragraph 3; document 33.126/11580) and the draft introductory statement (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585). Preparatory documents have no evidential value, since they at most reflect the opinion of their author but do not reveal what actually took place at the meeting in question. Heidelberger adds that the fact that one of the participants in the meeting on 14 January 1983 stated that it wished to propose certain rules of the game does not constitute either proof of an agreement or proof of the content of those rules. For the same reasons, Ciments Français and Unicem dispute the evidential value of the memorandum to the Chairman of Cembureau concerning the meeting of Head Delegates on 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729).

1057 Cembureau also states that the draft introductory statement of the Chairman for the meeting of 14 January 1983 and the memorandum to the Chairman for the meeting on 19 March 1984, in particular the reference to 'hot spots' in the latter document, reflect only the personal opinion of their authors, Mr Collis and Mr Dutron, Directors of Cembureau, rather than those of the Chairman and the participants in the meetings in question.

1058 Italcementi claims that it is impossible to prove, on the basis of the documents relating to the three Head Delegates meetings called in question in the contested decision, that a concurrence of wills existed between the participants in the various meetings, the documents concerned being preparatory documents, handwritten notes and memoranda. In any event, Italcementi cannot be certain that they were submitted in full to the Head Delegates.

1059 The Court finds that there is a contradiction in the reasoning of most of the applicants concerned: they deny that the preparatory documents for the various meetings of Head Delegates have any evidential value but rely on the same documents when they seek to show that the discussions at those meetings were lawful (see paragraphs 955 to 1026 above).

1060 In any event, the Commission did not rely in the contested decision solely on preparatory documents for the Head Delegates meetings. It relied, in particular, on the notes dated 2 April 1984 concerning the Head Delegates meeting held on 19 March 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 1737) and the 'summary notes' dated 12 November 1984 concerning the meeting held on 7 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755). It follows from those documents, and from the Blue Circle internal memoranda (documents 33.126/11332 to 11334 and 11335 to 11337), the statement of the Chairman of Heracles and Cembureau's admission (contested decision, recital 18, paragraph 4; documents 33.126/11525 and 13568 to 13573), that the proposals of the Chairman of Cembureau, which are clearly set out in the preparatory documents for the Head Delegates meetings held on 14 January 1983 and 19 March 1984, were made at those meetings and, furthermore, that they were approved by the participants in

those meetings. Proof of the existence of the concurrence of wills on non-transhipment to home markets and the regulation of sales from one country to another is therefore supported by the body of consistent evidence referred to in recitals 18, 19 and 45 of the contested decision.

2.7. Documents subsequent to the Head Delegates meetings showing that the Cembureau agreement was not concluded at the meeting held on 14 January 1983 or confirmed at the meetings held on 19 March and 7 November 1984

1061 A number of applicants claim that various documents show that the Cembureau agreement could not have been concluded at the meeting held on 14 January 1983 or confirmed at the meetings held on 19 March and 7 November 1984.

1062 First, Cembureau, FIC, Dyckerhoff, Aalborg, Irish Cement, Titan and AGCI refer to the handwritten Italcementi note on the Executive Committee meeting held in Paris on 14 April 1986 (contested decision, recital 17, paragraph 9; document 33.126/3185), which states: '... we must establish rules of the game amongst ourselves to avoid improper competition'. The fact that it was necessary to 'establish rules of the game' shows that those rules had not been adopted at the Head Delegates meeting held on 14 January 1983.

1063 That argument must be rejected. The Court points out that the sentence quoted from the Italcementi note is preceded by observations relating to dumped imports. The observations immediately following that sentence also relate to dumping. Moreover, it is apparent from that document that it was the Spanish delegate, Mr Bertrán, of Asland, who stated that it was necessary to 'establish rules of the game ... to avoid improper competition'. In that regard, it should be pointed out that an anti-dumping complaint had been lodged by the Community industry against the Spanish cement producers in April 1985 (OJ 1985 C 84, p. 5).

1064 It therefore follows from the foregoing, that contrary to what the Commission claims (contested decision, recital 17, paragraph 10), Mr Bertrán's statement was made in the context of a discussion of the problems caused by dumped imports. Even if such imports from Spain to other Member States show that the Spanish producers did not always comply with the Cembureau agreement, it is none the less the case that such a finding is not such as to shed a different light on the evidence on which the Commission relied in recitals 18, 19 and 45 of the contested decision, which shows that at the meeting held on 14 January 1983 a concurrence of wills was revealed regarding the principle of non-transhipment to home markets and the regulation of sales from one country to another (see, in particular, paragraphs 979 to 985 above). Moreover, the fact that Mr Bertrán, the representative of an industry against which an anti-dumping complaint had been lodged, assured the other participants in the meeting that he considered it

necessary to avoid improper competition is perfectly consistent with the theory of a pre-existing Cembureau agreement.

1065 Second, Titan observes that at the meeting of the Executive Committee on 9 November 1983 Mr Bertrán encouraged the establishment of cooperation between members of Cembureau but did not refer to any failure to comply with the rules on cooperation adopted at the meeting of 14 January 1983.

1066 That argument must also be rejected. The document to which Titan refers deals with the problem of low prices on the major export market and the need for cooperation between members of Cembureau to face up to that problem. Since the cooperation to which Mr Bertrán referred at the Executive Committee meeting on 9 November 1983 concerned the market outside Europe, the statement in question is not of such a nature as to shed a different light on the evidence on which the Commission relied in recitals 18, 19 and 45 of the contested decision (see, in particular, paragraphs 979 to 985 above).

1067 Third, Ciments Français considers that the Commission's argument that the Cembureau agreement was concluded by Cembureau and its members at the meeting of Head Delegates on 14 January 1983, then confirmed at the meeting held on 19 March 1984, is irreconcilable with the fact that in the case of Holderbank and the Spanish, Portuguese and Norwegian producers who participated in that meeting the Commission states that it had no evidence that their participation in the Cembureau agreement had any effect within the Community before 1986 (contested decision, recital 65, paragraph 4).

1068 That argument is irrelevant. Even supposing that the Commission erred or was inconsistent in its attribution of the infringement referred to in Article 1 of the contested decision to Holderbank, Aker and the Spanish and Portuguese undertakings and associations, that would not affect the probative value of the evidence referred to in recitals 18, 19 and 45 of the contested decision, which shows that a concurrence of wills on non-transhipment to home markets and the regulation of sales from one country to another was apparent at the Head Delegates meetings held on 14 January 1983, 19 March and 7 November 1984 (see, in particular, paragraphs 979 to 985, 1008 to 1010, and 1030 to 1037 above).

1069 Fourth, and last, Aalborg claims that the Commission's assertion that it is not certain that the infringement ever really ceased and cannot therefore establish a date for the ending of the infringement (contested decision, recital 65, paragraph 4) confirms that the Cembureau agreement did not exist. If the Cembureau agreement had been real and influenced conduct on the market, the Commission would have been in a position to establish whether or not it had been terminated.

1070 That argument must be rejected. The fact that the Commission has no evidence of the date when the agreement referred to in Article 1 of the contested decision ended does not affect the probative value of the evidence referred to in recitals 18, 19 and 45 of the contested decision, which shows that a concurrence of wills on non-transhipment to home markets and the regulation of sales from one country to another emerged at the Head Delegates meetings held on 14 January 1983, 19 March and 7 November 1984 (see, in particular, paragraphs 979 to 985, 1008 to 1010 and 1030 to 1037 above).

2.8. Characterisation as an agreement within the meaning of Article 85(1) of the Treaty

1071 First, CBR, FIC, Dyckerhoff, Heidelberger and Italcementi submit that the Commission could not characterise the Cembureau agreement as an agreement within the meaning of Article 85(1) of the Treaty. CBR considers that the Commission has not shown the expressions of will which distinguish an agreement from a concerted practice. The mere fact that Cembureau encouraged the adoption of certain good neighbour rules does not, in the absence of proof of the adhesion of the members of Cembureau, show that they agreed to subscribe to such a suggestion. Dyckerhoff, Heidelberger and Italcementi maintain that the Commission did not provide evidence that the views of the various participants converged at the meetings of Head Delegates in regard to the subject-matter of the discussions. FIC claims that the vague and inconsistent nature of the terminology used by the author of the Blue Circle internal memoranda to describe the alleged Cembureau agreement shows that the precise characterisation of that agreement is uncertain.

1072 It is clear from the body of documentary evidence referred to in recitals 18, 19 and 45 of the contested decision that a concurrence of wills on non-transhipment to home markets and the regulation of cement sales from one country to another became apparent at the meeting of Head Delegates held on 14 January 1983 and that it was confirmed at the Head Delegates meetings on 19 March and 7 November 1984. Such a concurrence of wills constitutes an agreement within the meaning of Article 85(1) of the Treaty (*ACF Chemiefarma* v *Commission*, cited in paragraph 643 above, paragraph 112; *Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraph 86; *Commission* v *Anic*, cited in paragraph 270 above, paragraph 130; *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 162; and *Tréfileurope* v *Commission*, cited in paragraph 958 above, paragraph 95). The use in the Blue Circle internal memoranda of the words 'Cembureau "agreement", "principle" or "policy"' of non-transhipment to internal European markets merely reflects the existence of that concurrence of wills and therefore that there was an agreement within the meaning of Article 85(1) of the Treaty. The Court will, however, consider below whether all the applicants may be regarded as having participated in the agreement in question.

1073 Second, Cembureau, Lafarge and Castle claim that the Commission has not produced evidence of its claim in recital 45, paragraph 8, of the contested decision that general instructions were given to the indirect members of Cembureau. Aker and EUROC consider that there is no evidence of instructions or recommendations given by the Head Delegates, by the national trade associations or by Cembureau itself to the undertakings or associations of undertakings which did not participate in the meeting.

1074 The Court points out that the draft introductory statement of the Chairman for the meeting of 14 January 1983 requested the participants in the meeting to 'spread words of wisdom around [them]'. In that respect, the manifestation of a concurrence of wills at the meetings of Head Delegates did not depend on any communication by the Head Delegates of 'words of wisdom' to the indirect members of Cembureau after the meeting. However, the fact that the indirect members of Cembureau may in particular cases have been unaware of the 'rules of the game' agreed at the Head Delegates meeting on 14 January 1983 is material to the question whether they adhered to the Cembureau agreement. That question will be considered below.

1075 Third, Italcementi claims that the bilateral measures called in question in the contested decision are not of such a nature as to prove the existence of an unlawful agreement involving the entire European cement industry. The existence of a concurrence of wills cannot be proved by the implementation of such a common intention.

1076 That argument must be rejected. It is sufficient to point out that the existence of the Cembureau agreement was properly established in the contested decision on the basis of the specific documentary evidence referred to in recitals 18, 19 and 45 (see, in particular, paragraphs 979 to 985, 1008 to 1010 and 1030 to 1037 above). The Commission did not therefore rely on the implementing measures alleged against the various addressees of the contested decision in order to prove the existence of the Cembureau agreement, even though, according to the contested decision, those measures confirm the existence of the concurrence of wills on non-transhipment to home markets and the regulation of cement sales from one country to another (contested decision, recital 45, paragraph 5).

1077 Fourth, and last, Italcementi claims that the evidence put forward by the Commission in recitals 18, 19 and 45 of the contested decision is also incapable of demonstrating the existence of a concerted practice that infringes Article 85(1) of the Treaty.

1078 That argument is irrelevant. In Article 1 of the contested decision the Commission correctly finds that there was an agreement, not a concerted practice.

2.9. Object and nature of the Cembureau agreement

1079 ENCI and VNC complains that the Commission has not proved that the alleged Cembureau agreement also applied to the Netherlands market. Such proof cannot in any event be inferred from the memorandum to the Chairman for the meeting of Head Delegates on 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729). The

memorandum expressly states that the discussions did not concern exports from Germany and Belgium to the Netherlands. No other document relating to the Head Delegates meetings refers to the situation on the Netherlands market.

1080 The Court points out, however, that there is nothing in the documents before it to show that a national market represented within Cembureau escaped the application of the agreement concluded on 14 January 1983 and confirmed on 19 March and 7 November 1984.

1081 With regard specifically to the Netherlands market, it should be pointed out that the Netherlands Head Delegate, Mr Platschorre, was present at the Head Delegates meeting on 14 January 1983 (contested decision, recital 19, paragraph 4; document 33.126/11581) and at that on 19 March 1984 (contested decision, recital 19, paragraph 8; documents 33.126/11699 and 11700). There is no indication that Mr Platschorre openly distanced himself from what was agreed at the meetings in question. On the contrary, it is apparent from the documents relating to the meeting of Head Delegates held on 19 March 1984 that the Cembureau agreement also applied to the Netherlands market. Thus, after being informed that the discussions would not concern 'traditional or even structural inter-state trade, ... e.g. exports from Germany and Belgium to the Netherlands' (memorandum to the Chairman for the meeting of Head Delegates on 19 March 1984), the participants in that meeting learnt during it that in addition to such exports there were '"random" additional exports to the Netherlands' (notes on the meeting dated 2 April 1984). On that point, it should be observed that the fact that certain exports to the Netherlands were described as 'random' already showed that those exports, unlike traditional or structural exports to that country, or in other words controlled exports, were seen as not complying with a rule of conduct in force on the Netherlands market concerning non-transhipment to home markets and the regulation of sales from one country to another.

1082 It follows that the argument put forward by ENCI and VNC must be rejected.

1083 AGCI claims that the Cembureau agreement in reality represents the common position adopted by a restricted group of undertakings, namely the 'group of eight', which constituted the 'hard core' of the ETF (contested decision, recital 25, paragraph 21; document 33.126/18848). Acting exclusively in their own interest and without the knowledge of the other members of Cembureau, those eight undertakings sought to combine in order to meet imports from other Member States, such as Greece. On this point, AGCI refers to various factors (the fact that the Directors of Cembureau participated in the meetings setting up the ETF held in Rome on 28 May 1986 and in Zurich and Celigny from 3 to 5 June 1986; the fact that a confidential copy of the minutes of the meetings of the EPC was sent to Blue Circle; and the fact that the Chairman of Cembureau and the Chairman of the EPC belonged to Blue Circle) which, in its view, show that the Cembureau board worked under the direction and on behalf of that restricted circle of large producers, independently of the other members of Cembureau, without their knowledge and against their interests. Titan criticises the Commission for not examining what was meant by the expression 'group of eight'.

1084 That argument does not refute the specific documentary evidence referred to in paragraphs 979 to 985 above, which shows unequivocally that the Cembureau agreement was concluded in January 1983 — well before the emergence of the 'Greek threat', which only materialised after 1986 — not in the restricted framework of a group of undertakings but in that of a meeting of Cembureau Head Delegates attended by the representatives of all the European cement industry and, in particular, a representative of AGCI. That undertaking's argument must therefore be rejected.

3. The Cembureau agreement as an infringement of the Treaty: restriction of competition and effects on trade between Member States

1085 It follows from all the foregoing that the Commission was entitled to conclude on the basis of the evidence which it presented in recitals 18, 19 and 45 of the contested decision that the Cembureau agreement had been concluded at the meeting of Head Delegates on 14 January 1983 (contested decision, recital 45, paragraph 1) and that the content of that agreement had been confirmed at the meetings of Head Delegates held on 19 March and 7 November 1984 (contested decision, recital 45, paragraph 2). The same evidence shows that the object of the Cembureau agreement was 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9).

1086 The Cembureau agreement therefore had an object which was in itself anti-competitive. It fell within a category of agreements expressly prohibited by Article 85(1)(c) of the Treaty. Since the Head Delegates represented the entire European cement industry (see paragraphs 924 to 927 above), the agreement was clearly such as to have a significant effect on trade between Member States.

1087 Ciments Luxembourgeois, Dyckerhoff, Lafarge, Aalborg, Alsen-Breitenburg, Nordcement, Unicem, Castle, Uniland, Oficemen, Irish Cement, Cimpor, SECIL, Italcementi, Aker, EUROC, Cementir and Blue Circle claim that the existence of an agreement must be assessed in its economic context. The explanation for the low level of trade in cement is not the existence of an agreement not to tranship to home markets but a series of economic reasons, such as the high costs of transport and harbour charges, the specification rules, administrative barriers and the cost of investing in exports. Furthermore, economic reality shows that the applicants had no interest in concluding the Cembureau agreement and that if such an agreement had been concluded it could not have significantly restricted competition. As regards the United Kingdom market, Blue Circle further states that the Commission itself took the view in the SO (point 74(7)) that the restrictions imposed by the CPMA (see paragraph 91 above) had the effect of isolating and dividing the national market and making it difficult, or even impossible, for Continental producers to penetrate that market. Aalborg and Blue Circle complain that the Commission, in assessing the evidence relating to the existence of the Cembureau agreement, failed to take into consideration the increase in crossborder trade in cement during the material period.

1088 The conformity of conduct with Article 85(1) of the Treaty must be assessed in its economic context (Case 56/65 *Société Technique Minière* [1966] ECR 235, at 248, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraph 140). However, even if the applicants' assertions were well founded, they are not of such a nature as to prove that the economic context excluded any possibility of effective competition (see, to that effect, the judgments in *Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraph 153, Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 24 to 29, and *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 127). Moreover, the inherently anti-competitive object which characterises the conclusion of an agreement not to tranship to home markets — an agreement expressly prohibited under Article 85(1)(c) of the Treaty — cannot be altered by an analysis of the economic context in which the agreement is situated (see, in that regard, *Tréfileurope* v *Commission*, cited in paragraph 223 above, paragraph 109, and *European Night Services and Others* v *Commission*, cited in paragraph 834 above, paragraph 136). An economic analysis cannot override the inescapable reality of documentary evidence such as that referred to in recitals 18, 19 and 45 of the contested decision. In any event, if the economic analysis proposed by the applicants were accurate, it would actually underline the gravity of the infringement, because by concluding the Cembureau agreement the Head Delegates attempted to eliminate the little actual competition remaining on the market.

1089 Aalborg's and Blue Circle's argument based on the alleged increase in the intra-Community trade in cement must be rejected for the reasons set out in paragraph 1018 above.

1090 Heidelberger, Titan and Italcementi complain that the Commission failed to consider whether the behaviour of operators on the market could be explained otherwise than by collusion.

1091 The Court points out, however, that as the Commission did not base the existence of the agreement on parallel conduct observed on the market, but on documentary evidence proving an agreement (see, in particular, paragraphs 979 to 985, 1008 to 1010 and 1030 to 1037 above) it was not required to examine whether the operators' behaviour on the market could be explained otherwise than by that agreement.

1092 Last, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Aalborg, Unicem, Buzzi, Asland, Castle, Uniland, Oficemen, Irish Cement, Italcementi, Aker, EUROC, Cementir and Blue Circle assert that, contrary to what is stated in the contested decision (recital 11, paragraphs 1 and 7), Europe was not the relevant geographical market. They submit that the cement market at the material time consisted of a mosaic of strictly delimited regional markets which did not overlap and were completely independent of one another.

1093 The Court points out (see paragraph 834 above) that, for the purposes of applying Article 85, the applicants' objections to the Commission's definition of the market cannot be viewed in isolation from their objections concerning the effect on trade between Member States and the impairment of competition (*SPO* v *Commission*, cited in paragraph 485 above, paragraph 75; *Enso Española* v *Commission*, cited in paragraph 718 above, paragraph 232; and *European Night Services and Others* v *Commission*, cited in paragraph 834 above, paragraphs 90 to 105).

1094 In the present case, the objection to the definition of the relevant market is therefore of no consequence, because the Commission rightly concluded, on the basis of the documents referred to in recitals 18, 19 and 45 of the contested decision, that the Cembureau agreement distorted competition and was liable to have an appreciable effect on trade between Member States (see paragraphs 1085 and 1086 above). Moreover, the very existence of the Cembureau agreement at a pan-European level directly contradicts the applicant's claim that Europe was the geographic reference market for cement.

4. Conclusions

1095 It follows from all the foregoing that on the basis of the evidence which it presented in recitals 18, 19 and 45 of the contested decision the Commission was entitled to conclude, first, that the Cembureau agreement had been concluded at the meeting of Head Delegates held on 14 January 1983 (contested decision, recital 45, paragraph 1), then confirmed at the Head Delegates meetings held on 19 March and 7 November 1984 (contested decision, recital 45, paragraph 2) and, second, that the agreement infringed Article 85(1) of the Treaty (contested decision, recital 45, paragraph 5, and Article 1).

B — Infringement of Article 190 of the Treaty

1096 Cembureau (T-26/95) claims that the Commission failed to explain, either in 'The Facts' of the contested decision or in its 'Legal Assessment', the extent to which the various items of evidence of the conclusion and confirmation of the alleged Cembureau agreement related to each other. It suspects that the Commission wished to compensate for that failure and therefore changed its argument and established a link between the various items of evidence for the first time in its defence.

1097 The Court observes that in recital 45 of the contested decision, which is entitled 'Non-transhipment to home markets' and appears in the 'Legal Assessment', the Commission maintains at the outset (paragraph 1):

'At the meeting of Head Delegates held on 14 January 1983, Cembureau and its members reached an agreement on non-transhipment to domestic markets and on the regulation of sales from one country to another ...'

1098 In the same recital (paragraph 2) the Commission states that the content of the agreement was confirmed at the meetings of Head Delegates held on 19 March and 7 November 1984.

1099 Thus, it is apparent upon reading recital 45, paragraphs 1 and 2, of the contested decision that the Commission based its legal assessment of the Cembureau agreement on the facts set out in recitals 18 and 19, entitled 'The Cembureau agreement or Cembureau principle of not transhipping to internal European markets' and 'Meetings of the Cembureau Head Delegates'.

1100 Furthermore, in recital 45 the Commission refers to various specific items of evidence in support of its argument. It maintains in particular (paragraph 1) that the purpose and content of the Cembureau agreement are evident from the letter convening the meeting of Head Delegates held on 14 January 1983 (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) and from the Chairman's draft introductory statement for that meeting (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585). It also relies (paragraph 2) on the notes on the meeting dated 2 April 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) to show that the Cembureau agreement was confirmed at the meeting of Head Delegates on 19 March 1984, and on the 'summary notes' dated 12 November 1984 (contested decision, recital 19, paragraph 14; documents 33.126/11754 and 11755) in concluding that it was confirmed again at the meeting of Head Delegates held on 7 November 1984. The Commission then states (paragraph 3) that the existence of the Cembureau agreement and its content are confirmed by the internal Blue Circle memoranda to which it refers in recital 18, paragraphs 2 and 3, of the contested decision (documents 33.126/11332 to 11334 and 11335 to 11337). It considers (paragraph 4) that Cembureau itself indirectly admitted to the existence of the Cembureau agreement in the statement which it made on the occasion of an investigation pursuant to Article 14 of Regulation No 17 and in its reply to the statement of objections pursuant to Article 15(1) of Regulation No 17 (contested decision, recital 18, paragraph 4; documents 33.126/11525 and 13568 to 13573). It adds (paragraph 6) that, according to the statement dated 25 June 1986 by the Chairman of Heracles (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877), the agreement not to tranship to internal markets had existed for some 30 years. However, since it did not have any other evidence to confirm that the conduct in question had lasted so long, it considered that the Cembureau agreement took effect only on 14 January 1983, the date of the Head Delegates meeting.

1101 In those circumstances, the Court cannot uphold Cembureau's argument that the Commission failed to explain the inter-relationship between the various items of evidence which it adduced to prove the conclusion and confirmation of the Cembureau agreement.

1102 Heidelberger (T-42/95) claims that the Commission fails to specify in its statement of reasons whether the complaint concerning the Head Delegates meeting held on 14 January 1983 relates to the conclusion of, or merely the proposal for, an agreement not to tranship to home markets. Heidelberger and Dyckerhoff (T-35/95) consider that the reasons on which the contested decision are based is contradictory, in that the decision refers to the expressions 'general instructions' and 'proposal' (contested decision, recital 45, paragraph 8) to describe what is alleged to be a firm decision adopted at the meeting on 14 January 1983.

1103 That argument must be rejected. It follows unequivocally from recital 45, paragraph 1, of the contested decision that the Commission complains that the participants in the meeting held on 14 January 1983 concluded an agreement not to tranship to home markets, not merely that they proposed such an agreement. The references in recital 45, paragraph 8, fourth and fifth subparagraphs, to 'general instructions' and to 'the proposal made at the meeting held on 14 January 1983' relate to the content of the Chairman's draft introductory statement for that meeting, in which it was proposed to establish 'rules of the game'. The Commission clearly explained in the contested decision that a concurrence of wills emerged at the meeting of 14 January 1983 concerning those 'rules of the game', which related to non-transhipment to home markets and the regulation of sales from one country to another.

1104 Dyckerhoff considers that it is contradictory to consider, on the one hand, that the Cembureau agreement became binding on all the direct and indirect members of Cembureau on 14 January 1983 and, on the other, that the agreement was confirmed at the subsequent meetings of Head Delegates.

1105 The Court points out, however, that the Commission did not contradict itself by stating that the concurrence of wills which emerged at the meeting held on 14 January 1983 was confirmed at the meetings held on 19 March and 7 November 1984. The confirmation of an agreement necessarily supposes that it was concluded beforehand.

1106 SFIC (T-36/95) maintains that the reasoning on which the contested decision is based is circular. In order to demonstrate the existence of the Cembureau agreement the Commission presents a number of decentralised acts, which in reality are not anti-competitive in nature, as measures implementing that agreement. SFIC claims that in the SO the Commission, using the existence of national agreements, had already reasoned from the base upwards in order to call in question the Cembureau agreement and that its reasoning became specious once it had dropped the proceedings relating to the national objections.

1107 That argument must also be rejected. It follows unequivocally both from the SO (points 9 and 61(a)) and from the contested decision (recitals 18, 19 and 45) that at the outset the Commission established the existence of the Cembureau agreement on the basis of a body of consistent specific documentary evidence, not on the existence of decentralised local, bilateral or multilateral agreements.

1108 Last, Heracles (T-57/95) maintains that in the contested decision the Commission did not sufficiently examine the arguments which it put forward in response to the SO.

1109 That argument is not supported by any concrete evidence on the basis of which the Court could evaluate its merits. It must therefore be rejected for lack of precision. In any event, the Commission is not required to reply in detail to all the arguments formulated by the various addressees of the SO during the administrative proceedings. It is sufficient that the statement of reasons allows the Community judicature to review the legality of the contested decision and provides the undertakings and associations concerned with the information necessary for them to be able to determine whether or not the decision is well founded (*VBVB and VBBB* v *Commission*, cited in paragraph 846 above, paragraph 22, *BAT and Reynolds* v *Commission*, cited in paragraph 846 above, paragraph 72; and *La Cinq* v *Commission*, cited in paragraph 846 above, paragraph 42). Recitals 18, 19, 28, 35, 36, 45, 46, 56 and 59 of the contested decision provide both Heracles and the Court with sufficient information from which to discern the principal elements of fact and of law underlying the reasoning which led the Commission to hold Heracles responsible for the infringements referred to in Article 1, Article 4(4)(d), (f) and (g) and Article 6 of the contested decision.

C — Breach of the rights of the defence when access was given to the file

1110 Italcementi (T-65/95) and Blue Circle (T-88/95) complain that during the administrative procedure they were not given access to certain incriminating documents which were invoked in recital 19 of the contested decision to support the finding of the infringement referred to in Article 1 of the contested decision (1). In the observations which they filed following the measures of 2 October 1996 and 18 and 19 June 1997, CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), ENCI (T-31/95), VNC (T-32/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), Buzzi (T-51/95), Rugby (T-53/95), Asland (T-55/95), Castle (T-56/95), Heracles (T-57/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Titan (T-64/95), Italcementi, Holderbank (T-68/95), Hornos Ibéricos (T-69/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95) and Blue Circle maintain that during the administrative procedure they were not given access to exculpatory evidence relating to the infringement referred to in Article 1 of the contested decision (2).

1. Incriminating evidence

1111 Italcementi and Blue Circle claim that their rights of defence were breached during the administrative procedure because they were not given access to a series of documents relating to the Head Delegates meetings, those documents being incriminating documents referred to in recital 19 of the contested decision (see paragraph 366 above). They refer to documents 33.126/11560 to 11577 and 11587 to 11633 concerning the Head Delegates meeting held on 14 January 1983 (contested decision, recital 19, paragraph 6), documents 33.126/11697, 11698, 11701 to 11713 and 11732 concerning the Head Delegates meeting on 19 March 1984 (contested decision, recital 19, paragraph 11) and documents 33.126/11739 to 11747, 11750, 11756 to 11773 and 11774 to 11789 concerning the Head Delegates meeting on 7 November 1984 (contested decision, recital 19, paragraph 15).

1112 However, even if all the documents to which Italcementi and Blue Circle refer were held inadmissible, it is apparent from the Court's analysis in paragraphs 861 to 1095 above that the Commission has adequately proved the existence of the Cembureau agreement.

2. Exculpatory evidence

1113 The Court will first consider arguments relating to exculpatory evidence that were raised by several applicants following the measures of 2 October 1996 and 18 and 19 June 1997. Having regard to the diversity of the other arguments and the documents to which they relate, the Court will then consider each argument in turn in the context of one or more cases.

2.1. Arguments raised by several applicants

1114 First, CBR, Cembureau, ENCI, VNC, SFIC, Vicat, Heidelberger, Lafarge, Aalborg, Asland, Castle, Heracles, Irish Cement, Titan, Italcementi, Aker, EUROC, Cementir and Blue Circle maintain in their observations lodged following the measure of 2 October 1996 that the whole of the national chapters of the SO and the associated documents constituted exculpatory evidence. They observe that none of the documents to which the Commission granted access following the measure of 2 October 1996 mentions a Cembureau agreement. They consider that if such an agreement had explained or been the driving force behind the conduct of the undertakings concerned there would have been repeated references to it.

1115 Similarly, in the observations which they lodged following the measure of 18 and 19 June 1997, Dyckerhoff, Aalborg, Unicem, Heracles, Italcementi, Cementir and Blue Circle state that there is no reference to a Cembureau agreement in the 'remainder' of the investigation file.

1116 The Court points out again that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission established the existence of the Cembureau agreement on the basis of specific documentary evidence. The argument set out in paragraphs 1114 and 1115 above must be rejected, because the applicants concerned fail to explain how the absence of any direct or indirect reference to the Cembureau agreement in the documents to which they were not given access during the administrative procedure is of such a nature as to shed a different light on that specific documentary evidence.

1117 Second, in the observations which they lodged following the measure of 2 October 1996 CBR, Cembureau, FIC, ENCI, VNC, Dyckerhoff, Aalborg, Irish Cement, Italcementi, Cementir and Blue Circle claim that the documents relating to Norcim, in the file on France, would have been of use to their defence. They observe that during the period to which the contested decision relates Norcim contemplated exporting cement to the United Kingdom, the Netherlands and Denmark. The difficulties which Norcim encountered in exporting to those markets had nothing to do with the existence of an alleged agreement not to tranship to home markets but was the result of various factors, such as its uncompetitive prices and the differences between national standards for the certification of the quality of cement. Moreover, when Norcim was faced with exports from Benelux producers, it did not protest against what would have been a breach of the Cembureau agreement but sought to ascertain what approach it could adopt to customers which it had lost to foreign competition. Norcim's conduct could not therefore be reconciled with the existence of the alleged Cembureau agreement.

1118 In support of their arguments, CBR refers to documents 33.126/5626 to 5636, 5641 to 5644, 5648 to 5663, 5682 to 5694, 5699 to 5702, 5705 to 5724 and 13484 to 13486; Cembureau to documents 33.126/5626, 5627, 5638, 5644, 5653, 5658, 5661, 5668, 5673, 5674, 5678, 5689, 5690, 5695, 5696, 5699, 5700, 5712, 5713, 5718, 5722, 5727, 5728, 5746, 5748, 13485, 13495, 13545 and 13557; FIC to documents 33.126/5660 to 5674, 5677 to 5679, 5680, 5681 and 13495 and 13497; ENCI and VNC to documents 33.126/5626 to 5634, 5651 to 5656, 5660 to 5663, 5671 to 5674, 5682 to 5687, 5705 to 5708, 5712 and 5713; Dyckerhoff to documents 33.126/5637 to 5644, 5651 to 5669, 5671 to 5674, 5676 to 5681, 5695 to 5698, 5709 to 5724, 5734 to 5737, 5741 to 5746, 13484 to 13486, 13511 and 13512; Aalborg to documents 33.126/5626 to 5637, 5641, 5644, 5657 to 5659, 5671, 5674 and 13484 to 13486; Irish Cement to documents 33.126/5626, 5627, 5638, 5644, 5653, 5658, 5661, 5668, 5673, 5674, 5678, 5684, 5689, 5690, 5695, 5696, 5699, 5700, 5712, 5713, 5718, 5722, 5727, 5728, 5746, 5748, 13485, 13495, 13545 and 13557; Italcementi to documents 33.126/5651, 5653, 5680, 5681, 5705, 5706, 13484, 13485, 13487, 13500, 13503 and 13506; Cementir to documents 33.126/5626 to 5634 and 5682 to 5687; and Blue Circle to documents 33.126/5671 to 5724, 13498 to 13509, 13532 and 13542.

1119 CBR adds that had it been aware of Norcim's internal rules (documents 33.126/5626 to 5634) it would have been in a position to challenge the validity of the Commission's argument that the existence of exports from Northern France to the Netherlands demonstrates the European nature of the geographical reference market adopted in the SO and in the contested decision.

1120 The Court points out, however, that the Commission has never claimed that the Cembureau agreement and its implementing measures had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement was impugned because of its anti-competitive object. At the very most, therefore, the documents referred to in paragraphs 1118 and 1119 above show that Norcim, which is not an addressee of the contested decision, did not always observe the Cembureau agreement.

1121 Furthermore, the Cembureau agreement did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) but was opposed to 'random' exports (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), namely uncontrolled or unregulated exports. The existence of imports or exports in a specific case is not therefore of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45). Finally, Norcim's conduct merely confirms the European dimension of the relevant geographical market.

1122 Third, in the observations which they lodged following the measure of 18 and 19 June 1997 CBR, Cembureau, FIC, Dyckerhoff, SFIC, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Heracles, Uniland, Oficemen, Irish Cement, SECIL, ATIC, Italcementi and Cementir maintain that the note by Mr Toscano Jr (of Cimpor) dated 17 February 1983 concerning the Head Delegates meeting on 14 January 1983 (documents 33.322/314 to 344) would have been of use to their defence, because it supported their argument that the principle of not transhipping to home markets was not discussed at that meeting. The document confirms their contention that problems of dumping were discussed at that meeting. As the note in question is a Cimpor internal note, there is no reason to assume that it does not give an accurate account of all the exchanges of views which took place at the meeting of 14 January 1983. At the hearing, Ciments Luxembourgeois, which did not lodge observations following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraph 170 above), referred to Mr Toscano Jr's note to support its allegation that there had been a breach of its rights of defence during the administrative procedure.

1123 As the Commission acknowledged at the hearing (see paragraph 153 above), Mr Toscano Jr's note of 17 February 1983 is relevant to the infringement found in Article 1 of the contested decision: it relates to the Head Delegates meeting of 14 January 1983.

1124 The Court must therefore assess whether, in the light of the evidence adduced by the Commission in support of the objection upheld in Article 1 of the contested decision, the document would have had even a small chance of altering the outcome of the administrative procedure if the applicants concerned had been able to rely on it during that procedure (see paragraph 247 above).

1125 The Commission rightly considered that the documentary evidence referred to in points 9 and 61 of the SO and recitals 18, 19 and 45 of the contested decision, and in particular that referred to in paragraphs 979 to 985 above, shows that a concurrence of wills concerning non-transhipment to home markets and the regulation of sales from one country to another was reached at the Head Delegates meeting held on 14 January 1983 and, therefore, that the Cembureau agreement to which Article 1 of the contested decision refers was concluded at that meeting. The same documents, in particular those mentioned in paragraphs 1008 to 1010 and 1030 to 1037 above, also reveal that the agreement was confirmed at the Head Delegates meetings held on 19 March and 7 November 1984.

1126 In reality, Mr Toscano Jr's note was not of such a nature as to shed a different light on the evidence which the Commission set out in points 9 and 61 of the SO and recitals 18, 19 and 45 of the contested decision to support its finding that the Cembureau agreement existed.

1127 The document in question consists of the notes taken at the meeting by Mr Toscano Jr (documents 33.322/314 to 317) and eight annexes (documents 33.322/318 to 344) consisting of the documents distributed at the meeting.

1128 Had it been Mr Toscano Jr's intention to draw up an exhaustive record of the meeting, his note would have covered all the points discussed and possibly, in the case of certain points, have referred to one or other of the eight annexes.

1129 In that regard, the Court points out that the note contains no reference to the discussions concerning the price formation systems. However, it is apparent from the final agenda of the meeting (contested decision, recital 19, paragraph 3; document 33.126/11656), the documents referred to in recital 17, paragraphs 2 and 3 of the contested decision and the statements of the various applicants during the proceedings before the Court (see paragraph 977 above) that such discussions took place at the meeting. Although Mr Van Hove's suggestions concerning fair competition form part of annex 8 (document 33.322/344), the note refers to that annex only in

the context of the problems of dumping discussed at the meeting: 'Mr Van Hove, of the Liaison Committee of the EEC cement industries, presented an analysis of the common market rules on protection against dumping and observed that all members of the EEC are associated in Cembureau. His analysis is in annex 8.'

1130 In those circumstances, Mr Toscano Jr's note cannot be considered an accurate and exhaustive account of the discussions which took place at the meeting of 14 January 1983. At the very most, the document in question proves that the problem of dumped imports was discussed, a point which has never been disputed by the Commission (see paragraph 986 above). It does not show, however, that the discussions were confined to that point. The note is therefore not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which shows that at the meeting of Head Delegates held on 14 January 1983 a concurrence of wills emerged on the rule of non-transhipment to home markets and the regulation of sales from one country to another.

1131 The Court also points out that in both the SO (points 7 and 8) and the contested decision (recital 17, paragraphs 2 and 3) the Commission referred to two other documents relating to the Head Delegates meeting held on 14 January 1983, namely the document 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the [Chairman]' (contested decision, recital 17, paragraph 3; documents 33.126/11630 to 11633) and the 'Cimpor note' for the meeting of the Executive Committee of Cembureau held on 25 March 1983 (documents 33.322/308 to 312), which, like Mr Toscano Jr's note (documents 33.322/314 to 344), contain no trace of a discussion of the rule on non-transhipment to home markets and the regulation of sales from one country to another. A number of applicants even consider that one or other of these documents is the official record of the Head Delegates meeting held on 14 January 1983 (see paragraphs 970 and 971 above). In the contested decision, however, the Commission discounts the argument submitted by a number of parties in their defence during the administrative procedure that these documents showed that only lawful proposals were made at the Head Delegates meeting on 14 January 1983 (contested decision, recital 17, paragraph 4). The Commission cannot see why in those circumstances 'there had to be no record of the Head Delegates meeting held on 14 January 1983' (contested decision, recital 17, paragraph 4). In other words, the existence of those two documents did not sway the Commission from its conclusion that a concurrence of wills was expressed at the Head Delegates meeting held on 14 January 1983 in relation to the Cembureau principle of non-transhipment to home markets and the regulation of sales from one country to another, and that this concurrence of wills was confirmed at the Head Delegates meetings held on 19 March and 7 November 1984.

1132 The Court concludes, therefore, that if the applicants concerned had had access to Mr Toscano Jr's note during the administrative procedure the comments which they could have made on the basis of that note would not have had even a small chance of altering the outcome of the administrative procedure. Accordingly, the fact that the document was not made available to the applicants concerned during the administrative procedure did not prejudice their defence (see paragraph 247 above).

2.2. Case T-25/95 *CBR* v *Commission*

1133 First, in its observations of 10 February 1997 CBR considers that the national chapters in the SO and their associated documents would have allowed it to challenge, during the administrative procedure, the finding that the geographical market was Europe. In that regard, it refers, first, to documents 33.126/17160 to 17172 and 17635 to 17637 in the file relating to the United Kingdom, which show that the United Kingdom cement producers were seeking to use the CPMA (see paragraph 91 above) in order to make imports less attractive; second, to the chapters in the SO on Italy (Chapter 13), the United Kingdom (Chapter 14), France (Chapter 15), Spain (Chapter 18) and Portugal (Chapter 19), which show that the national agreements and concerted practices were an obstacle to imports into those countries; and, third, to the Ciments Français note dated 11 September 1986 (documents 33.126/4115 to 4122), which is at variance with the Commission's finding that there were wide differences in prices over a long period, capable of meeting exporters' desire for long-term profitability (contested decision, recitals 9 and 11, paragraph 6).

1134 The Court points out that in concluding that the Cembureau agreement existed the Commission relied on the specific documentary evidence referred to in points 9 and 61 of the SO and in recitals 18, 19 and 45 of the contested decision. If the applicant had been able, during the administrative procedure, to formulate observations on the reference market on the basis of the documents referred to in the preceding paragraph that could not have altered the outcome of that procedure. The very existence of the Cembureau agreement at pan-European level, clearly shown by the above documentary evidence, directly contradicts CBR's argument that the geographical reference market for cement is not Europe.

1135 For the sake of completeness, the Court points out that far from supporting CBR's argument, the documents to which it refers show that cement is the subject of cross-border trade and that intra-Community imports exercise competitive pressure. Last, even if it should transpire that there was no 'significant gap' between selling prices in Belgium and France in 1983, 1984 and 1985 (document 33.126/4115 mentioned in paragraph 1133 above), that circumstance would not be of such a nature as to affect the definition of the geographical reference market adopted in the contested decision.

1136 As regards, second, the existence of the Cembureau agreement, CBR states in its observations of 10 February 1997 that the dates of the alleged national agreements and concerted practices do not coincide with the date of the alleged Cembureau agreement. It refers in that regard to Norcim's internal rules (documents 33.126/5626 to 5634) and to various documents relating to the alleged United Kingdom agreement and concerted practice (documents 33.126/17017 to 17015).

1137 However, the difference between the dates on which the national agreements and the Cembureau agreement were concluded is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and

in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement. Even supposing, moreover, that such an argument would have enabled the applicant to demonstrate the absence of any link between the national agreements and concerted practices and the Cembureau agreement, the fact that it did not have access to the documents in question could not prejudice its defence, as ultimately the national objections were not referred to in the contested decision and, in establishing the existence of the Cembureau agreement, the Commission did not rely on a finding that the national agreements and concerted practices existed.

1138 In its observations of 12 November 1997 CBR puts forward a number of documents which allegedly show that the observations made by its representatives, in particular at the meeting held on 14 January 1983, were in keeping with a general desire to find a solution to the problems facing the cement industry in compliance with the European competition rules. In that regard, it refers to two internal memoranda from Lafarge, a memorandum dated 16 June 1982 (document 33.126/6962) and a memorandum dated 1 December 1982 (document 33.126/6966).

1139 However, those internal memoranda are not capable of establishing that there has been a breach of CBR's rights of defence either.

1140 As regards the memorandum dated 16 June 1982, CBR considers it relevant that it states: 'Indép. All forte pression et CBR a refusé de leur tordre le cou comme demandait D'. [Indep. Germ. strong pressure and CBR refused to twist their necks as D. requested]. None the less, the Court points out that the Cembureau agreement did not prohibit all cement exports to a member country of Cembureau. The principle of non-transhipment to home markets did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the meeting of Head Delegates held on 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 to 11729), but was opposed to 'random' exports, that is to say, uncontrolled or unregulated exports. 'Random' exports from Germany to Belgium were expressly referred to at the meeting held on 19 March 1984 (notes on the meeting of Head Delegates held on 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). The fact that there were German imports into Belgium in a particular case was therefore not of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement.

1141 As regards the internal Lafarge memorandum dated 1 December 1982, CBR relies on an extract from this memorandum which states that Mr Van Hove 'seems to attach too much importance to what the EEC says'. However, it is important to place that extract in the context of the passage in the memorandum from which it is taken: 'He [Mr Van Hove] seems to attach too much importance to what the EEC says; is this because of proximity or rather with an idea at the back of his mind: to unlock the borders without being denounced by the trade as the instigator of disorder.' It is apparent, therefore, that, far from showing that the Cembureau agreement did not exist, the memorandum to which CBR refers confirms that 'lock[ed] ... borders' were a reality and that it was necessary to avoid 'disorder' on the market.

1142 Neither of the internal Lafarge memoranda to which CBR refers is therefore of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in finding that the Cembureau agreement existed. However, the Court will consider below whether those documents shed a different light on the question of CBR's participation in the Cembureau agreement (see paragraphs 4479 to 4483 below).

2.3. Case T-26/95 *Cembureau* v *Commission*

1143 First, Cembureau states in its observations of 10 February 1997 that the market analysis in the national chapters of the SO and in the national files (more specifically, the analysis of the German, French, United Kingdom, Italian, Spanish, Portuguese and Greek markets) was clearly relevant to the analysis of the European cement market in the international chapters of the SO. It maintains that the national chapters of the SO and the relevant documents should have been made available to it during the administrative procedure.

1144 The Court points out that, in concluding that the Cembureau agreement existed, the Commission relied on a body of specific documentary evidence referred to in points 9 and 61 of the SO and in recitals 18, 19 and 45 of the contested decision. If the applicant had been able, during the administrative procedure, to submit arguments concerning the reference market using the market analysis in the national chapters of the SO and in the relevant national files, that could have made no difference to the outcome of that procedure. The very existence of the Cembureau agreement concluded at pan-European level, which is shown by the above-mentioned documentary evidence and not by an analysis of the cement producers' behaviour on the market, confirms the definition of the geographical reference market adopted in the contested decision (recital 11).

1145 Second, in its observations of 10 February 1997 Cembureau maintains that various documents relating to the national objections provide reasons capable of contradicting the Commission's allegations that the European cement market was artificially partitioned as a result of the alleged international agreement and concerted practice. It refers, first, to two extracts from point 49 in Chapter 6 of the SO, on Germany, and to a number of documents in the file on Germany dealing with fines imposed by the Bundeskartellamt on various national producers in respect of illegal cartels during the 1980s. These various documents prove the existence of national cartels but not the existence of a European cartel. As regards the file on the United Kingdom, there is no proof that the cement industry was concerned with imports before the Greek problem arose in 1986. That file therefore makes it even less certain that imports from Germany represented a threat which might have been discussed at the Head Delegates meeting held on 19 March 1984. It is also apparent from a number of documents in the file on the United Kingdom (documents 33.126/17073 to 17075, 17080 to 17091, 17160 to 17174, 17178, 17179, 17203 to 17205, 17624, 17625, 17631 to 17633 and 17641 to 17654) that at that time the CMF and its members were extremely anxious to comply with Community competition law and that for that purpose detailed legal opinions had been obtained and regular contact maintained with the United Kingdom and European authorities. Access to the file on Italy would have allowed Cembureau to argue that the low level of imports on that market was

not the result of the alleged Cembureau agreement but rather of over-capacity on the domestic market and the measures taken to regulate the consequences thereof (documents 33.126/12485 to 12505). The Spanish file shows that there was no link between the agreements of 'Hispacement' (a Spanish export joint venture) and the alleged Cembureau agreement (SO, point 88). The low level of imports on that market should in fact have been attributed to its oligopolistic structure, characterised by vertical integration (documents 33.322/1372 to 1382, 1391, 1392, 1523, 1524, 1724, 1727, 1728, 1730, 1732, 1791 and 1819).

1146 The Court points out, however, that none of the observations which Cembureau considers it would have been able to make on the basis of the documents to which it refers would have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement. Furthermore, the fact that in the file on the United Kingdom there is no reference to the United Kingdom producers' being concerned with imports before 1986 would not have undermined the evidential value of the memorandum to the Chairman of Cembureau for the meeting held on 19 March 1984 (SO, point 9, paragraph (b); contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), in which it is stated that the then 'hot spots' included '[e]xports from Germany to the United Kingdom and Ireland'.

1147 Third, in its observations of 10 February 1997 Cembureau maintains that the documents in the national files dealing with cement imports support its argument that there was no Cembureau agreement. In addition to the documents relating to Norcim (see paragraph 1118 above), Cembureau refers to documents 33.126/14798, 14806 and 14807 in the file on France, which show that the concerns expressed related to dumped exports from Central Europe, not to intra-Community trade. The only document in the file on France to refer to discussions on defence against imports is the extract from the record of the meeting of SFIC held on 7 July 1987 (document 33.126/14879). However, that document deals exclusively with the lower quality of imports and the risks for consumers if specifications for imported cement were not determined by the cement industry. It therefore had no link with an alleged Cembureau agreement. It is also apparent from the documents in the United Kingdom file (documents 33.126/17631 to 17633) that the Office of Fair Trading (hereinafter 'the OFT') considered that the advent of imports in 1986 was a new event which justified a review of the CPMA (see paragraph 91 above). The Commission itself echoed that view of the United Kingdom market when it observed, in the first paragraph of point 37, in Chapter 4 of the SO, that until 1985 the United Kingdom had surplus production, which, in Cembureau's view, was likely to discourage imports. There is therefore a discrepancy in timing between the evidence in the file on the United Kingdom showing that the United Kingdom was not threatened by imports until 1986 and the Commission's allegations that the alleged Cembureau agreement was concluded in 1983 in order to deal with a crisis in relation to trade between the members of Cembureau. It also follows from the file on Spain (documents 33.322/1318 and 1412) that the reference to 'rules of the game' in the handwritten Italcementi note on the Executive Committee meeting held in Paris on 14 April 1986 (contested

decision, recital 17, paragraph 9; document 33.126/3185) concerned the question of antidumping measures, not the alleged Cembureau agreement. Last, Cembureau maintains that although the file on Portugal contains a number of references to Cembureau meetings (documents 33.322/88, 89, 92 and 96) there is no reason to suppose that those meetings were linked with the alleged Cembureau agreement.

1148 The Court points out, however, that the discussions on the need for technical specifications for imported cement in the interests of consumers are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in concluding that the Cembureau agreement existed. The same applies to the circumstance that the alleged surplus production on the United Kingdom market restricted imports until 1986.

1149 As regards the documents relating to Spain, the Court points out that Mr Bertrán's reference to 'rules of the game', reported in the handwritten Italcementi note on the Executive Committee meeting held on 14 April 1986, was made, contrary to the Commission's claim in the contested decision (recital 17, paragraph 10), in the context of a discussion of the problems caused by dumped imports (see paragraph 1064 above). However, that error in interpreting the note in question does not affect the legality of Article 1 of the contested decision (see paragraph 1064 above). Moreover, that document was not included in the body of specific documentary evidence from which the Commission concluded that the Cembureau agreement existed. The Italcementi note is referred to by the Commission in the contested decision (recital 17, paragraph 9) solely in order to illustrate the discussions which took place between European cement producers during the period in question on 'fair or healthy or correct' competition; furthermore, recital 17 is entitled 'The discussions on "fair or healthy or correct" competition'. Those discussions were not found to constitute an infringement in the contested decision. Consequently, even on the assumption that through its comments Cembureau could have prevented the Commission's error in interpreting the Italcementi note, those comments could not have altered the outcome of the administrative procedure in the applicant's favour as regards the infringement referred to in Article 1 of the contested decision.

1150 Fourth, Cembureau claims in its observations of 28 November 1997 that the meeting held on 14 January 1983 primarily concerned dumping and that this topic was considered and discussed both under point 1 ('Imports from Eastern Europe') and under point 2 ('Intra-European trade') on the agenda of that meeting (contested decision, recital 19, paragraph 3; document 33.126/11656). Point 2 on the agenda was also devoted to a series of legal questions concerning competition and intra-Community trade, including a presentation of the basing point system (the BPS notified to the Commission in 1981) in the light of Articles 85 and 86 of the Treaty. Cembureau maintains that a number of documents to which it did not have access during the administrative procedure thus cast further doubt on the Commission's view that point 2 of the agenda dealt with discussions which led to the conclusion of the Cembureau agreement. In that regard, Cembureau refers to documents 33.126/15443 to 15528 (documents relating to a Franco-German meeting on 6 and 7 December 1983), documents 33.126/8164 to 8166 (draft record of the meeting of the Administrative Board of CBR held on 15 September 1983) and documents 33.126/5295 and 5296 (memorandum from Mr Steinbach dated 13 May

1983 concerning antidumping measures against the German Democratic Republic, Poland, Czechoslovakia, Yugoslavia and Spain).

1151 The Court points out that the Commission has never denied that at the meeting of 14 January 1983 discussions took place on the various cement industries' concerns with dumped imports and on price formation systems (in particular the BPS) (contested decision, recital 19, paragraphs 2 to 15). If the various documents to which Cembureau refers had been made available to it during the administrative procedure, any comments which it might have been able to make on the basis of those documents to show that the participants in the meeting had discussed dumping and price formation systems would therefore merely have confirmed matters which the Commission had fully taken into account. They could not have obscured the real situation disclosed by the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in finding that, in addition to dealing with what may have been legitimate topics for discussion, the participants in the meeting held on 14 January 1983 agreed on an unlawful principle of non-transhipment to home markets and the regulation of sales from one country to another.

2.4. Case T-30/95 *FIC* v *Commission*

1152 First, FIC maintains in its observations of 10 February 1997 that the national chapters in the SO are at variance with the Commission's allegation in the international chapters of the SO and in the contested decision as to the existence of the Cembureau agreement. In the national chapters the Commission claimed that the national markets were isolated by national or regional cartels which made any imports difficult or even impossible (SO, Chapter 13, point 72 (Italian market), Chapter 14, points 74 and 77 (United Kingdom market), Chapter 15, point 81 (French market), Chapter 16, point 84 (German market), Chapter 18, point 89 (Spanish market), and Chapter 19, point 91 (Portuguese market)) and which had the effect of removing any incentive to export (SO, Chapter 15, point 81 (French market) and Chapter 16, point 84 (German market)).

1153 FIC also maintains that after reading the national chapters it could see that there were 'natural barriers' to imports, namely the fact that numerous cement producers in the States in question had subsidiaries both in their country of origin and in other Community countries (concentration of supply at the level of large international groups) and that the majority of these producers had facilities for making ready-mixed concrete, thus controlling a significant part of demand for cement in their respective countries (policy of vertical integration) (SO, Chapter 3, point 32 (Italian market), Chapter 4, point 37 (United Kingdom market), Chapter 5, point 42 (French market), Chapter 6, points 47 and 48 (German market) and Chapter 8, point 54 (Spanish market)). FIC considers that if it had had access to those documents during the administrative procedure it would have been able to submit in its defence that, as the

undertakings had economic reasons for not exporting, they had no need to adopt an illegal principle in order to guard against what was clearly a very slight risk.

1154 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission established the existence of the Cembureau agreement on the basis of specific documentary evidence. Alternative explanations based on an economic analysis of the markets, the existence of national or regional agreements and natural obstacles to inter-State trade, which the applicant might have been able to provide for the low volume of intra-Community trade in cement, would not have been of such a nature as to shed a different light on that specific documentary evidence (see paragraphs 263 and 264 above). On the contrary, explanations of the 'natural barriers' to inter-State trade in cement (high concentration of supply and vertical integration policy) would have underlined the gravity of the infringement committed, because by concluding the Cembureau agreement the Head Delegates attempted to eliminate what little actual competition remained on the market (see paragraph 1088 above).

1155 Second, FIC submits in its observations of 10 February 1997 that the alleged national cartels predated the conclusion of the alleged Cembureau agreement. It stresses that there is no link between those national cartels and the Cembureau agreement.

1156 For the reasons given in paragraph 1137 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1157 Third, in its observations of 20 January 1998 FIC refers to a letter from Mr Van Hove, Chairman of the CLC, to the members of that committee, entitled 'EEC — Price formation system' (documents 33.126/3242 and 3243). A comparison between the content of that letter and document 33.322/344, which is among the annexes to Mr Toscano Jr's notes on the meeting of 14 January 1983 (see paragraph 1122 above), unequivocally confirms that the 'suggestions for fair competition' which Mr Van Hove made at that meeting (contested decision, recital 17, paragraph 3) related to the BPS (see paragraph 852 above).

1158 The Court points out that in the contested decision the Commission rejected the argument that '"the suggestions put forward with the aim of ensuring fair competition" were none other than the suggestions put forward to the Commission under the notification procedure carried out by the Belgian and Dutch cement producers on 16 July 1981' (contested decision, recital 17, paragraph 4). Moreover, the 'suggestions for fair competition' are not part of the evidence on which the Commission relied to establish the existence of the Cembureau agreement. Those suggestions are referred to, in recital 17, paragraph 3, of the contested decision, solely in order to illustrate the discussions on 'fair or healthy or correct' competition, discussions which were not ultimately found in the contested decision to be an infringement. Consequently, the

observations which FIC could have made, if it had had access to the documents which it invokes in relation to that point, could not have altered the outcome of the administrative procedure.

1159 Fourth, in its observations of 20 January 1998 FIC asserts that a Heidelberger note on the meetings of Head Delegates and of the Executive Committee on 7 and 8 November 1984 (documents 33.126/5312 to 5315) show that only questions concerning prices on overseas export markets and dumped imports from countries of the East were dealt with at the meeting on 7 November 1984. At no point in that meeting was the Cembureau principle of non-transhipment to home markets confirmed.

1160 The Court points out that the Heidelberger note, which is a brief record of the meetings of the Head Delegates and of the Executive Committee on 7 and 8 November 1984, states: 'The conditions of competition on the export market have become increasingly worse. Greece and Spain are the fiercest competitors and are increasingly drawing all the countries of the Pacific zone with surplus production into that price war.' The observations which FIC might have made on the basis of that document, had it been accessible to it during the administrative procedure, would not have been of such a nature as to shed a different light on the 'summary notes' dated 12 November 1984 (documents 33.126/11754 and 11755) from which the Commission rightly concluded that the Cembureau agreement had been confirmed at the Head Delegates meeting on 7 November 1984, because those 'summary notes' show that at that meeting the channelling of Greek and Spanish production surpluses had been endorsed by Cembureau and its members in order to avoid destabilising European markets (SO, point 9(c); contested decision, recital 45, paragraph 2). In any event, those observations would not have shed a different light on the documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in finding that the Cembureau agreement had been concluded at the Head Delegates meeting held on 14 January 1983.

1161 Fifth, FIC submits in its observations of 10 February 1997 that the documents in the national files constitute fresh evidence that the members of Cembureau intended to comply with the rules of competition law. Thus it is apparent from the documents concerning the chapter of the SO on the United Kingdom that the United Kingdom cement industry was always scrupulously careful to comply with the law, in particular competition law. FIC refers in that regard to the minutes of the meetings of the CMF held on 4 September 1985 (documents 33.126/17086 to 17091), 2 October 1985 (documents 33.126/17092 to 17098), 16 October 1985 (documents 33.126/17099 to 17102), 6 August 1986 (documents 33.126/17160 to 17165), 3 September 1986 (documents 33.126/17166 to 17172), 16 September 1986 (documents 33.126/17173 and 17174), 5 November 1986 (documents 33.126/17180 to 17184), 11 February 1987 (documents 33.126/17203 to 17205; see also press release dated 12 February 1987 concerning that meeting (document 33.126/17858)) and 4 March 1987 (documents 33.126/17206 to 17209). In the light of the CMF's constant concern to avoid any infringement of competition law, it is difficult to accept that it could have agreed to infringe those rules by concluding the Cembureau agreement. In its observations of 20 January 1998 FIC relies on a number of documents which, in its view, clearly convey the European cement industries' intention to comply with competition law and which would therefore have constituted a good deal of evidence of use to its defence during the administrative procedure. It refers, first, to a Hispacement document of August 1984 (documents 33.322/3081 to 3087) concerning a discussion of the agreement envisaged between Spanish and Greek producers concerning the CMA (see paragraph 1040

above) and which shows that the parties to that agreement took into consideration 'possible breaches of (Spanish and European) law governing practices which restrict competition'. FIC then refers to an Italcementi document concerning the draft minutes of the meeting of the Cembureau Executive Committee held on 5 and 6 December 1985 (documents 33.126/3190 to 3196), which records a suggestion by Mr Bertrán that at its next meeting the CLC should examine 'the advisability of defining, in agreement with DG IV of the EEC, "fair competition" rules in order to be ready to act should the necessity arise'. Last, it again relies on the record of the meetings of the Head Delegates and of the Executive Committee on 7 and 8 November 1984 found at Heidelberger's premises (documents 33.126/5312 to 5315), which refers to a desire to 'deal with the matter in accordance with the law on restrictive agreements'.

1162 The Court observes, however, that access to the various documents referred to by FIC, which allegedly convey the concern of the various parties (the CMF, the parties to the agreement on the CMA, Mr Bertrán of Asland, and Heidelberger) to comply with competition law, would not in any way have enabled it to convince the Commission of its own intention always to act in accordance with the law. In any event, none of those documents, which relate to national aspects (documents 33.126/17086 to 17102, 17160 to 17174, 17180 to 17184, 17203 to 17209 and 17858), the overseas export policy (documents 33.322/3081 to 3087), the anti-dumping measures (documents 33.126/3190 to 3196) or concentrations of undertakings (documents 33.126/5312 to 5315) rather than to intra-Community trade, would have shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement.

1163 Sixth, FIC claims in its observations of 10 February 1997 that none of the documents in the national files give grounds for concluding that Cembureau played the slightest role in monitoring imports. The documents relating to the national chapters of the SO show that the first producers to be affected by imports from Greece, namely the United Kingdom and Italian producers, attempted to deal with the problem by their own means. Thus, the only joint reaction by United Kingdom cement producers when confronted by imports from Greece took the form of contacts with their parliamentary and government authorities and with the Commission; there was not the slightest involvement of Cembureau. FIC refers in that regard to the minutes of the meetings of the CMF held on 6 August 1986 (documents 33.126/17160 to 17165), 3 September 1986 (documents 33.126/17166 to 17172), 8 October 1986 (documents 33.126/17178 and 17179) and 5 November 1986 (documents 33.126/17180 to 17184). These direct contacts, without the slightest Cembureau involvement, between European producers and public authorities or between the authorities of the various Member States threatened by imports from Greece are again confirmed in the minutes of the meeting of Oficemen held on 18 September 1986 (documents 33.322/1319 to 1323) and in the minutes of the meetings of the CMF held on 8 October 1986 (documents 33.126/17178 and 17179) and 3 June 1987 (documents 33.126/17219 to 17225). In order to meet imports from Greece, the Italian producers concentrated on controlling domestic demand for cement by acquiring ready-mix concrete companies or by concluding agreements with them. They clearly also concluded agreements with Yugoslavian cement producers, seeking to purchase part of their production directly in order to avoid imports from those producers. None of the documents in the file on Italy contains any reference to action by Cembureau (documents 33.126/2945 to 2948, 2949 to 2951, 15990 to 15997, 12145 to 12341 and 16235 to 16282). In conclusion, FIC considers that taken as a whole the documents to which it refers would have enabled it to argue that the fact

that Cembureau had no coordinating or initiating role in combating imports from Greece was further confirmation that the alleged Cembureau agreement did not exist.

1164 The Court points out that in concluding that the Cembureau agreement existed the Commission did not rely on Cembureau's involvement in measures to monitor imports, in particular measures designed to resolve the problem caused by imports from Greece, but, rather, on specific documentary evidence. The various documents on which FIC relies could not have shed a different light on that evidence.

1165 Seventh, and last, in its observations of 10 February 1997 FIC relies on the record of the meeting of the Executive Committee of Oficemen held on 13 February 1986 (documents 33.322/1311 to 1318), as confirmation that the only plausible explanation for the reference in the Italcementi note on the meeting of the Executive Committee of Cembureau held on 14 April 1986 (contested decision, recital 17, paragraph 9; document 33.126/3185) to the need to adopt 'rules of the game' to avoid 'improper competition' was to be found in the fight against dumped imports from the East rather than in any principle of non-transhipment to home markets within the Community, which the Commission has always refused to accept.

1166 However, for the reasons given in paragraph 1149 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

2.5. Cases T-31/95 *ENCI* v *Commission* and T-32/95 *VNC* v *Commission*

1167 In the pleadings lodged following the measure of 2 October 1996 ENCI and VNC state that the alleged national cartels predated the conclusion of the alleged Cembureau agreement.

1168 However, for the reasons given in paragraph 1137 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1169 In the pleadings lodged following the measure of 18 and 19 June 1997 ENCI and VNC claim that four documents are at variance with the existence of the Cembureau agreement. First, they refer to the minutes of the meeting of the Board of Directors of the Belgian company Obourg

held on 26 June 1987 (documents 33.126/375 to 379), which mention imports into the Netherlands of cement from Spain and France. At point 2 of the minutes it is also stated: 'Retaliatory measures against Spanish cement manufacturers are difficult to envisage, while those against French producers are being reviewed pending a later decision.' Second, ENCI and VNC refer to the document of the Compagnie des Ciments Belges ('the CCB') entitled 'Basic information 1987' (documents 33.126/1629 and 1634 to 1641), which observes in regard to the cement market: '[In the Netherlands] competition from certain brands of German cement is still very keen on the market. In Zealand we are finding French bagged cement' (point 1.1.2). In the same document it is added (points 2.1.1 and 2.1.2): 'The extended crisis in building and public works means that competition, in particular German competition, is very active [on the Belgian and Netherlands markets].' The document also refers to cement exports to the Netherlands by the CCB (point 4.1). Third, the applicants refer to the CCB document entitled 'Annual information 1989' (documents 33.126/1768 to 1783), which confirms as follows in regard to the Netherlands (point 1.1.2): 'Competition from certain brands of German cement is still very keen on the market. In Zealand we are finding French cement in bags and in bulk. There are also imports of Spanish and Greek cement and, in smaller quantities, imports of cement from the GDR, Poland and Yugoslavia.' This document states (points 2.1.1 and 2.1.2) that 'in spite of a significant resumption of construction in 1988, German competition is still present' on the Belgian and Netherlands markets, and that in the Netherlands 'Spanish and Greek cement has also appeared'. Fourth, and last, the applicants refer to a Heidelberger document (document 33.126/3447), in which it is stated that sales by Heidelberger on the Netherlands market rose by 36.6% in 1987.

1170 The Court points out that the Commission has never claimed that the Cembureau agreement and the implementing measures had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement was found to constitute an infringement because of its anti-competitive object. Furthermore, it did not prohibit 'traditional or even structural inter-State trade ... for example ... exports from Germany and Belgium to the Netherlands' (memorandum to the Chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), but was opposed to 'random' exports, namely uncontrolled or unregulated exports; the 'random' exports to the Netherlands and Belgium were expressly mentioned at the meeting of 19 March 1984 (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). The fact that the documents referred to in the preceding paragraph attest to the existence of certain 'random' exports to the Netherlands and Belgium, of which the Head Delegates were aware, shows at most that the Cembureau agreement was not always observed by certain Community producers. It is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and the contested decision (recitals 18, 19 and 45) in finding that the Cembureau agreement existed.

2.6. Case T-35/95 *Dyckerhoff* v *Commission*

1171 First, Dyckerhoff claims that it is apparent from examining the national files and the national chapters in the SO that the Commission itself proceeds from the principle that the markets are delimited by national borders; the file also contains much additional evidence of the cement markets' natural frontiers. In its observations of 7 February 1997 Dyckerhoff claims that a number of passages in the national chapters of the SO on Italy (chapter 3, points 32 to 35), the United Kingdom (chapter 4, points 37 to 41), France (chapter 5, points 42 to 46) and Greece (chapter 7, points 50 to 53) and also documents 33.126/2985, 3017 to 3032, 3099 to 3105, 3158 to 3166, 5626 to 5634, 5789, 5791, 11993, 12083 to 12087, 12136 to 12140, 12142 and 12143, 14496, 14528, 14530, 17035 to 17051, 17863 to 17865, 19398 to 19401 and 19394 and documents 27.997/1 to 7, show that the broad limitation of cement markets is the consequence of the existence of national agreements and joint ventures, State price controls and the vertical integration of national markets, which allows many local producers to control demand on their markets. In its observations of 5 January 1998 Dyckerhoff states that the 'remainder' of the investigation file contains a number of additional documents which confirm that the cement markets do in fact have natural frontiers. It states that documents 33.126/299, 2105 to 2113, 4132 to 4139 and 5677 to 5679 refer to administrative and economic obstacles which hindered trade between Member States; that documents 33.126/5883, 8139, 10279 to 10283, 12139 to 12141 and 13297 to 13319 attest to the existence of national regulations and national organisations of the markets which made access to those national markets virtually impossible; that documents 33.126/6112 to 6128 and 6746 to 6765 establish that the effect of the compartmentalisation of the markets was strengthened by national price controls; that documents 33.126/8630 to 8639, 14691 to 14711, 16931 to 18140, 18296 to 18311, 18338 to 18340, 18359 to 18361, 18379, 18380, 18398 to 18400 and 18417 to 18419 show that there was cross-shareholding between European cement producers which provided more advantageous opportunities to secure outlets on regional and national markets than did localised crossborder sales operations.

1172 The Court points out, however, that, for the reasons given in paragraph 1154 above, those arguments would not have been of such a nature as to alter the outcome of the administrative procedure.

1173 Second, in its observations of 5 January 1998 Dyckerhoff claims that documents 33.126/272 to 275, 719, 1852, 4125 to 4127, 5926, 5938, 6888, 6897, 7129, 14627, 14630, 14637, 14661, 14663, 14691, 14711 and 18173 show that there was export activity despite the natural barriers to the market that otherwise existed. Those activities were not criticised or censured within Cembureau and that is at variance with the existence of the Cembureau agreement.

1174 The Court points out that the principle of non-transhipment to home markets did not prohibit 'traditional or even structural inter-State trade, e.g. exports from Germany and Belgium to the Netherlands' (memorandum to the Chairman for the meeting of Head Delegates held on 19 March 1984) but was opposed to 'random' exports (notes on the meeting of Head Delegates held on 19 March 1984), namely uncontrolled or unregulated exports. The fact that there may have been exports in a specific case is not therefore of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and

61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement.

1175 Third, in its observations of 7 February 1997 Dyckerhoff argues that the Cembureau agreement did not exist since (a) there was no causal link between that agreement and the national concerted practices and (b) there was no link between the documents relating to the alleged national agreements and concerted practices and the alleged Cembureau agreement. Point (a) is established by the content of certain passages in the national chapters of the SO (chapter 4, points 37 and 38) and by document 33.126/5726, which show that the CPMA (see paragraph 91 above) and certain national agreements and concerted practices existed well before the meeting of 14 January 1983. Point (b) is established by the fact that there is no reference to a European agreement in the documents relating to the alleged national agreements and concerted practices and by the fact that the national associations and national groups were preoccupied with imports from other Member States. In that regard, Dyckerhoff refers to a number of documents relating to France, Portugal and Spain, and Greece. In the case of France, it refers to the documents relating to Norcim (see paragraph 1118 above). In the case of Spain and Portugal, it refers to points 54 to 56 of the SO and to documents showing the existence of a principle of non-delivery from Spain to Portugal and vice versa (documents 33.322/513, 575, 996 to 1010, 1037, 1038, 1400, 1406, 1407 and 2901). It also points out that the documents relating to that bilateral concerted practice make no reference to an agreement at European level. Furthermore, correspondence by telex in 1988 (documents 33.322/527 to 529) reveals that Cimpor refused to deliver cement in the Benelux countries but did not invoke the alleged Cembureau agreement to justify its refusal. In the case of Greece, Dyckerhoff claims that the file on that country contains a number of documents relating to the alleged Cembureau principle which were not communicated to it during the administrative procedure (documents 33.126/19875 to 19887).

1176 The Court finds, however, that the various documents to which Dyckerhoff refers do not show that its rights of defence were infringed. The absence of any reference to the Cembureau agreement, the fact that some national agreements and concerted practices predated that agreement and the fact that the national associations and national groups were preoccupied with imports from other Member States are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing that the Cembureau agreement existed.

1177 Furthermore, if the applicant had been able to show during the administrative procedure, on the basis of the documents referred to in paragraph 1175 above, that there was no link between the national agreements and concerted practices and the Cembureau agreement, that would not have altered the outcome of that procedure, since the proof of the existence of the Cembureau agreement does not in any way depend on the existence of the national agreements and concerted practices.

1178 Last, Dyckerhoff cannot claim that its rights of defence were infringed by the Commission's failure to grant it access to certain documents in the file on Greece relating to the alleged Cembureau agreement (documents 33.126/19875 to 19877). Those documents set out the statement made by Mr Kalogeropoulos at the Heracles Board Meeting held on 25 June 1986. The Court points out that the passage from that statement, reproduced in recital 18, paragraph 5, of the contested decision, was quoted verbatim in point 9 of the international part of the SO. Moreover, the documents in question were in the Box (see paragraph 95 above). In those circumstances, they must be regarded as evidence which can be used against Dyckerhoff. As regards documents 33.126/19878 to 19887, it is sufficient to observe that the Commission did not use them either in the SO or in the contested decision to prove the existence of the Cembureau agreement. Furthermore, Dyckerhoff has not submitted anything to show that those documents may have contained evidence that would exculpate it.

1179 Fourth, in its observations of 5 January 1998 Dyckerhoff claims that various documents show that protection against dumped cement imports from Eastern Europe was uppermost in the minds of the European industry in the meetings and discussions reported in 1983 and 1984. It refers in that regard to the letter dated 16 November 1982 containing an invitation to the Head Delegates meeting on 14 January 1983 (document 33.322/346), the minutes of the meeting of FIC held on 8 December 1982 (documents 33.126/2026 to 2033), the minutes of the Franco-German meeting held on 6 and 7 December 1983 (documents 33.126/15494 to 15496), the minutes of the meeting of the Board of Directors of FIC held on 10 October 1984 (documents 33.126/2056 to 2062), the minutes of the meeting of the Executive Committee of Cembureau held on 8 November 1984 (documents 33.126/10485 and 10486), documents from BDZ (documents 33.126/5198 to 5208 and 5243 to 5251), an internal Blue Circle memorandum (documents 33.126/10840 and 10841) and a letter from Heidelberger to Cembureau dated 1 December 1987 (documents 33.126/3604 and 3605).

1180 However, those documents are not of such a nature as to shed a different light on the various items of specific documentary evidence referred to in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which show that at the meeting of 14 January 1983 the Head Delegates agreed on the principle of non-transhipment to home markets and the regulation of sales from one country to another. At the very most, the documents in question prove that the problems of dumping and cement imports from Eastern Europe were also discussed at the meeting of 14 January 1983, a point which the Commission has never disputed (see contested decision, recital 19, paragraphs 2 to 15). Consequently, any observations which the applicant might have been able to make had it had access to the documents in question could not have altered the outcome of the administrative procedure.

2.7. Case T-36/95 *SFIC* v *Commission*

1181 First, in its observations of 10 February 1997 SFIC relies on a number of documents in the file on the United Kingdom, relating to the CPMA (see paragraph 91 above) (file IV/27.997 and

documents 33.126/17017 to 17034, 17863 to 17865 and 17867 to 17873). This price system, which was notified to the Commission and approved by the United Kingdom competition authorities, is similar to the BPS (see paragraph 852 above), which had also been notified to the Commission in 1981 and which was referred to at the Head Delegates meeting on 14 January 1983. SFIC considers that those documents would have been of use in showing that the BPS and, more generally, the discussions at the Cembureau meeting on 14 January 1983 were lawful. The same applies to the Italian document relating to the system of standardisation of delivered prices of cement, the 'Incontro Nolo' system (documents 33.126/11913 to 11919), which also resembled the BPS to a certain extent.

1182 In its observations of 7 January 1998 SFIC also relies on a series of documents to which it was granted access following the measure of 18 and 19 June 1997 (documents 33.126/623 to 632, 673, 674, 730, 1175 to 1178, 1219 to 1221, 1552 to 1554, 1960, 1961, 2026 to 2028, 2050, 2051, 2058, 2066, 2084, 2545 to 2553, 2591 to 2609, 2682, 2683, 5038 to 5051, 5105 to 5119, 8098 to 8104, 8131, 8132, 8146 to 8148, 8151, 9031 to 9048, 9050 to 9053, 9068 to 9074 and 9103 to 9112) as showing that the discussions at the meeting of 14 January 1983 on price formation systems, in particular the BPS introduced by the Belgian, Netherlands and German industries, were lawful. According to SFIC, it is also clear from one or other of documents 33.126/2545 to 2553, 2591 to 2609, 2682, 2683, 9050 to 9053, 9068 to 9074 and 9103 to 9112 that examination of the applicability of the BPS and the Commission's analysis of its compatibility with European competition law were not limited to the Belgian, Netherlands and German markets but concerned all the Community markets. Accordingly, SFIC should have been given access to those documents during the administrative procedure and would thereby have been in a position to put forward solid facts to support its assertions that the Commission was informed of the European producers' deliberations concerning the BPS and that the reference to that price formation system at the meeting on 14 January 1983 was perfectly legitimate, there being no reason at that time to presume what the Commission's official reaction to that subject would be. Other documents in the investigation file (documents 33.126/2047, 2413 and 16410 to 16413) show that at the material time the European cement producers were concerned about dumped imports from the Eastern Europe countries.

1183 The Court finds, however, that the documents in question are not of such a nature as to shed a different light on the various items of specific documentary evidence referred to in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which show that at the meeting held on 14 January 1983 the Head Delegates agreed on the principle of non-transhipment to home markets and the regulation of sales from one country to another. At the very most, they prove that the problems of dumping and the BPS were also discussed at the meeting on 14 January 1983. The Commission has never disputed either that price formation systems, in particular the BPS, and antidumping measures were discussed at the meeting of 14 January 1983 (contested decision, recital 19, paragraphs 2 to 15) or that there were contacts between certain European industries and it regarding the basing point system (contested decision, recital 17, paragraph 4).

1184 Second, in its observations of 7 January 1998 SFIC claims that the record of the meeting of the Management Committee of FIC held on 27 June 1982 (documents 33.126/1890, 1896 and

1897) confirms its claim that the Head Delegates meetings were not covered by its articles of association.

1185 The Court considers that there is no need to analyse the content of that record in detail. It suffices to point out that it relates to an argument which had been raised in a number of replies to the SO, including SFIC's, and that it is fully discussed by the Commission in the contested decision (recital 44, paragraph 3). Accordingly, any further comments that SFIC might have made on that point could not have altered the outcome of the administrative procedure.

1186 Third, SFIC claims in its observations of 7 January 1998 that various documents to which it did not have access during the administrative procedure (documents 33.126/2575 to 2585 and 2591 to 2609) — in particular a university study dated 1977 on the method of fixing prices in the cement industry, which criticises the Phlips study, the only one quoted by the Commission in the contested decision (recital 10) — would have supported its argument based on the economic analysis of the cement market.

1187 The Court considers, however, that any alternative explanations by SFIC based on the economic analysis of the cement market would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in concluding that the Cembureau agreement existed (see paragraphs 263 and 264 above).

1188 Fourth, in its observations of 7 January 1998 SFIC claims that notes drawn up by SECIL following the General Assembly of Cembureau on 11 to 13 June 1985 (documents 33.322/119 to 123) show that the members of Cembureau were concerned with the need to restructure the industry and with governmental reluctance to de-restrict prices.

1189 However, SFIC does not specify how access to those documents could have altered the outcome of the administrative procedure. In any event, those documents could not have shed a different light on the specific documentary evidence of the Cembureau agreement. The fact that it did not have access to those documents during the administrative procedure did not therefore prejudice SFIC's defence.

2.8. Case T-37/95 *Vicat* v *Commission*

1190 First, Vicat states that in each chapter of the SO devoted to a particular national agreement and/or concerted practice, the Commission found that there were national agreements and concerted practices which had the effect of rendering imports from other Member States difficult, or even impossible. It cites passages from the chapters of the SO on Italy (chapters 3 and 13), Spain (chapters 8 and 18), the United Kingdom (chapters 4 and 14), Portugal (chapters 9 and 19) and Germany (chapters 6 and 16). The fact that Vicat did not have access to those passages of the SO deprived it of the opportunity to provide an alternative explanation for the low level of crossborder trade in cement to which the Commission refers on numerous occasions in order to establish the existence of the Cembureau agreement.

1191 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in establishing the existence of the Cembureau agreement. Accordingly, any alternative explanations for the low level of trade between the member countries of Cembureau that Vicat could have put forward had it been given access to the entire SO during the administrative procedure would not have been of such a nature as to shed a different light on that documentary evidence (see paragraphs 263 and 264 above).

1192 Second, in its observations of 7 February 1997 Vicat alleges that documents demonstrate that the alleged national agreements and concerted practices were independent of Cembureau and of the role which the Commission sought to attribute to it. Vicat states that there is no reference to Cembureau or the Cembureau agreement in the documents which it was able to consult following the measure of 2 October 1996 and that the alleged national cartels predated the conclusion of the alleged Cembureau agreement. Vicat refers to the chapters of the SO on Italy (chapters 3 and 13) and Portugal (chapters 9 and 19), to documents 33.126/2921 to 2931, 3017 to 3032, 3053 to 3059, 3099 to 3108, 3110 to 3126, 3150 to 3154, 3158 to 3160, 3163 to 3166, 3365, 11990, 11991, 12081 to 12096, 12136 to 12140, 12142 and 12143, relating to the objections concerning Italy, documents 33.322/1226 to 1228, 1300 to 1310, 1329 to 1332 and 1365 to 1368, relating to the objections concerning Spain, documents 33.322/905, 1019 and 1020, 1072, 1406 to 1408, 1410 to 1412, 2897 to 2903 and 2905, relating to the objections concerning Portugal, and documents 33.126/17017 to 17053, 17202 to 17205, 17620 to 17623 and 17863 to 17865, relating to the objections concerning the United Kingdom.

1193 The Court points out, however, that, for the reasons given in paragraphs 1176 and 1177 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1194 Third, in its observations of 8 January 1998 Vicat refers to an internal Ciments Français memorandum dated 22 September 1988 relating to the organisation of Cembureau (documents

33.126/4037 to 4039), whose content, it claims, shows that Cembureau and the Head Delegates could not have played any role in the areas called in question by the Commission in the contested decision.

1195 Vicat's interpretation of the Ciments Français memorandum cannot be accepted. It cannot be inferred from a document dated 22 September 1988, referring to structural changes within Cembureau envisaged at the end of 1987 and to the situation existing at that time, that at the material time, that is to say in 1983 and 1984, several years before that memorandum was drafted, Cembureau and the Head Delegates were unable to play any role in the areas referred to in the contested decision. The fact that it did not have access to that document during the administrative procedure did not therefore affect Vicat's rights of defence.

2.9. Case T-39/95 *Ciments Français* v *Commission*

1196 In its observations of 21 November 1997 Ciments Français claims that a number of documents confirm that the discussions at the meeting of Cembureau on 14 January 1983 and at the meeting of the Executive Committee on 25 March 1983 concerned a study of a new pricing system for cement rather than an alleged rule on non-transhipment to home markets. It refers in that regard to an extract from the minutes of a meeting of the CLC held on 7 July 1977 (documents 33.126/2545 to 2548); a letter dated 21 November 1977 from the Netherlands Head Delegate to the General Delegate of the CLC (documents 33.126/2569 to 2571); a letter from Mr Van Hove dated 22 February 1978 (documents 33.126/9049 to 9058); a letter dated 15 June 1978 sent on behalf of the German, Belgian and Netherlands producers to Mr Witlox, of the Commission (documents 33.126/7858 to 7860); a memorandum dated 21 December 1978 concerning the study of a new cement pricing system (documents 33.126/7861 to 7875); a letter from Mr Van Hove dated 23 December 1981 (documents 33.126/3242 and 3243); a draft letter to the Commission dated 21 June 1983 (documents 33.126/5038 to 5051); a report of FIC Board of Directors dated 5 July 1983 (documents 33.126/2050 to 2053); and an undated note on the background to relations between Belgian cement producers and the Commission found at the registered office of Ciments d'Obourg (documents 33.126/630 to 632). Ciments Français concludes from all those documents that the Commission could not in any event have taken the view that the discussions on price formation systems within Cembureau in 1983, in particular those at the meetings held on 14 January and 25 March 1983, constituted evidence of an alleged general agreement not to tranship to home markets.

1197 The Court finds, however, that the comments by Ciments Français on the basis of the documents to which it refers do not give grounds for concluding that there has been an infringement of its rights of defence. The Commission did not take the view that the discussions on the introduction of a new price formation system at the meeting on 14 January 1983 led to the conclusion of the Cembureau agreement. It has always stated that at the meeting held on 14 January 1983, as well as possibly discussing such a price formation system, the Head Delegates concluded a market-sharing agreement, known as the Cembureau agreement. The documents to which Ciments Français now refers shed no new light on the specific documentary

evidence used by the Commission both in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of that agreement. It follows that the argument examined must be rejected.

2.10. Case T-42/95 *Heidelberger* v *Commission*

1198 In its observations of 10 February 1997 Heidelberger states, first, that the documents relating to the national objections in the SO show that the national associations and undertakings of any particular Member State were concerned only with the situation on the market in that Member State. Moreover, the documents relating to the national chapters of the SO refer to the existence of national and bilateral agreements and concerted practices but not of a pan-European agreement. It cannot therefore be concluded from the national files that there was an agreement at European level which led to the compartmentalisation of the national markets pursuant to an alleged Cembureau agreement. In support of its argument Heidelberger refers to documents 33.126/2921 to 2925, 3017 to 3036, 3081 to 3083, 12508, 12509, 19188, 19194 and 19218.

1199 However, those documents do not show that there has been a breach of Heidelberger's rights of defence. The absence of any reference to the Cembureau agreement in the documents to which it did not have access during the administrative procedure and the existence of documents relating to measures decided upon by undertakings and their associations purely at national level, even assuming that those measures were established by the documents on which Heidelberger relies, are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in finding that the Cembureau agreement existed.

1200 Second, in its observations of 20 February 1998 Heidelberger claims that a number of documents show that the participants in the meeting held on 14 January 1983 did not conclude the Cembureau agreement. It refers to a record of the meeting of FIC held on 8 December 1982 (document 33.126/2027) and an internal CBR note concerning preparation for the meeting of 14 January 1983 showing that the intra-Community problems to be discussed at that meeting concerned the BPS (see paragraph 852 above) and export aid (document 33.126/8132). It also refers to documents from Obourg, CBR, Schwenk, BDZ, SFIC and FIC showing that the main concern at that time was dumped imports (documents 33.126/186, 2059, 2067, 2102, 15443 to 15446, 8166, 5295, 5212 and 5213).

1201 However, the documents relied on are not of such a nature as to shed a different light on the various items of specific documentary evidence referred to in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which show that at their meeting on 14 January 1983 the Head Delegates agreed on the principle of non-transhipment to home markets and the

regulation of sales from one country to another. At the very most those documents show that the problems of dumping, the BPS and export aid were also discussed at the meeting. The Commission has never disputed the fact that discussions on price formation systems, in particular on the BPS, and on antidumping measures took place at that meeting (contested decision, recital 19, paragraphs 2 to 15).

1202 Third, in its observations of 20 February 1998 Heidelberger submits a number of documents which, it claims, show that the European cement market was not the object of a network of bilateral and multilateral agreements. It refers to the written version of a speech made in Vancouver in 1987, from which it is clear that all European cement producers wished to acquire a larger share of the market in Europe (document 33.126/8618), and to a Ciments Français memorandum describing the competitive situation on the international cement market, from which it is clear that a number of European cement producers wanted to enter neighbouring European markets (document 33.126/4380).

1203 Heidelberger's interpretation of document 33.126/8618 cannot be accepted. Although the assertion that all European cement producers wished to acquire a larger share of the market is to be found among the claims made in that document, the context of that assertion shows that it does not have the meaning which Heidelberger seeks to ascribe to it. It is actually the second part of a sentence in point 2 of that document, which is worded as follows: 'All European cement companies are working on further integration in ready mixed concrete and aggregates and are trying to acquire bigger market share in these activities.' The statement quite clearly refers to 'ready mixed concrete and aggregates' rather than to cement. Similarly, Heidelberger fails to show, on the basis of the content of the Ciments Français memorandum (document 33.126/4380), that its rights of defence were infringed. As the memorandum is undated, it is difficult to determine the period to which Ciments Français's remarks refer and Heidelberger has not provided any information in that regard. Nor does the document reveal whether the exports to which it refers are exports between members of Cembureau or exports of non-European producers. In any event, even if the exports in question were exports between members, the Court points out that the Commission has never claimed that the Cembureau agreement had had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement constituted an infringement because it had an anti-competitive object. Furthermore, the principle of non-transhipment to home markets did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), but was opposed to 'random' exports (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), namely uncontrolled or unregulated exports. Accordingly, the content of document 33.126/4380 is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement.

2.11. Case T-43/95 *Lafarge* v *Commission*

1204 In the statement which it lodged on 28 January 1998 Lafarge emphasises that the record of a discussion within CBR dated 3 November 1982 (document 33.126/8132) shows that, contrary to what the Commission alleges (contested decision, recital 19, paragraph 3), Mr Van Hove, the Chairman of CLC, did not orchestrate changes to the agenda of the meeting of 14 January 1983.

1205 That argument must be rejected. The document to which Lafarge refers predates the adoption of the agenda and the dealings to which it gave rise. The internal CBR meeting, of which the document is the record, was on 3 November 1982, whereas the draft agenda and the alterations suggested by Mr Van Hove are dated 16 and 17 November 1982 (see paragraphs 798 to 800 above). Furthermore, the document submitted by Lafarge states: 'preparation Cembureau meeting 14 January 1983: agenda will be fixed on 22 December 1982; the desirability of holding a meeting of the DGR in order to prepare the Cembureau meeting will be assessed according to the agenda...'. Contrary to what Lafarge suggests, the content of the document therefore confirms the timetable of events preceding the convening of the meeting of 14 January 1983, as described in the contested decision. Accordingly, any arguments which that applicant might have been able to put forward during the administrative procedure could not have altered the outcome of that procedure.

1206 In the statement lodged on 10 February 1997 and 28 January 1998 Lafarge also claims that a number of documents support its argument that the Head Delegates were in fact concerned with dumping and imports from third countries. No Cembureau agreement was therefore concluded or confirmed at the Head Delegates meetings. Lafarge refers to a document relating to the Head Delegates meeting held on 7 November 1984 (documents 33.126/5312 to 5315) and also to various documents which emanate mainly from German cement producers (documents 33.126/3854, 5156, 5200, 5203, 5215, 5230, 5231, 5233, 5234 to 5265, 5295, 5301, 5312 and 8164).

1207 Lafarge also refers to a series of documents that allegedly support its argument that the lawful means of ensuring fair competition discussed by the Head Delegates in fact referred to the BPS (see paragraph 852 above), which had been notified to the Commission and which concerned not just Belgian and Netherlands cement producers but all other European producers too. It considers it unacceptable that the Commission refused to allow it to inspect all the documents relating to the negotiations between it and the cement industry. It refers in that regard to documents 33.126/1219 to 1221, 1552 to 1554, 2050, 2051, 2545 to 2553, 5038 to 5051, 5105 to 5119, 7858 to 7860, 8146 to 8148, 8151, 8170, 8171, 9050 to 9053, 9068 to 9073, 9078 to 9080 and 9103 to 9112.

1208 However, the documents to which Lafarge refers are not of such a nature as to shed a different light on the various items of specific documentary evidence referred to in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which establish the existence of the

Cembureau agreement. At the very most, they prove that the BPS, the problems of dumping and imports from third countries were also discussed at the Head Delegates meetings, matters which the Commission has never disputed (contested decision, recital 19, paragraphs 2 to 15). Consequently, the observations which Lafarge might have been able to make could not have altered the outcome of the administrative procedure.

2.12. Case T-44/95 *Aalborg* v *Commission*

1209 First, Aalborg states that the documents which it was able to inspect following the measures of 2 October 1996 and 18 and 19 June 1997 provide an alternative explanation for the objective of the meetings of European cement producers during the relevant period. It is clear from a number of documents that at those meetings the European cement industries did not allow themselves to be guided by a principle of non-transhipment to home markets but considered ways in which they could lawfully regulate the formation of prices and prevent 'random' imports and dumped imports. In its observations of 10 February 1997 Aalborg refers to the file which the CMF lodged with the Commission in 1973 when notifying the United Kingdom CPMA agreement (Case IV/27.997; see paragraphs 91 and 93 above) based on the basing point system; it was eventually decided to take no further action in that case when the agreement was terminated in 1987. Aalborg maintains that an opportunity to refer to that file during the administrative procedure would have allowed it to show that no incriminating evidence could be inferred from the description of the basing point system given by Mr Van Hove at that meeting. In its observations of 12 January 1998 Aalborg produces a series of documents (documents 33.126/1078 to 1088, 1147 to 1163, 2569 to 2578, 2591 to 2597, 5038 to 5051, 9010 to 9075 and 9078 to 9082) to show that for many years the European cement industry, in particular the Belgian industry, maintained close contact with the Commission concerning the introduction of a basing point system, the BPS (see paragraph 852 above), which was to cover the markets in Belgium, the Netherlands, part of West Germany and, possibly, Northern France. Those documents would have allowed Aalborg to show that what was actually discussed at the meeting held on 14 January 1983 was whether it was possible, without infringing Community competition law, to introduce on a European scale a price formation system comparable to the BPS notified to the Commission in 1981. Aalborg points out that the Commission had not yet officially responded to that notification as at 14 January 1983.

1210 Aalborg also refers in its observations of 12 January 1998 to a letter sent by Mr Van Hove to the members of the CLC on 18 February 1983 (documents 33.126/2412 to 2415), which states expressly, under the heading 'B. Imports—Exports of cement between EEC countries' that 'any agreement on prices, deliveries per company etc. are prohibited' and which reviews a series of what Aalborg regards as legal means of cooperating to establish fair competition (legal proceedings under Article 86 of the Treaty; introducing a price formation system monitored by the Commission; occasional alignment of prices with those of competitors, etc.), with no mention of an approach based on the principle of non-transhipment to home markets. Aalborg also puts forward a series of documents (documents 33.126/4982/54 and 66, 5295, 5296 and 6160 to 6165) to show that it was dumped imports from Eastern Europe and Spain that preoccupied the European cement industry in 1983 and 1984. It attempts, in particular, to show, in the light of an extract from document 33.126/6162, which states that 'the rules of the economic game are not applied by the countries of the East and, in particular, by East Germany', that the 'rules of the game' referred to in the draft introductory statement of the

Chairman for the meeting of Head Delegates on 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) actually related to dumping, not to intra-Community trade. Aalborg also refers to the SFIC notice of 4 January 1988 entitled 'Plan of the file "Cement imports at dumped prices"' (document 33.126/14806) and to a letter dated 19 January 1989 from Lafarge to the Directorate for External Economic Relations (documents 33.126/14799 and 14800).

1211 The Court points out, however, that for the reasons given in paragraph 1183 above the argument would not have been of such a nature as to alter the outcome of the administrative procedure. It should be added, for the sake of completeness, that the fact that document 33.126/6162 states that 'the rules of the economic game are not applied by the countries of the East, in particular by East Germany' is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement. It is common ground that the producers of Eastern Europe did not confine themselves to their home markets but exported quantities of cement to the Community market. Moreover, document 33.126/6162 also states that the countries of Eastern Europe 'are sometimes heavily in debt ... and are therefore obliged to export in order to repay their foreign debt'. Accordingly, the fact that the Eastern European producers did not apply 'the rules of the economic game' is not of such a nature as to shed a different light on the documentary evidence which shows that the Cembureau Head Delegates adopted and confirmed such rules.

1212 Second, in its observations of 10 February 1997 Aalborg claims that the SFIC notice of 4 January 1988 entitled 'Plan of the file "Cement imports at dumped prices"' (document 33.126/14806) would have been useful evidence to show that the reference to the need to 'establish rules of the game ... to avoid improper competition' made by Mr Bertrán at the meeting of the Cembureau Executive Committee in Paris on 14 April 1986 and recorded in a handwritten Italcementi note (contested decision, recital 17, paragraph 9; document 33.126/3185) was to the problems of dumped imports from markets outside the Community, not to intra-Community trade.

1213 The Court points out, however, that, for the reasons given in paragraph 1149 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1214 Third, in its observations of 10 February 1997 Aalborg relies on chapters 6 and 16 of the SO, relating to the German market, in which the Commission describes (point 47), and then condemns (points 82 to 84), an agreement dated 15 February 1980 on the exchange of statistics and a number of alleged agreements to share the German market which, according to the Commission, would have been completely ineffective had they not come under the umbrella of the Cembureau principle of non-transhipment to home markets. Aalborg considers that those

documents would have allowed it to illustrate the way in which the Commission's legal assessment of the situation changed between the SO and the contested decision and, consequently, to show that its rights of defence were inevitably infringed. In that regard, Aalborg points out that in the SO the Commission expressed the view that the German agreements of 1980 already formed part of a general principle of non-transhipment to home markets on a European scale, whereas subsequently in the contested decision it took the view that the Cembureau agreement was concluded in 1983.

1215 That argument must be rejected. First, at the stage of the administrative procedure Aalborg could not have foreseen the Commission's alleged change of assessment in the contested decision. In any event, it should be pointed out that in both the SO and the contested decision the Commission takes the view that the Cembureau agreement entered into force with effect from 1983, even though it states that it had evidence that the agreement not to tranship to home markets might have existed well before 1983 (SO, points 9 and 61; contested decision, recital 45, paragraphs 1 and 6). Consequently, Aalborg's complaint alleging a change in the Commission's legal assessment and a corresponding infringement of its rights of defence is in any event irrelevant.

1216 Fourth, and last, in its observations of 12 January 1998 Aalborg claims that documents 33.126/1692, 1693, 2301, 2313, 2335, 2336, 2356, 3452 to 3463, 14809, 14810 and 14817, and documents 33.322/1235, 2313 and 2335 show that intra-Community exports and imports took place after 14 January 1983, that being at variance with the existence of the Cembureau agreement.

1217 The Court points out that the Commission has never claimed that the Cembureau agreement and its implementing measures had had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement constituted an infringement because it had an anti-competitive object. Furthermore, the Cembureau agreement did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), but was opposed to 'random' exports (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), namely uncontrolled or unregulated exports. The existence of imports or exports in a specific case is not therefore of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45).

2.13. Case T-48/95 *BDZ* v *Commission*

1218 In its observations of 10 February 1997 BDZ claims that the documents which it was able to inspect following the measure of 2 October 1996 would have enabled it to show that the alleged national agreements and concerted practices referred to in the national objections were unconnected with the Cembureau agreement. It states that the evidential value of the documents in the file concerning Greece is slight because they refer to a European agreement and concerted practice but do not give details of their subject matter. It refers in that regard to documents 33.126/19875 to 19887.

1219 The Court finds, however, that if BDZ had been able to show during the administrative procedure that there was no link between the national agreements and concerted practices and the Cembureau agreement the outcome of that procedure could not have been different, because the proof of the existence of the Cembureau agreement does not depend in any way on the existence of the national agreements and concerted practices. Inasmuch as BDZ's argument is based on documents 33.126/19875 to 19887, it must be rejected for the reasons set out in paragraph 1178 above.

2.14. Case T-50/95 *Unicem* v *Commission*

1220 First, in its observations of 28 November 1997 Unicem submits that documents 33.126/8167, 8168 and 15494 to 15496 clearly show that at the meeting of 14 January 1983, in which it did not participate, the discussions, including those under point 2 of the agenda 'Intra-European trade', solely concerned dumping and measures to counteract it.

1221 However, for the reasons set out in paragraph 1180 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1222 Second, in its observations of 28 November 1997 Unicem refers to documents 33.126/299, 300, 304, 721, 2554, 6206 to 6208, 6244, 7440, 13399 to 13402, 13434 to 13484, 14549, 14621, 14627, 14630, 14636, 14637, 14640, 14646, 14661 to 14663, 14694, 14709 to 14711 and 16209. Those documents show that the Commission's contention that Cembureau played a central role in the forces of competition on the cement market was wholly irrelevant. The documents distributed by Cembureau over the period in which the alleged Cembureau principle was applicable, in particular regarding the volume, origin, destination and prices of exports, were historical and globalised, wholly without commercial value, and did not enable the undertakings concerned to be identified or cross-border trade in cement to be permanently monitored.

1223 However, the comments which Unicem could have made on the basis of those various documents in order to highlight the lack of detail in the information on intra-Community exports/imports exchanged through Cembureau during the period in question and the unsuitability of that information for permanently monitoring cross-border trade in cement would not have been of such a nature as to shed a different light on the body of specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement.

1224 Lastly, in its observations of 28 November 1997 Unicem submits that it is clear from the national files that the specific features of the various home markets, combined with the special agreements and independent bilateral contacts which existed on those markets, in themselves explain the lack of intra-Community trade in cement. Those features would have made imports into those markets difficult, even impossible, and would have had the effect of eliminating any incentive to export. They are thus at variance with the Commission's theory based on the existence of the Cembureau agreement. As regards the French market, Unicem refers more specifically to documents 33.126/1394, 1395, 5648, 5674, 5688, 5695, 5696, 5747, 5748, 5751, 14806, 14807, 14809 to 14826, 14938 to 14976, 15025, 15026 and 15040 and to points 78 and 81 of the SO. As regards the United Kingdom market, it relies on points 74 and 77 of the SO and on documents 33.126/17641 to 17654. As regards the Spanish and Portuguese markets, it relies on point 89 of the SO. Lastly, in the chapters of the SO dealing with the German market, it refers more specifically to points 47 and 84, and, in the chapters dealing with the Greek market, it refers to point 86.

1225 However, for the reasons set out in paragraph 1191 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

2.15. Case T-51/95 *Buzzi* v *Commission*

1226 In its statement of 27 November 1997 Buzzi contends that certain documents show that the conditions and costs of transport played a crucial role for the cement market. The importance of transport costs for an assessment of the profitability of cement exports is confirmed by a SNFCC document of 2 December 1986 (documents 33.126/6048 to 6050). That document would therefore have been useful to show that the relevant geographic market could not have had a Community dimension.

1227 The Court points out that during the administrative procedure Buzzi had already stressed the importance of transport costs for exports (Buzzi's reply to the SO, paragraph 4.3.). The Commission observed, however, in the contested decision (recital 20, paragraph 7) that Buzzi stated that despite that obstacle it had '[exported] worthwhile quantities ("interessanti quantità") of cement to the South of France'. In those circumstances, the fact that Buzzi did not

have access, during the administrative procedure, to the SNFCC document of 2 December 1986 did not prejudice its rights of defence. Moreover, the Court finds that the document in question confirms the definition of the market adopted in the contested decision (recital 11, paragraph 7). The document states that the considerable imports in the Antwerp-Rotterdam-Amsterdam zone 'would not leave France unaffected, because of their disturbing effect on the Benelux market and that of West Germany, which might spread'. It follows that the document would not have been of any use for Buzzi's defence if it had been accessible to Buzzi during the administrative procedure.

2.16. Case T-57/95 *Heracles* v *Commission*

1228 First, in its observations of 10 January 1997 Heracles submits that it is clear from a number of documents in the national files that the alleged agreement to prevent imports into the markets in fact stemmed from a series of national agreements in force in various Member States, other than Greece, and not from a Cembureau agreement. Heracles asserts that the documents on which the Commission relied in establishing the existence of the Cembureau agreement appear, when considered in the context of the national files, to point to the existence of various national agreements (United Kingdom, France and Italy), regional agreements (Southern Germany), bilateral agreements (France/Germany, France/Italy, Spain/Portugal) and multi-lateral agreements (Belgium/Netherlands/Germany), which were all concluded by the parties concerned in order to strengthen their respective national arrangements rather than to implement the alleged Cembureau agreement, and which in themselves sufficed to isolate the national markets by making imports difficult, if not impossible. The national files reveal that in many cases the national practices that were designed to prevent imports predated the alleged Cembureau agreement; that those practices were implemented entirely independently of that alleged agreement and without any reference to it; that they were considerably more complex than that agreement, inasmuch as they were derived from far closer cooperation between producers, stemming from the structure of their shareholdings; and that the nature of that cooperation to prevent imports varied from one State to another, which shows that it could not have derived from an alleged single Cembureau principle. As regards the United Kingdom market, Heracles refers to point 74 of the SO and to documents 33.126/17017 to 17051, which deal with the CPMA (see paragraph 91 above), adopted in 1934 by the CMF and notified to the Commission in 1973. It also states that, if it had had access to the documents relating to the national agreements and concerted practices, in particular those concerning the United Kingdom agreement and concerted practice, it could have shown that the statement made on 25 June 1986 by Mr Kalogeropoulos at the meeting of its board, to which the Commission refers in recital 18, paragraph 5 of the contested decision (documents 33.126/19875 to 19877), did not relate to the Cembureau agreement, but to the various national, bilateral and multilateral arrangements concluded at that time between the European cement producers in order to hinder imports. In the file relating to Germany, the applicant refers more specifically to point 84, and points 48 and 49 of the SO, which show the structural relationships existing between the principal German, French, Swiss, Belgian, Dutch and Luxembourg producers; those relationships could explain, better than the alleged Cembureau agreement, the bilateral agreements made between those various markets in order to restrict imports. Heracles also refers to the chapters of the SO dealing with the regional agreements and concerted practices in Germany, in particular the agreement relating to the award of quotas in Southern Germany. As regards the French market, it refers to points 42 and 44 of the SO, which attest to the existence of links, at that time, between the main national producers, and also to points 78 and 79 of the SO, where the Commission takes the view that the object and effect of the various forms of cooperation in

existence on that market was to distort competition to an appreciable extent. In the file concerning Italy it refers to points 32 to 34 of the SO, which summarise the market sharing and cooperation agreements in force on the market at that time. In the file relating to Spain, it refers to point 55 of the SO, which illustrates the bilateral relations between the Spanish and Portuguese producers.

1229 The Court finds that the comments and alternative explanations, based on the existence on a number of markets of national, bilateral or multilateral agreements and on the structure of the shareholding of European producers of cement, which Heracles could have provided in regard to the low volume of intra-Community imports during the period in question would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in order to establish the existence of the Cembureau agreement (see paragraphs 263 and 264 above).

1230 For the reasons set out in paragraph 1137 above, the argument that the national agreements and concerted practices predated the Cembureau agreement and that they were implemented entirely independently of that agreement would not have been of such a nature as to alter the outcome of the administrative procedure.

1231 Second, in its observations of 24 November 1997 Heracles submits that it is clear from several documents that no Cembureau agreement was concluded at the meeting of 14 January 1983. It claims that documents 33.126/5295, 5296, 15443 to 15518 and 16410 to 16416 show that the main concern of the European cement industry at that time was imports from non-member countries of the Community, not intra-Community trade.

1232 For the reasons set out in paragraph 1180 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1233 Finally, in its observations of 24 November 1997 Heracles refers to several documents which, it claims, show that, contrary to the Commission's allegations, the alleged Cembureau agreement was never confirmed at the Head Delegates meetings of 19 March and 7 November 1984. It thus cites the memorandum of 12 November 1984 from Mr Van Hove to the board members of FIC (documents 33.126/2436 to 2447), which clearly states, in regard to the meeting of 7 November 1984, that 'no internal EEC problem was dealt with or raised' (extract from document 33.126/2436). The fact that the Head Delegates meeting dealt only with subjects of legitimate concern to the members of Cembureau is also clear from documents 33.322/119 to 123 relating to the Cembureau General Assembly in June 1985. They show that intra-Community trade was not even discussed at that general assembly.

1234 The comments which Heracles could have made on the basis of the various documents would clearly not have been of such a nature as to shed a different light on the memorandum to the Chairman for the Head Delegates meeting on 19 March 1984 (SO, points 9 and 61; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) and on the notes on that meeting, dated 2 April 1984 (SO, points 9 and 61; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), which clearly show that the Cembureau agreement was confirmed at that meeting (see paragraphs 1008 to 1010 above).

1235 As to the meeting of 7 November 1984, the Commission regarded the discussions held at that meeting as proof that the Cembureau agreement had been confirmed once again, in that the channelling of Greek and Spanish surplus production outside the Community had been supported by Cembureau and its members in order to avoid destabilisation of the European markets (SO, paragraphs 9 and 61; contested decision, recitals 19, paragraph 14, and 45, paragraph 2). Furthermore, at the hearing on 3 March 1993 the FIC put forward documents 33.126/2436 to 2447 and referred in particular to the explicit statement that no internal EEC problem had been dealt with at the meeting of 7 November 1984. However, for the reasons given in recital 44, paragraph 3, of the contested decision, the Commission took the view that those documents and that statement were not of such a nature as to shed a different light on the content of the discussions at that meeting. Consequently, the comments which Heracles could have made during the administrative procedure in order to argue that intra-Community trade in cement was not dealt with at the meeting of 7 November 1984 could not have altered the outcome of the procedure on that point.

1236 Lastly, the Commission has never alleged that intra-Community trade was discussed at the Cembureau General Assembly in June 1985.

1237 Consequently, the observations which Heracles could have made if it had had access to the documents cited in paragraph 1233 above would not have altered the outcome of the administrative procedure.

2.17. Cases T-53/95 *Rugby* v *Commission*, T-56/95 *Castle* v *Commission*, T-70/95 *Aker* v *Commission* and T-71/95 *EUROC* v *Commission*

1238 First, in their statements of 10 February 1997 Castle, Aker and EUROC assert that the national chapters of the SO show that the low level of intra-Community trade in cement was explained by the cost of transport and by factors such as the degree of concentration on national and regional markets, vertical integration, cross-supply arrangements, minority shareholding links and other forms of cooperation. The low level of trade is also explained by the existence of national agreements and concerted practices.

1239 However, for the reasons set out in paragraph 1154 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

1240 Second, in their statements lodged following the measures of 18 and 19 June 1997, Rugby, Castle, Aker and EUROC contend that documents to which they did not have access during the administrative procedure show that the discussions which took place at the meeting of 14 January 1983 did not concern the adoption of a rule of non-transhipment to home markets but rather the establishment of a basing point system for cement and problems of dumping, in particular by eastern European countries. In that regard the applicants claim that an extract from the minutes of a CBR board meeting at the end of 1982 (document 33.126/8132) show that the Belgo-Netherlands basing point system was to be analysed at the meeting on 14 January 1983. Furthermore, they refer to a note by Mr Van Hove concerning his meeting on 16 February 1978 with an official of the Commission regarding pricing systems applicable in Belgium and the Netherlands (documents 33.126/9049 to 9053). It is apparent from the latter document that some cement producers were discussing with the Commission a basing point system which favoured fair competition. That document therefore undermines the Commission's contention that the references to 'fair competition' in some of the documents referred to in point 7 of the SO proves the unlawful object of Cembureau's activities. Rugby, Castle, Aker and EUROC also refer to a study on the application to the cement sector of a basing point system, sent to the Commission on 21 December 1978 by representatives of the German, Belgian and Netherlands cement producers (documents 33.126/7861 to 7875). That study explains why the assumptions and conclusions of the 1976 Phlips study were not applicable to the cement industry. In the contested decision the Commission relied on that study in submitting that a basing point system was anti-competitive (contested decision, recital 17, paragraph 4, footnote 53). Furthermore, the arguments used by Mr Van Hove in the course of a talk at the Cembureau meeting of 14 January 1983 concerning the basing point system (contested decision, recital 17, paragraph 3) are in conformity with the conclusions reached in the study sent to the Commission on 21 December 1978. In support of their argument that at the meeting of 14 January 1983 the discussions concerned a basing point system for the cement sector and the problem of dumped imports, the applicants also refer to the following documents concerning the notification to the Commission of the Belgo-Netherlands basing point system: extracts from the minutes of certain meetings of the board of CBR from January to March 1981 (documents 33.126/8098 to 8104), a letter from Mr Van Hove of 23 December 1981 to the CLC members in Cembureau (documents 33.126/3242 and 3243) showing that the other members of Cembureau were closely following the progress of the negotiations between the Commission and the cement producers concerned by the basing point system which had been notified; the draft minutes of the CBR board meeting of 15 December 1983 (documents 33.126/8170 to 8173); an extract from the minutes of the meeting of the management board of CBR on 20 December 1983 for the purpose of preparing a reply to the Commission's letter of August 1983 in which the Commission had stated that it was suspending its formal assessment of the notification of the basing point system (documents 33.126/8146 to 8148) and a memorandum entitled 'History of relations between the Commission and the Belgian cement industry' (documents 33.126/9078 to 9080). The latter memorandum shows that the Commission's first official reaction to the notification of the basing point system was made on 1 August 1983, that is to say after the meeting of 14 January 1983. Rugby submits that this information would have enabled it to understand why the Commission could not fairly object to discussions within Cembureau regarding a basing point system for Europe. It also refers to a CBR note of 12 March 1986 concerning the notification to the Commission of the basing point system (document 33.126/9114). Castle, Aker and EUROC refer to a letter of 15 June 1978 from the representatives of German, Belgian and Netherlands cement producers addressed to an

official of the Commission and concerning price formation systems for cement (documents 33.126/7858 to 7860). Lastly, Rugby submits that it is also clear from the above documents that the basing point system was discussed at the meeting of the Cembureau Executive Committee on 25 March 1983.

1241 The Court finds, however, that the documents on which Rugby, Castle, Aker and EUROC rely are not of such a nature as to shed a different light on the specific documentary evidence adopted in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) to establish the existence of the Cembureau agreement. At the very most, those documents tend to show that problems of dumping and the BPS (see paragraph 852 above) were also discussed at the meeting of 14 January 1983. It should be added that the Commission has never disputed that at that meeting discussions also took place on price formation systems, in particular on the BPS, and on anti-dumping measures (contested decision, recital 19, paragraphs 2 to 15), or that there had been contacts between it and certain European industries in regard to the basing point system (contested decision, recital 17, paragraph 4). Furthermore, the fact that in the note concerning Mr Van Hove's meeting with a Commission official on 16 February 1978 (documents 33.126/9049 to 9053) Mr Van Hove considered that the basing point system could promote fair competition would not have been of use to the defence of the applicants concerned, because that note did not disclose what had been discussed at the meeting of 14 January 1983, and the passages of the SO (points 7, 8 and 60) and of the contested decision (recital 17) relating to fair competition did not raise any objection that was found to be an infringement in the contested decision. For the same reasons, the rights of defence of the applicants concerned were not infringed by the fact that access was not given during the administrative procedure to the study on the application to the cement sector of a basing point system, sent to the Commission on 21 December 1978. Furthermore, the fact that the Commission's initial reaction to the notification of the Belgo-Netherlands system was given only on 1 August 1983 has no bearing on the discussions which took place at the meeting of 14 January 1983.

1242 As to Rugby's argument that it is apparent from the documents referred to in paragraph 1240 above that discussions took place on the basing point system at the meeting of the Executive Committee of Cembureau on 25 March 1983, the Court finds, first, that the Commission does not dispute that at that meeting there were discussions, *inter alia*, concerning a basing point system (contested decision, recital 17, paragraphs 2 and 4) and, second, that the Commission has never alleged that the Cembureau agreement was concluded or confirmed in the course of that meeting. As presented in the SO and the contested decision, the meeting of the Cembureau Executive Committee on 25 March 1983 was linked to the discussions of 'fair or healthy or correct' competition. The Court points out that the passages of the SO (points 7, 8 and 60) and of the contested decision (recital 17) relating to fair competition did not ultimately give rise to a finding of infringement in the contested decision. Consequently, even if Rugby had been able to show during the administrative procedure that it was apparent from the documents on which it relies that at the meeting of the Executive Committee of Cembureau of 25 March 1983 discussions took place on a basing point system, that could not have altered the outcome of that procedure.

1243 First, in its observations of 10 February 1997 Irish Cement submits that in the various national chapters of the SO the Commission itself acknowledges that the national or regional cartels which existed in a number of Member States sufficed to isolate those Member States from intra-Community trade because they made imports from other Community countries difficult or even impossible and they eliminated any incentive to export. Irish Cement therefore considers that the access to the national chapters of the SO during the administrative procedure would have enabled it to seek to show that, contrary to what the Commission alleges, the true explanation for the low volume of inter-State trade in cement was not the conclusion of an alleged Cembureau agreement but the existence of a series of independent national cartels. It refers more specifically to points 47 to 49 and 82 to 84 of the SO as regards the German market, to paragraphs 44 to 46 and 78 to 81 of the SO as regards the French market, paragraphs 38 to 40 and 73 to 77 of the SO as regards the United Kingdom market, paragraph 72 of the SO as regards the Italian market, paragraph 89 of the SO as regards the Spanish market, and paragraph 86 of the SO as regards the Greek market.

1244 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in establishing the Cembureau agreement. Any alternative explanations for the low level of trade between Cembureau member countries which Irish Cement could have put forward if it had had access to the entire SO during the administrative procedure would not have been of such a nature as to shed a different light on that documentary evidence (see paragraphs 263 and 264 above). Furthermore, even supposing that the documents relied on would have enabled the applicant to prove that there was no link between the national agreements and concerted practices and the Cembureau agreement, the inaccessibility of the documents in question did not impair its defence, because, for the reasons set out in paragraph 1137 above, the national objections are not upheld in the contested decision.

1245 Second, in its observations of 5 January 1998 Irish Cement submits that the lawfulness of the discussions which took place at the Head Delegates meeting of 14 January 1983 and those at the Head Delegates meetings of 19 March and 7 November 1984 is also confirmed by a series of minutes of meetings of the Cembureau Executive Committee which took place between March 1983 and November 1984 (documents 33.322/1423 to 1444 and 33.126/7882 to 7886). It is clearly apparent from those minutes that the discussions in question concerned dumped imports from East Germany and Spain. Those documents would also have been useful to Irish Cement in order to show that the statements made by some of the Head Delegates at the meeting of 19 March 1984 according to which 'the hot spots [were] exports from Spain to Ireland and the United Kingdom' and the 'future of Cembureau would be in doubt if the problem of trade between member countries was not dealt with and settled within the Association' (SO, point 9(b)), had in fact related to the concern of Cembureau's members regarding a major dispute (anti-dumping complaint) between some of them, the attempts to find an amicable settlement and the danger of a long-term split, if the dumping could not be prevented. Irish Cement adds that all those documents would also have been useful to it in order to show that the sole object of the exchanges of information on prices which took place at the Head Delegates meetings (contested decision, recital 16(a)) was to evaluate the dangers of

dumping and to include the information in the anti-dumping complaints filed with the Commission.

1246 The Court finds, however, that the documents relied upon are not of such a nature as to shed a different light on the various items of specific documentary evidence relied upon in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement. At the very most, those documents prove that the problems posed by the dumped imports were also discussed at the meetings in question, a point which the Commission has never disputed (see paragraph 1180 above). Consequently, the observations which the applicant could have made if it had had access to those documents could not have altered the outcome of the administrative procedure. As regards the meeting of 19 March 1984, it should be added that the documents adduced by Irish Cement could not have shed a different light on the fact that amongst the 'hot spots' referred to in the memorandum to the Chairman for that meeting were 'exports from Germany to the United Kingdom and Ireland' and 'exports from France to Germany' (SO, point 9(b); contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), namely concerns directly touching upon the intra-Community transfers of cement which the Cembureau agreement set out to regulate.

1247 As to the objective of the exchanges of information on prices at the Head Delegates meetings, the comments which Irish Cement could have submitted on the basis of the documents in question could not have shed a different light on the specific documentary evidence which shows that exchanges of information of that type took place at those meetings in order to 'assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices' (draft introductory statement by the Chairman for the meeting of Head Delegates on 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)), to '[highlight] potential causes of conflict' (notes of 2 April 1984 relating to the meeting of Head Delegates of 19 March 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737)) and to 'reduce the gap' between the prices in order to eliminate the 'temptation' to export (memorandum to the Chairman for the meeting of Head Delegates of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729)).

1248 Third, in its observations of 10 February 1997 Irish Cement relies on the minutes of the CMF meeting of 16 October 1985 (documents 33.126/17099 to 17102), from which it is apparent that two United Kingdom producers, RTZ and Rugby, feared that a change in the existing agreements on the United Kingdom market would encourage imports of cement on that market. It considers that to be evidence that there was no international agreement to restrict imports.

1249 The Court points out, however, that the comments which Irish Cement could have made on the basis of that document, if it had been accessible to it during the administrative procedure, could not have been of such a nature as to shed a different light on the specific documentary evidence

on which the Commission relied in establishing the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45). The Commission has never alleged that the effect of the Cembureau agreement was to eliminate all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement constituted an infringement because it had an anti-competitive object.

1250 Fourth, in its observations of 5 January 1998 Irish Cement relies on a joint statement of 3 October 1986 by Mr Cannellopoulos, for Titan, and Mr Kalogeropoulos, for Heracles, on the subject of 'Export of Greek cement to England' (documents 33.126/11116 and 11117), which stated that 'threats have been heard and efforts launched with a view to form a common front with other European producers in order to block the Greek export drive wherever possible, even in third countries and to undermine the Greek cement industry and disrupt its own domestic market by taking over one of the Greek companies'. According to Irish Cement, that statement clearly implies that at that time there was no Cembureau agreement. If such an agreement had existed, the 'common front with other European producers' referred to in that joint statement would already have been a reality and there would have been no need for efforts to form one. Irish Cement adds that that statement is manifestly at variance with the alleged statement made by Mr Kalogeropoulos at the meeting of 25 June 1986 of the Board of Heracles (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877).

1251 The Court finds, however, that the extract from the document to which the applicant refers is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in establishing the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45). The organisation of a collective defence against the specific threat which Greek imports constituted for west European markets from 1986 onwards in no way excludes the pre-existence of a general agreement on non-transhipment to home markets on a European scale (see paragraph 913 above).

2.19. Cases T-61/95 *Cimpor* v *Commission*, T-62/95 *SECIL* v *Commission* and T-63/95 *ATIC* v *Commission*

1252 First, in their statements lodged on 21 January and 7 February 1998 respectively, Cimpor and ATIC contend that certain documents show that in 1983 the main concern of the European cement industry was dumped exports from eastern Europe to western Europe. ATIC relies in that regard on the Vicat notes of 21 and 22 December 1987 (documents 33.126/6160 to 6175) and Cimpor refers to the '1988 Management Report' of Ciments d'Obourg (document 33.126/186). They claim that those documents would have enabled them to refute the Commission's contention that the Cembureau agreement was concluded at the Head Delegates meeting of 14 January 1983.

1253 The Court finds, however, that the two documents referred to are unrelated to the Head Delegates meeting of 14 January 1983 and do not therefore disclose what was discussed at that meeting. Even assuming that they relate to the meeting in question, they are not of such a nature as to shed a different light on specific documentary evidence on which the Commission relied in establishing that, alongside their discussions on dumping, the Head Delegates concluded, at their meeting of 14 January 1983, an agreement not to tranship to home markets and to regulate sales from one country to another, an agreement which was confirmed at the Head Delegates meetings of 19 March and 7 November 1984 (SO, points 9 and 61; contested decision, recitals 18, 19 and 45).

1254 Second, in their statements of 21 January 1998 Cimpor and SECIL refer to internal documents of FIC relating to meetings of the Executive Committee and of the Cembureau Head Delegates on 7 and 8 November 1984 (documents 33.126/862 and 863) which reveal not only the concerns of the representatives of the European industry to which imports of cement from eastern European countries gave rise, but above all the fact that Cembureau was not involved in questions of competition between its members. In that regard, it draws attention to the footnote in the document, which states that no internal Community problem was dealt with or raised at those meetings.

1255 The Court points out that the proof of the Cembureau agreement is in no way based on the discussions which took place at the Cembureau Executive Committee meeting on 8 November 1984. As to the meeting of Head Delegates of 7 November 1984, document 33.126/862 indicates that 'no internal EEC problem was dealt with or raised'. It is the same document as document 33.126/2436 (see paragraph 1233 above). The argument which Cimpor and SECIL base on that statement would not have been of such a nature as to alter the outcome of the administrative procedure. Document 33.126/862 is not of such a nature as to shed a different light on the documents referred to in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45), which show that the Cembureau agreement was concluded at the meeting of Head Delegates of 14 January 1983 and confirmed at the meetings of 19 March and 7 November 1984 (see paragraphs 979 to 985, 1008 to 1010, 1030 to 1037 and 1235).

2.20. Case T-65/95 *Italcementi* v *Commission*

1256 First, in its observations of 10 February 1997 Italcementi states that the documents to which it was able to gain access following the measure of 2 October 1996 show that the economic context of the alleged European agreements and concerted practices was significantly more complex than described by the Commission in the international part of the SO and then in the contested decision and that the limited volume of cross-border trade in cement in the Community was easily explained by a number of characteristics of the market, such as its structural overcapacity (SO, points 37, 42, 47, 54 and 56 as regards, respectively, the United Kingdom, French, German, Spanish and Portuguese markets) and the cross-shareholding between companies in the various Member States (SO, points 42, 54, 56 and 82 as regards,

respectively, the French, Spanish, Portuguese and German markets). It is unnecessary to have recourse to a theory based on the existence of an alleged principle not to tranship to home markets.

1257 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission established the existence of the Cembureau agreement on the basis of specific documentary evidence. The alternative explanations, based on the economic background, which the applicant could have supplied for the low volume of intra-Community trade in cement would not have been of such a nature as to shed a different light on that specific documentary evidence (see paragraphs 263 and 264 above). On the contrary, explanations of 'natural barriers' to inter-State trade in cement which the applicant could have put forward if it had had access to the entire SO during the administrative procedure would have been of such a nature as to underline the gravity of the infringement committed, because by concluding the Cembureau agreement the Head Delegates attempted to eliminate the little actual competition which remained on the market (see paragraph 1088 above).

1258 Second, in its observations of 10 February 1997 Italcementi submits that the documents in the national files bring into proportion the central role attributed by the Commission to Cembureau in affecting competition in Europe over the period in question. It is apparent from those documents that the various national and regional cross-border agreements and concerted practices which were suspected by the Commission, in the SO, to exist on a number of markets (United Kingdom, French, German, Greek, Spanish and Portuguese markets) were wholly independent of the forum and activities of Cembureau. The SO states, moreover, that those various national or regional agreements and concerted practices sufficed in themselves to eliminate or limit the economic interpenetration desired by the Treaty and to hinder the natural flows of goods between Member States; they did not need to be brought under a principle of non-transhipment to home markets on a European scale (SO, points 77, 81, 84, 86, 89 and 91 as regards, respectively, the United Kingdom, French, German, Greek, Spanish and Portuguese markets). From a logical point of view, it is therefore unthinkable that the European cement producers would have felt it necessary to weave the backdrop of a pan-European agreement and restricted practice designed to restrict competition on a market which was already structurally weakened by a mosaic of alleged national and regional agreements, some of which had been concluded well before 1983 (documents 33.126/17863 and 17864 and points 46 and 82 of the SO, regarding the French and German markets respectively), the date from which the Commission alleges that it has definite evidence of the existence of the Cembureau agreement. The German file is particularly revealing of the illogical and arbitrary nature of the reasoning adopted by the Commission in reaching the view that Cembureau was the 'compulsory crossroad' for various agreements and concerted practices existing at a local level or in the border regions of the Community. Italcementi observes that the Commission, after having explained why it considered that the alleged exchange of information between German producers through the BDZ, and between the BDZ and the SFIC, and the alleged market-sharing cartels on the southern German market were, although all of strictly national scope, in themselves of such a nature as to influence intra-Community trade, took the view that the decision of the German producers not to export was due to their concern not to infringe the Cembureau agreement. In so doing, the Commission had not taken into account the fact that the alleged German agreements went back to 1956, that is to say, well before the alleged birth of the Cembureau principle (SO, points 82 and 84). Above all, it reached its analysis when there was nothing in the description of the facts (SO, points 47 to 49) to link such local and regional agreements to a Cembureau agreement.

1259 In its observations of 26 November 1997 Italcementi also refers to a series of documents relating to the Belgian market (documents 33.126/851, 853 to 856, 874, 1135 to 1138, 1204 to 1206, 1543 to 1547, 1804 and 1805, 1823, 1824, 2661 to 2664, 2691, 2692, 7784, 8055, 8154, 8155, 8207 to 8209, 8557, 8562, 9039, 9751, 10052, 10330, 10351, 10352, 10439, 10440, 18056 to 18061, 18067, 18081, 18082, 18100, 18101 and 18110 to 18113) which, it claims, show that on that market too there were local agreements and concerted practices concerning market shares, prices, exports to other Member States of the Community or to non-member countries, the supply of clinker, upstream markets (exploitation of limestone deposits), downstream markets (inert materials, concrete), the supply of cement to concrete plants and transport. Those agreements and concerted practices were wholly independent of Cembureau, its activities and the alleged principle which it had created; they would in themselves have been of such a nature to eliminate any competition. The note of 24 January 1989 on the contacts between Cimpor, SECIL, Asland and Ready-Mix (document 33.322/178) gives information concerning the local agreements and concerted practices between the two Portuguese producers, which, because they extended to the downstream market in concrete, would have reinforced the partitioning of that market against foreign competition.

1260 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission established the existence of the Cembureau agreement on the basis of specific documentary evidence. Even assuming that the documents to which Italcementi refers would have enabled it to show that there was no link between the national agreements and concerted practices and the Cembureau agreement, the inaccessibility of the documents in question could not have impaired its defence, because the national objections are not the subject of the contested decision and the proof of the existence of the Cembureau agreement in no way depends upon the existence of the national agreements and concerted practices. Furthermore, even the comments which Italcementi might have been able to make on the basis of the documents which allegedly show that the national agreements and concerted practices reduced trade between Member States could not have shed a different light on the specific documentary evidence used by the Commission in the SO and in the contested decision in establishing the existence of the Cembureau agreement (see paragraphs 263 and 264 above). On the contrary, those explanations would have been of such a nature as to underline the gravity of the infringement committed, because by concluding the Cembureau agreement the Head Delegates attempted to eliminate what little actual competition remained on the market (see paragraph 1088 above).

1261 Third, in its observations of 10 February 1997 Italcementi submits that amongst the documents which it was able to inspect there is no reference to an alleged 'macro-concertation' on a European scale. On the contrary, the only references to Cembureau in those documents (documents 33.126/14855, 14858, 14859, 14861, 14870, 14871, 14889 and 14893) bring out its exclusive role as a forum for discussions of a strictly technical and economic, but not commercial, nature.

1262 The Court points out, however, that the comments which Italcementi could have made on the basis of the various documents in order to bring out such a role by Cembureau would not have been of such a nature as to shed a different light on the body of specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement.

1263 Fourth, in its observations of 10 February 1997 Italcementi alleges that the extract from the minutes of the meeting of 23 July 1986 of the Board of Heracles (documents 33.126/19879 and 19880) would have enabled it to shed a different light on the statement by Mr Kalogeropoulos at the Heracles' board meeting on 25 June 1986, on which the Commission relied in proving the existence of the Cembureau agreement (SO, point 9; contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877). The document of 23 July 1986 contains, alongside the mention of the United Kingdom cartel and the European agreement and restricted practices to which the statement of 25 June 1986 already referred, an explicit reference to Cembureau but does not establish a link between the agreements and concerted practices and Cembureau. Italcementi claims that in his statement Mr Kalogeropoulos merely mentioned 'the agreement between all European cement producers' without referring to the 'Cembureau agreement or principle'. That clearly shows that the agreement referred to in the minutes had no link to Cembureau and that the author of the statement, the Chairman of Heracles, probably intended to refer, in rather condensed terms, to all the local and regional agreements and concerted practices existing on the various national markets of the Community.

1264 The Court points out, however, that the fact that the minutes of the Heracles' board meeting of 23 July 1986 (documents 33.126/19879 and 19880) do not establish an explicit link between Cembureau and the European agreements and concerted practices is not of such a nature as to shed a different light on the specific documentary evidence, in particular the internal memoranda of Blue Circle (contested decision, recital 18, paragraphs 2 and 3; documents 33.126/11332 to 11334 and 11335 to 11337) and the documents relating to the Cembureau Head Delegates meetings referred to in recital 19 of the contested decision, which unambiguously establish a link between the infringement referred to in Article 1 of the contested decision and Cembureau.

1265 Fifth, in its observations of 10 February 1997 Italcementi alleges that a number of documents clearly show that in their daily commercial relations the European cement producers operated in total ignorance of the existence of an alleged overriding principle that there should be no transhipment to home markets. Furthermore, various documents show the existence of intra-Community exports or the desire to make such exports, which is at variance with an alleged Cembureau agreement. Italcementi refers to several Spanish documents (documents 33.322/406 to 408, 1607, 1608 and 2898 to 2901) and Portuguese documents (documents 33.322/155 to 157, 470 to 481, 483, 484, 575, 1021 and 1022). By referring to the efforts underway to 'promote awareness both international and national as to the need to stimulate solidarity between producers, which is the only serious — although difficult — way of neutralising the consequences associated with imports', the minutes of the Asland board meeting of 24 September 1986 (documents 33.322/1607 and 1608), proves that there was no such international awareness at that time and, accordingly, that the actual effects of the alleged Cembureau agreement on the functioning of the national cement industries had passed totally unnoticed. As regards documents 33.322/470 to 481, 483 and 484, they show that apart from the alleged national and Spanish-Portuguese cartels, the Portuguese producers remained free to export to other Cembureau member countries. Italcimenti adds that it has found several documents (documents 33.126/14956 to 14976 (internal documents of SFIC summarising cement imports into France between 1984 and 1988), 13487, 5680 and 5681 (minutes of meetings of the sales directors of the French company Norcim)) which show that, having regard to the evolution in cross-border trade in cement during the period in question, even if the Cembureau agreement had existed from 1983 onwards (*quod non*) it was evidently not applied in practice. In its observations of 26 November 1997 Italcementi refers to another series of documents which provide further support for its contention on that point. Several documents (documents 33.126/732 to 735, 1963, 1991, 2058 and 10193 to 10195) thus attest the concerns

of the Belgian industry that an excessive increase in their domestic prices might have dire effects on imports, in particular those from Germany, which shows that such imports did not seem to be prohibited by an alleged principle that there should be no transhipment to home markets. A series of documents relating to exports from Germany and France to Belgium and to exports from Belgium to the United Kingdom (documents 33.126/375, 885, 886, 1404 to 1406, 1425, 6916, 6947, 6954, 7552, 7558, 7760, 7761, 8110, 8112 to 8118, 8131 to 8132, 8382, 8519, 8540, 10193 to 10195 and 18099 bis) prove that the alleged Cembureau principle had no practical effect and show that the undertakings threatened, or feeling threatened, by imports defended themselves in particular by granting rebates to their customers, organising retaliatory measures on the markets in which those imports originated, envisaging or making alliances, acquisitions or shareholdings in various countries. Finally, many other documents (documents 33.126/3973, 3974, 10837 to 10839 and 10857 to 10872) support its contention that the obstacles to export were due to entirely commercial reasons. On the other hand, where such exports were possible, they took place regardless of an alleged agreement on non-transhipment to home markets. Italcementi concludes that all the documents referred to prove that the international trade flows in cement corresponded fully to the logic of the market (structure of the national markets, differences between price levels, deficiency of production capacity, natural and technical barriers to trade etc.) and not to alleged principles designed to limit their volume.

1266 The Court points out that the Commission has never claimed that the Cembureau agreement and the implementing measures had had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement constituted an infringement because it had an anti-competitive object. Furthermore, the Cembureau agreement did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), but was opposed to 'random' exports (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), namely uncontrolled or unregulated exports. The existence of imports or exports in a specific case is not therefore of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45).

1267 The Asland document of 24 September 1986 (documents 33.322/1607 and 1608) must be placed in context, namely that of the specific threat represented by imports from Greece at that time. The comments which Italcementi might have made on the basis of that document, if it had been made available to it during the administrative procedure, would not therefore have been of such a nature as to shed a different light on the body of specific documentary evidence showing the prior conclusion of a general agreement, on a European scale, to ensure non-transhipment to home markets and to regulate sales from one country to another.

2.21. Case T-68/95 *Holderbank* v *Commission*

1268 In its observations of 8 February 1997 Holderbank contends, first, that if it had had access during the administrative procedure to the chapters of the SO concerning the United Kingdom agreement and concerted practice (chapters 4 and 14) and to the documents relating thereto it could have shown that the absence of exports to the other Member States was explained by circumstances unconnected with the alleged Cembureau agreement. It observes in that regard that the Commission itself asserts in points 38, 73 and 74 of the SO that the United Kingdom market was entirely isolated, partitioned and, therefore, inaccessible to foreign competitors as a result of the CPMA (see paragraph 91 above). The abovementioned points of the SO would therefore contradict the existence of the alleged Cembureau agreement.

1269 Next, Holderbank points to a series of documents in the file on the United Kingdom — essentially correspondence during 1986-1987 between the members of the CMF and with the OFT (see paragraph 1147 above) — which, had it had access to them during the administrative procedure, would have enabled it to substantiate its assertion that the United Kingdom market was in fact inaccessible to continental producers. It cites in particular the letter of the chairman of the CMF to the OFT (documents 33.126/17624 and 17625) which states that by virtue of the 'delivered price system', which distinguished the United Kingdom from the majority of western European markets, cement intended for United Kingdom customers had to be delivered to the building site, which caused considerable practical difficulties for potential foreign competitors. It is also apparent from documents 33.126/17625 and 17641 to 17653 that, contrary to the Commission's allegations, in reality, taking into account transport costs, United Kingdom prices were less than those charged on the continental markets, in particular in West Germany; that would have been likely to curb exports to the United Kingdom. Those documents would therefore have enabled Holderbank to counter, during the administrative procedure, the objection that the absence of export activity was due to an international agreement. Documents 33.126/17642 and 17643 show that at the material time there was a reduction in demand in the United Kingdom. That fact is also exculpatory evidence, because the increasing surplus capacity of the United Kingdom market would have had the effect of increasing the pressure of costs on local producers and thereby reinforcing their tendency to hinder imports. Document 33.126/17646 relating to imports from Greece, former East Germany and Poland show that, on account in particular of the retaliatory measures adopted on prices by local producers, the foreign producers could not hope to import into the United Kingdom except by way of dumping. Holderbank concludes on that point by annexing to its observations of 8 February 1997 a series of minutes from the meetings of the CMF (documents 33.126/17062, 17090, 17099, 17100, 17134, 17141, 17142, 17147, 17149, 17158, 17163 to 17168, 17171, 17183, 17193, 17200, 17211, 17215, 17220, 17227, 17262, 17280, 17623, 17624, 17666, 17667 and 17696 to 17699), which strikingly illustrate the division and partitioning of the United Kingdom market.

1270 Finally, in the file relating to Greece, it points to a note of the Heracles board of 29 September 1986 (documents 33.126/19881 and 19882) which, it claims, reveals that the Commission took the statement of Mr Kalogeropoulos of 25 June 1986 (SO, point 9; contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877) out of context. That note clearly shows

that exports from Greece to the United Kingdom were prevented solely by the United Kingdom agreement and concerted practice, not by an international agreement.

1271 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in establishing the existence of the Cembureau agreement. Neither the alternative explanations for lack of intra-Community trade in cement, based on the existence in the United Kingdom of agreements to share and partition the home market, nor the comments which Holderbank could have made in regard to the note of the Heracles board of 29 September 1986 (documents 33.126/19881 and 19882) would have been of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement. It should be added that the Heracles note of 29 September 1986 merely states: 'Until now, in England, the agreement has "terrorised" the market and prevented the large undertakings in the field of ready-to-use concrete from purchasing Greek cement otherwise they will receive a lot of trouble'. There are therefore no grounds for asserting that that note refers to the United Kingdom agreement rather than to the European agreement. Even assuming that, as Holderbank alleges, the author of the note wished to refer to the United Kingdom agreement, that does not preclude the prior existence of a broader European agreement 'supporting' that local agreement. Holderbank's criticisms, in the light of the Heracles note of 29 September 1986, of the statement by Mr Kalogeropoulos, the chairman of Heracles, of 25 June 1986, which refers specifically to the 'interplay' of the United Kingdom and European agreements (see paragraph 913 above) in the context of the Greek problem, could not therefore have shed a different light on the body of specific documentary evidence on which the Commission relied in finding that the Cembureau agreement existed.

2.22. Case T-69/95 *Hornos Ibéricos* v *Commission*

1272 First, in its statement of 10 February 1997 Hornos Ibéricos submits that the existence of a United Kingdom agreement and concerted practice, not the alleged Cembureau agreement, made it impossible for other producers to penetrate the United Kingdom market. That fact is clear from the chapters of the SO relating to the United Kingdom (Chapters 4 and 14) and from a note of the Heracles board of 29 September 1986 (documents 33.126/19881 and 19882). The fact that the applicant did not have access to those documents during the administrative procedure therefore infringed its rights of defence.

1273 For the reasons set out in paragraph 1271 above, that argument must be rejected.

1274 Second, in its statement of 10 February 1997 the applicant refers to an internal note of the Commission's DG III of November 1994, which shows that the Commission's analysis of the market in the contested decision is erroneous.

1275 It should be recalled that, in principle, the applicants are not entitled to access to the Commission's internal documents (judgments in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission*, cited in paragraph 144 above, paragraph 25, and in Case T-7/89 *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 54; order in *NMH Stahlwerke and Others* v *Commission*, cited in paragraph 196 above, paragraph 35). That restriction on access to internal documents is justified by the need to ensure the proper functioning of the Commission when dealing with infringements of the Community competition rules (order in *NMH Stahlwerke and Others* v *Commission*, cited above, paragraph 36).

1276 The Court finds that the internal note to which Hornos Ibéricos refers was not rendered accessible through the measures of organisation of procedure prescribed by the Court. The applicant, which cannot prove that the internal note of DG III was disclosed to it in a lawful manner, may not base any argument on its content. In any event, even if it had been lawfully disclosed to the applicant during the administrative procedure, the outcome of that procedure could not have been different. It is a note sent in November 1994 to the Director-General of DG IV containing some suggestions from DG III with a view to the imminent adoption of the contested decision. If the applicant had been able to draw the Commission's attention to some aspects of the note before the adoption of the contested decision that could not have had any effect on the contested decision, because the Commission adopted that decision on 30 November 1994 with full knowledge of all the information in the note in question. Furthermore, in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in finding the infringement referred to in Article 1 of the contested decision. If the applicant had been able, during the administrative procedure, on the basis of the internal note from DG III, to submit that the relevant market did not have a European dimension, that would not have been of such a nature as to shed a different light on the specific documentary evidence showing the existence of the Cembureau agreement and also, having regard to the European nature of the agreement and concerted practice, the European dimension of the relevant market.

2.23. Case T-87/95 *Cementir* v *Commission*

1277 First, in its observations of 10 February 1997 Cementir asserts that in the national files it found a number of documents proving that the European cement market was naturally divided into separate zones, that intra-Community trade in cement was necessarily restricted to the frontier zones or, where possible, to exports by sea or river, and that such trade could at most involve certain specific undertakings, of which Cementir was not one, as it did not carry out any export business. It considers that in the light of those facts the Commission would have had to recognise that its 'European' concept of the cement market distorted the facts and that, consequently, it was arbitrary to assume that there was a single general concerted practice, whose anti-competitive effects were spread throughout Europe.

1278 Cementir adds that if the Commission had concentrated its attention on individual behaviour on the national markets, it might have discovered infringements committed by one or other undertaking on certain clearly defined segments of those markets but would never have concluded that there was a European-wide agreement designed to ensure that there was no transhipment to home markets, a conclusion for which there is no evidence in the documents consulted. In support of its contentions, Cementir cites a document relating to the Greek-Spanish agreement on the creation of the CMA (see paragraph 1040 above) (documents 33.126/19220 to 19223), minutes of the meeting of the CMF on 17 July 1986 (documents 33.126/17157 to 17159), which refer to the measures taken by the United Kingdom producers in order to combat imports of Greek cement into the United Kingdom, internal SFIC documents relating to imports in 1985, 1987 and 1988 (documents 33.126/14956 to 14976), the minutes of the Heracles board meeting of 23 July 1986 (documents 33.126/19878 to 19880), and a series of documents showing that the actions taken by various Italian producers in order to protect the Italian market against Greek imports had no connection with the alleged Cembureau agreement (documents 33.126/2945 to 2948, 2949 to 2951, 2934, 2935, 2954 to 2966, 3065 to 3068). It also refers to the decision in 1972 of the Bundeskartellamt finding a local agreement and concerted practice to be unlawful. It also refers, without identifying them precisely, passages in the SO indicating that Lafarge controlled Wössinger Zement (Germany) and Asland (Spain). It claims that those passages show that the export policy of those companies was that of a group strategy, not the application of an alleged principle that there should be no transhipment to home markets. Finally, Cementir claims that Chapters 8 and 9 of the SO show that Oficemen, SECIL and Cimpor had concluded agreements concerning the Spanish and Portuguese markets, the effect of which, on the Commission's own admission, was to make imports of cement from abroad almost impossible.

1279 In its observations of 29 December 1997 Cementir also claims that a number of documents show the existence of agreements on the Belgian market from 1965 onwards (documents 33.126/860, 861 and 1543 to 1551) and bi- or multilateral contacts, cross-border agreements or draft agreements concerning the German, Netherlands and Belgian markets (documents 33.126/1119 to 1134, 1175 to 1179 and 1574 to 1577), the Belgian and French markets (documents 33.126/837, 838 and 985 to 1009), the French and Spanish markets (documents 33.126/4066 to 4069), and the Luxembourg, German and French markets (documents 33.126/4251 to 4253 and 4263 to 4269). All those documents confirm that the agreements, concerted practices and other types of cooperation which were able to exist in particular zones had a purely local origin and explanation and were unconnected with an alleged European agreement and concerted practice. None of those documents makes any allusion to such an agreement or concerted practice. Lastly, an FIC document (documents 33.126/2105 to 2113), which reflects the Belgian association's view of Cembureau's role and which shows that it was reluctant to communicate certain information to Cembureau, fully confirms Cementir's assertions regarding the function and powers of Cembureau and the absence of general concerted action between the European producers at the level of Cembureau.

1280 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in establishing the existence of the Cembureau agreement. That documentary evidence shows that at their meeting of 14 January 1983 the Head Delegates concluded an agreement on non-transhipment to home markets and regulation of sales from one country to another, an agreement subsequently confirmed at the meetings of 19 March and 7 November 1984. If, on the basis of the

documents to which it refers, Cementir had been able, during the administrative procedure, to put forward arguments relating to the reference market that could not have altered the outcome of the administrative procedure. The very existence of the Cembureau agreement concluded on a pan-European scale directly contradicts Cememtir's contention that the geographical reference market for cement is not Europe. Furthermore, neither the absence of any allusion to the Cembureau agreement in the various documents put forward by Cementir, nor the alternative explanations based on the existence of natural and technical barriers to cross-border trade in cement or forms of cooperation and local and regional agreements — sometimes dating from well before 1983 and allegedly unconnected with a European agreement to share markets — which Cementir could have put forward to explain the low volume of intra-Community trade in cement during the period in question, nor the comments which it could have made on Cembureau's role and powers and the reluctance of some associations to communicate certain information to Cembureau, would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in establishing the existence of the Cembureau agreement. On the contrary, the explanations based on 'natural barriers' to inter-State trade in cement which Cementir might have put forward if it had had access to the whole of the SO during the administrative procedure would have been of such a nature as to underline the gravity of the infringement committed, because by concluding the Cembureau agreement the Head Delegates attempted to eliminate what little actual competition remained on the market (see paragraph 1088 above).

1281 Second, in its observations of 29 December 1997 Cementir argues that a series of documents (documents 33.126/2056 to 2062) show that following a price increase on the Belgian market in 1984 local customers began to turn to German cement, which was less expensive. It refers, moreover, to a CBR document of 17 January 1986 (documents 33.126/10193 to 10198) which refers to imports into Belgium of German cement and is thus at variance with the existence of the Cembureau agreement.

1282 The Court points out that the Commission has never alleged that the effect of the Cembureau agreement had been to eliminate all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement was found to be an infringement because of its anti-competitive object. Furthermore, 'random' exports to Belgium were explicitly referred to at the Head Delegates meeting of 19 March 1984 (notes on the meeting of 2 April 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). The fact that the CBR document of 17 January 1986 attests the existence of some 'random' exports to Belgium, of which the Head Delegates were aware, shows at the very most that some Community producers did not always comply with the Cembureau agreement; it is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) in finding that the Cembureau agreement existed. On the contrary, the content of that document shows the effectiveness of the Cembureau agreement. The note in question states: 'Imports of German cement into Belgium appear stable, although remaining at a relatively high level. They reached 250 000 tonnes in 1983, 220 000 tonnes in 1984 and will probably reach 203 000 tonnes in 1985.'

1283 Third, in its observations of 29 December 1997 Cementir puts forward a series of documents which it claims show the lawfulness of the subjects discussed at the two Head Delegates meetings in which it took part, namely those of 14 January 1983 and 7 November 1984. Other documents (documents 33.126/1175 to 1179, 2026 to 2049, 2050 to 2053, 2056 to 2062 and 5295) would have confirmed that the object of the two meetings was to examine changes in dumped imports from eastern Europe and lawful means of meeting them (complaint to the Commission), as well as conditions on the world cement market. That is also the context in which allusion was made at the meeting of 14 January 1983 to the Belgo-Netherlands basing point system which had been notified to the Commission in 1981 but in regard to which the Commission had not yet officially reacted at that time. Cementir considers that access to all those documents during the administrative procedure would have enabled it to put forward an interpretation of the documents on which the Commission relied in establishing the existence of the Cembureau agreement that was totally different from the Commission's interpretation of them in the contested decision.

1284 For the reasons set out in paragraph 1208 above, that argument would not have been of such a nature as to alter the outcome of the administrative procedure.

2.24. Case T-88/95 *Blue Circle* v *Commission*

1285 First, in its memorandum of 10 February 1997 Blue Circle contends that the national chapters of the SO and the documents relating to it refer to the existence of local agreements and concerted practices (national, bilateral or multilateral) which, as the Commission accepts in the national chapters of the SO, had the effect of partitioning the markets in question or, at least, of materially affecting inter-State trade. However, those local agreements are wholly unconnected with a pan-European agreement or concerted practice. The local agreements were thus wrongly regarded by the Commission as proof of the existence or implementation of a Cembureau agreement. Moreover, since the agreements and concerted practices described in the national chapters of the SO prevented trade in cement between Member States, the national files could have supported the observations made on its behalf by its economic expert, Dr Williamson, and his argument that the patterns of trade in cement found on the market over the period in question, in particular exports from Greece, were explicable by factors other than an alleged European agreement and concerted practice. Blue Circle also contends that a number of items in the national files show that bilateral agreements such as the Greco-Spanish agreement or the Hispano-Portuguese agreement, which the Commission had initially rightly included within the national objections and then dropped, were ultimately 'recycled' by the Commission as evidence of the existence of a Cembureau cartel.

1286 In support of each of those arguments Blue Circle puts forward passages or documents taken from the files relating to Greece, Germany, France, Italy, Spain and Portugal, which it identifies by reference to the numbers in the top right corner of the page, their title or location in the SO. None of those documents are, however, appended to its memorandum.

1287 The Court finds that, by not appending to its memorandum the documents referred to therein, contrary to the clear instructions in the measure of 2 October 1996, Blue Circle made it impossible for the Court to identify those documents with the precision necessary to assess their relevance to Blue Circle's defence during the administrative procedure. Moreover, Blue Circle had an opportunity to make good its error after the measure of 18 and 19 June 1997, which granted it full access to the Commission's file, including documents already covered by the measure of 2 October 1996 other than documents making up file IV/27.997 (the CMF file relating to the CPMA (see paragraphs 91 and 93 above)), on which Blue Circle did not rely in its observations of 10 February 1997.

1288 In any event, the alternative explanations based on the economic analysis of the markets or the existence of many local (national, bilateral or multilateral) agreements which Blue Circle could have provided in regard to the patterns of inter-State trade in cement over the period in question would not have been of such a nature as to shed a different light on the body of specific documentary evidence on which the Commission relied in finding that the Cembureau agreement existed (SO, points 9 and 61; contested decision, recitals 18, 19 and 45). Furthermore, the existence of national agreements and other local agreements, such as the Greco-Spanish agreement or the Hispano-Portuguese agreement, was not taken into account by the Commission as proof of the existence of the Cembureau agreement; the existence of that agreement was established exclusively on the basis of the documentary evidence referred to in points 9 and 61 of the SO and in recitals 18, 19 and 45 of the contested decision. Consequently, the comments which Blue Circle could have made in order to show that there was no connection between the local agreements and the Cembureau agreement could not have altered the outcome of the administrative procedure as regards the finding of the very existence of the agreement referred to in Article 1 of the contested decision.

1289 Second, in its statement of 12 December 1997 Blue Circle submits that examination of the documents which it was able to inspect following the measure of 18 and 19 June 1997 supports its contention that the European cement industry was riddled with local, national, bilateral or multilateral agreements. Blue Circle considers that if it had had access to the entire file and the entire SO during the administrative procedure it could have drawn the Commission's attention to the existence of those agreements and the fact that they were totally independent of an alleged Cembureau agreement not to tranship to domestic markets. It could thus have caused the Commission to tackle those local agreements alone and to attribute responsibility for them only to the producers involved in them. The Commission's analysis in the SO and in the contested decision is also quite at variance with the evidence in a number of documents (documents 33.126/4226, 4227, 4379 to 4392, 6858 to 6865, 6908, 6912, 6913, 6920, 6921, 6923 to 6976, 7041, 7046 to 7048, 7766 to 7772, 8124 to 8138, 8152 and 16936 to 16938). They show that various major European cement producers pursued active, competitive and expansionist policies of acquiring controlling shareholdings in foreign companies. According to Blue Circle, that practice is wholly inconsistent with the implementation of an alleged agreement not to tranship to home markets. Those documents also show that several companies had shareholdings, sometimes cross-shareholdings, in other European cement producers. They would thus have enabled Blue Circle to provide a plausible alternative explanation for the low level of inter-State trade in cement during the period in question. Some of the documents (documents 33.126/6914, 6959, 8124 to 8138 and 8152) which provide details of some of those acquisitions, show that in the months preceding the acquisitions in question the purchaser and vendor often engaged in discussions on prices, imports and exports, the possibility of joint

action, etc. Viewed in context, they clearly show that the purchaser's desire was not to implement the Cembureau agreement but rather to obtain information on the target market in order to value the shares of the target company. Blue Circle submits that none of those documents refers to Cembureau or suggests the existence of any agreement not to transhipto home markets or that such an agreement existed. It argues that if it had had access to those documents during the administrative procedure it could have deepened its analysis of the European cement market and of the network of main relationships and controlling shareholdings which existed on that market. It could thus, by providing a different explanation for the functioning of the market than that given by the Commission, have refuted the Commission's theory based on the existence of a single and continuous European agreement pursuant to which there was to be no transhipment to home markets.

1290 A number of other documents (documents 33.126/270, 781 to 807, 839 to 843, 847 to 849, 853 to 859, 1175 to 1245, 4066 to 4068, 4073, 5671 to 5724, 6883, 8124 to 8138, 8186, 13498 to 13509, 13532, 13542, 18517, 18533 and 18534, and documents 33.322/923 to 929) clearly show that the cement market was traditionally divided by many local, national, bilateral (in particular between France and Belgium, France and Portugal, and Belgium and the Netherlands) or multilateral agreements (in particular between the Benelux countries, Germany and France), some of which went back to 1964. The documents relating to all those agreements in themselves undermine the Commission's theory based on the existence of a European agreement, because they offer a plausible alternative explanation for the low volume of intra-Community trade in cement. Blue Circle submits that some of the local agreements referred to in the national chapters of the SO, and the documents relating to them, expressly sought to promote export trade (for example, documents relating to the Franco-Portuguese cooperation agreement and to the agreements between the Benelux countries, France and Germany, and also documents relating to the French company, Norcim).

1291 Other documents show that numerous economic, commercial, technical or legal factors, such as different national price control mechanisms (documents 33.126/3333, 3336 to 3338 and 3342 to 3345), different transport costs (documents 33.126/1224 to 1238, 3524 to 3526 and 3536 to 3542), differences in quality and specifications (documents 33.126/3556, 5678 and 5699), different tax systems and environmental controls (document 33.126/3589) and the existence on some markets of subsidies or special advantages for the local industry (document 33.126/5673) affected inter-State trade in cement and therefore explained the fragmentation of the markets observed during the period in question.

1292 Lastly, the existence of the local agreements, the network of cross-shareholdings and the other factors referred to above, which were liable to reduce trade between Member States, also show that the European cement producers had no interest in adopting, at the level of Cembureau, a principle that there should be no transhipment to home markets.

1293 The Court points out that in the SO (points 9 and 61) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in establishing the existence of the Cembureau agreement. Neither the absence of any explicit or implicit allusion to Cembureau, the Cembureau agreement or any European agreement on non-transhipment to home markets in the documents referred to by the applicant in its observations of 12 December 1997, nor the alternative explanations based on the existence in Europe of a large number of national, bilateral or multilateral agreements, some of which predated 1983, the shareholding structure of European companies in the cement sector or the existence of economic, commercial, legal and technical obstacles to inter-State trade in cement which Blue Circle could have supplied for the low volume of intra-Community trade in cement during the period in question, nor the comments which it could have made on the basis of documents illustrating the expansionist policy of various European groups in the cement sector and the individual or joint export activities of various European producers, would have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in establishing the existence of the Cembureau agreement. On the contrary, the comments on the various factors which contributed to the fragmentation of the markets which Blue Circle might have submitted, had it had access to the entire SO and the entire investigation file during the administrative procedure, would have been of such a nature as to underline the gravity of the infringement committed, because by concluding the Cembureau agreement the Head Delegates tried to eliminate what little actual competition remained on the market (see paragraph 1088 above).

1294 The Court points out that the Commission has never claimed that the Cembureau agreement and the implementing measures had had the effect of eliminating all intra-Community trade in cement and any temptation to engage in inter-State trade. According to Article 1 of the contested decision, the Cembureau agreement constituted an infringement because of its anti-competitive object. Furthermore, the Cembureau agreement did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) but was opposed to 'random' exports (notes on the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737), namely uncontrolled or unregulated exports. The existence of imports or exports in a specific case is not therefore of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement (SO, points 9 and 61; contested decision, recitals 18, 19 and 45). Finally, as regards the argument that there was no connection between the local agreements and the Cembureau agreement, the Court refers to paragraph 1288 above.

3. Conclusions

1295 Italcementi and Blue Circle have not succeeded in showing that their rights of defence were infringed during the administrative procedure because they were not given access to documents subsequently used to support the finding of the infringement referred to in Article 1 of the contested decision. As regards the exculpatory evidence that is alleged to be included in the parts of the SO and the investigation file to which access was not given during the administrative procedure, the Court finds that the 39 applicants concerned by the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 124 and 158 to 172 above) have not succeeded in showing that the comments which they could have made on the basis of

documents that had been inaccessible to them would have had even a small chance of altering the outcome of the administrative procedure as regards the existence of the infringement referred to in Article 1 of the contested decision (see paragraph 247 above). In those circumstances, the restricted access to the SO and to the investigation file which they had during the administrative procedure did not prejudice their defence against the objection relating to the existence of the Cembureau agreement.

The applicants' participation in the Cembureau agreement

A — Preliminary observations

1296 The Commission has proved that the Cembureau agreement existed (see paragraph 1095 above).

1297 The Commission found that various measures governed and conditioned by the Cembureau agreement had been taken by various undertakings and associations of undertakings (contested decision, recital 46, paragraph 1). Thus it took the view that all the following were measures implementing the Cembureau agreement: the specific and periodic exchanges of information on prices within the framework of Cembureau (contested decision, Article 2), the Franco-Italian agreements and concerted practices (contested decision, Article 3(1)), the Hispano-Portuguese agreement (contested decision, Article 3(2)), the Franco-German agreements and concerted practices (contested decision, Article 3(3)), the measures adopted in the framework of the ETF (contested decision, Article 4), the ECEC (contested decision, Article 5) and the EPC (contested decision, Article 6). It stated (contested decision, recital 46, paragraph 2, second subparagraph) as follows: '... The objects are identical in all instances, namely the common rule on non-transhipment to home markets, the other arrangements being merely measures to implement or back up that rule. The participants are also identical, since the situation is characterised by the accession of the European cement industry, directly or through the national trade associations, to a common rule and by the implementation of that rule, in the various specific cases, by those most directly involved.' For that reason it took the view (contested decision, recital 46, paragraph 1, first subparagraph) that 'the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts [... had] constituted a "single and continuous agreement"'.

1298 The infringement referred to in Article 1 of the contested decision relates to that single and continuous agreement.

1299 All the parties submit that the Commission committed an error of assessment or infringed Article 85(1) and/or Article 190 of the Treaty in finding that they participated in the

infringement referred to in Article 1 of the contested decision. The Court must therefore first examine whether, on the basis of the evidence set out in the contested decsion, the Commission was entitled to find that had they participated in the Cembureau agreement.

1300 For the purpose of that analysis, the situation of Cembureau and its direct members must be distinguished from that of the other addressees of the contested decsision.

1301 As regards Cembureau and its direct members, the decision states that the Cembureau agreement was concluded by 'Cembureau and its members' 'at the meeting of Head Delegates held on 14 January 1983' (contested decision, recital 45, paragraph 1) and that the same parties confirmed the content of that agreement at the meeting of Head Delegates held on 19 March and 7 November 1984 (contested decision, recital 45, paragraph 2). For that reason, Cembureau and its direct members are considered to be '[direct] parties to the agreement on non-transhipment to home markets and the regulation of sales from one country to another' (contested decision, recitals 45, paragraph 10, and 65, paragraph 3, first subparagraph).

1302 Although Cembureau and all its direct members had, according to the Commission, participated in one or more of the implementing measures referred to in Articles 2 to 6 of the contested decision, the proof of their participation in the Cembureau agreement does not depend on their participation in those measures. That proof is based on their participation in the Head Delegates meetings and, in the case of the direct members, also on their membership of Cembureau (contested decision, recitals 44, paragraph 4, 45, paragraphs 1 and 2, and 65, paragraph 3, first subparagraph).

1303 However, in the case of the direct members of Cembureau established outside the Community at the time of the Head Delegates meetings, the Commission fixed the starting date of their participation in the infringement referred to in Article 1 of the contested decision by reference to their participation in a measure implementing the Cembureau agreement within the Community (contested decision, recitals 45, paragraph 11, and 65, paragraph 4).

1304 As regards the other addressees of the contested decision, Article 1 refers to several indirect members of Cembureau and Buzzi.

1305 With regard to the indirect members of Cembureau, the Commission took the view that the Head Delegates appointed by the national associations represented their members at the meetings in which the Cembureau agreement was concluded and then confirmed. The Commission observes in that regard (contested decision, recital 44, paragraph 5): '... if the associations enter into commitments, they do so in the interests of their members and in the name of their members and not in their own interest: in point of fact, the cement producers are the real actors, acting through their trade associations.' It adds (contested decision, recital 65,

paragraph 3, first subparagraph): 'however, for the purposes of [the contested] decision, the Commission takes into consideration only the undertakings which were represented within Cembureau by their association and which, in addition to their membership of the association, clearly manifested their accession to the agreement by participating' in a measure implementing the Cembureau agreement. The proof of the participation of the indirect members of Cembureau in the Cembureau agreement may therefore be seen in their participation in one or more measures implementing it. For that reason, the indirect members are considered to have 'participated indirectly in the [Cembureau] agreement, through their participation in the various arrangements and measures agreed on to supplement the general agreement and/or assist in its implementation' (contested decision, recital 45, paragraph 10).

1306 Lastly, in the contested decision, Buzzi, which is neither a direct nor an indirect member of Cembureau, is considered to have acceded to the Cembureau agreement through its participation in the Franco-Italian agreements and concerted practices referred to in Article 3(1) of the contested decision (contested decision, recital 65, paragraph 3, first subparagraph, and third paragraph under (c), and paragraph 4, third subparagraph, first indent).

B — Membership of a national association that is a member of Cembureau as a criterion for attributing liability for the infringement referred to in Article 1 of the contested decision

1307 CBR (T-25/95), ENCI (T-31/95), Dyckerhoff (T-35/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Alsen-Breitenburg (T-45/95), Nordcement (T-46/95), Rugby (T-53/95), Cimpor (T-61/95), SECIL (T-62/95) and Hornos Ibéricos (T-69/95) contend that the Commission committed an error of law in finding that they participated in the Cembureau agreement because they were members of a national association that was a direct member of Cembureau.

1308 The Court points out that, according to the SO, the Cembureau agreement had been concluded by Cembureau and its members and the indirect members of Cembureau had adhered to the Cembureau agreement *ex nunc* with effect from the date on which they participated in a measure implementing that agreement. However, the SO does not take Cembureau's indirect members' membership of a national association as the basis for attributing liability to them for the infringement constituted by the Cembureau agreement (see paragraphs 554 to 562 above).

1309 It follows that in the contested decision the Commission was not entitled to rely on membership of a national association that was a member of Cembureau as a criterion for attributing liability for the infringement referred to in Article 1. As has already been pointed out, the sole criterion on which the Commission could lawfully rely as against the indirect members of Cembureau was that of accession to the Cembureau agreement by virtue of participation in a measure implementing it (contested decision, recitals 45, paragraph 10, and 65, paragraph 3; see paragraphs 563 and 564 above). It is the same criterion for attributing liability as is used in the SO.

1310 The Court must therefore examine whether the participation of the indirect members of Cembureau in the Cembureau agreement is shown sufficiently clearly by their participation in one or more measures implementing the agreement (contested decision, recital 65, paragraph 3, first subparagraph).

1311 In those circumstances, the argument in question is devoid of purpose and must be rejected.

C — Power of Head Delegates and associations of undertakings to conclude the Cembureau agreement

1312 First, CBR (T-25/95), Cembureau (T-26/95), FIC (T-30/95), VNC (T-32/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Alsen-Breitenburg (T-45/95), Nordcement (T-46/95), BDZ (T-48/95), Unicem (T-50/95), Rugby (T-53/95), BCA (T-54/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95), Italcementi (T-65/95), Cementir (T-87/95) and AGCI (T-103/95) contend that an agreement such as the Cembureau agreement does not fall within the scope of the activities authorised in Cembureau's statues or in the statutes of the various national trade associations involved. The Head Delegates are not an organ of Cembureau or an organ of those associations with authority under their respective statutes to commit the members of Cembureau in a valid manner. Nor did the direct members of Cembureau ever authorise them to conclude the Cembureau agreement.

1313 The argument that Cembureau and the Head Delegates of Cembureau had no power under the statutes to conclude the Cembureau agreement has already been rejected (see paragraphs 923 to 928 above). For the same reasons, any argument based on lack of competence under the statutes of the direct members of Cembureau must also be rejected. As the Commission correctly found, on the basis of the evidence put forward in recitals 18, 19 and 45 of the contested decision, that the Cembureau agreement was concluded at the meeting of the Head Delegates held on 14 January 1983 and was confirmed at the meetings of the Head Delegates on 19 March and 7 November 1984 (see paragraph 1095 above), the only question is whether the Head Delegates acted in the name and on behalf of the direct members of Cembureau.

1314 According to the first subparagraph of paragraph 6 of Cembureau's Articles in force during the period considered by the contested decision, each member of Cembureau was to nominate, before each meeting of Cembureau's General Assembly, the representative who was to cast its vote. The representatives of Cembureau's direct members so nominated were called 'Head Delegates'. That was confirmed by Cembureau in its reply to the SO, page 7 (contested decision, recital 15, paragraph 4): 'As is the case with government representatives on international bodies, and despite the fact that the title "Head Delegates" is not provided for in the Articles ...

a person was appointed "Head Delegate" in order to cast votes in the General Assembly. Cembureau kept an up-to-date list of such "Head Delegates".'

1315 It follows that the Head Delegates were authorised by the direct members to take decisions at Cembureau's General Assembly. Their actual power of representation was not, however, limited to the Cembureau general assemblies alone.

1316 It is apparent from the telex of 17 November 1982 (contested decision, recital 19, paragraph 3; document 33.126/11558) from Mr Van Hove to Mr Collis and Mr Dutron, directors of Cembureau, that the Head Delegates represented the direct members of Cembureau also at the meetings of the Head Delegates organised by Cembureau. In that telex Mr Van Hove, the Belgian Head Delegate, suggested that he 'be invited [to the meeting of Head Delegates on 14 January 1983] as chairman of the CLC for EEC problems and that Belgium appoint somebody else as Head Delegate'.

1317 That finding is corroborated by the 'official' letter convening the Head Delegates meeting of 14 January 1983 (document 33.126/11554) which was sent to all the direct members of Cembureau. It is unequivocally clear from that letter that the Head Delegates were invited to the meeting of 14 January 1983 not in their personal capacity, but in their capacity as representative of a direct member of Cembureau. It stated: 'to have any chance of positive results it is necessary that all Members are involved and participate in a common reflection. For this reason, I am inviting you to a special meeting [of Head Delegates] to be held in the office of Cembureau in Paris on 14 January 1983 at 9 am.'

1318 In those circumstances, the Commission was entitled to take the view that when the Head Delegates concluded and then confirmed the Cembureau agreement at their meetings of 14 January 1983, 19 March and 7 November 1984 they were representing and committing the direct members of Cembureau.

1319 Second, FIC contends that by its nature a trade association is not able to conclude an agreement restricting competition within the meaning of Article 85(1) of the Treaty, as it does not carry on any commercial or economic activity. To the same effect, Cembureau submits that an association must play an active commercial role if Article 85(1) of the Treaty is to apply to it. ATIC states that by virtue of its statutes it could not carry on any type of commercial activity.

1320 As the Commission rightly observes in the contested decision (recital 44, paragraph 2) it is not necessary for trade associations to have a commercial or economic activity of their own for Article 85(1) of the Treaty to be applicable to them (Case 71/74 *Fruit- en Groentenimporthan-*

del and Frubo v *Commission* [1975] ECR 563, paragraphs 28 to 32, hereinafter '*Frubo*'; *Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraphs 87 and 88; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 19; and Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraphs 20 and 26; *CB and Europay* v *Commission*, cited in paragraph 83 above, paragraphs 76 and 77). Article 85(1) of the Treaty applies to associations in so far as their activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress. To place any other interpretation on Article 85(1) of the Treaty would be to remove its substance (*Frubo*, cited above, paragraphs 30 and 31).

1321 It follows that the argument must be rejected.

D — The finding that both undertakings and associations were responsible for the same infringement

1322 Cembureau (T-26/95), SFIC (T-36/95), Vicat (T-37/95), BDZ (T-48/95), Cimpor (T-61/95), SECIL (T-62/95), ATIC (T-63/95) and Italcementi (T-65/95) contend that the Commission committed an error of law in finding that both associations and members of those associations participated in the infringement referred to in Article 1 of the contested decision. SECIL states that the same infringement cannot be characterised as both an agreement and a decision within the meaning of Article 85(1) of the Treaty, the former concerning undertakings and the latter associations. One and the same infringement should therefore be characterised either as an agreement between undertakings or as a decision by associations of undertakings. Cembureau, SFIC, Vicat, BDZ, Cimpor, SECIL and ATIC allege that the Commission did not observe the conditions laid down in the case-law for validly attributing one and the same infringement to an association and to its members. It states that such an attribution of responsibility is permissible only where the Commission succeeds in proving that the association's conduct was separate and autonomous from that of its members. In those circumstances, the Commission's approach also infringes the *non bis in idem* rule. Italcementi contends that, if the logic of the description in the contested decision is followed, the infringement should be characterised as a decision of an association and not as an agreement between undertakings. The Commission ought therefore to have proved that Italcementi had indicated its agreement to what had been decided at the level of Cembureau and that it had acceded to it. Italcementi's participation in the Cembureau agreement could not therefore be based solely on its capacity as a member of Cembureau.

1323 The Court finds that contrary to SECIL's assertion, the Commission did not characterise the Cembureau agreement as both an agreement and a decision of associations of undertakings. It considers in the contested decision (recital 45, paragraph 5) that 'the rule on non-transhipment to domestic markets and the regulation of sales from one country to another constitute an agreement'.

1324 However, in Article 1 of the contested decision the Commission finds not only that undertakings participated in the agreement found therein but also several associations of undertakings and an association of associations of undertakings and undertakings, namely Cembureau.

1325 The Court points out in that regard that the wording of Article 85(1) of the Treaty does not exclude agreements between associations of undertakings and undertakings from the scope of the prohibitions which it lays down. In order to find that an association and its members have participated in one and the same infringement the Commission must establish conduct on the part of the association which is separate from that of its members (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193, hereinafter '*Woodpulp I*').

1326 In the present case, there is no doubt as to the separate role played by the associations in the infringement referred to in Article 1 of the contested decision. Cembureau's separate role consisted in its taking the initiative for the meetings of the Head Delegates during which the Cembureau agreement was concluded and then confirmed, and in preparing those meetings (contested decision, recital 19). The separate role of the national associations that were members of Cembureau consisted in concluding, then confirming, the Cembureau agreement with Cembureau. The indirect members of Cembureau acceded to the agreement through the measures implementing that agreement. Their accession was made possible by the fact that the national associations were invited to spread 'words of wisdom' around them (draft introductory statement by the Chairman for the meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)), a circumstance which also underlines the separate role played by the national associations. Lastly, Cembureau and the national associations played a separate role from that of the indirect members of Cembureau in the implementation of the Cembureau agreement. Only Cembureau and its direct members are the subject of the infringements constituted by the exchanges of price information found in Article 2(1) and (2) of the contested decision (see paragraphs 1450 to 1452 below).

1327 On the other hand, in the contested decision, the member undertakings of the associations that are the subject of the contested decision are not regarded as having concluded the Cembureau agreement. According to that decision (recitals 45, paragraph 10, and 65, paragraph 3, first subparagraph), they acceded to the Cembureau agreement through their participation in one or more of the implementing measures referred to in Articles 3 to 6 of the contested decision.

1328 Having regard to the separate roles played by the associations and the undertakings in concluding and implementing the agreement referred to in Article 1 of the contested decision, the Commission was entitled to attribute responsibility for that infringement to both the associations and the members of those associations. For the same reasons, there was no infringement of the *non bis in idem* rule.

1329 Lastly, as to Italcementi's argument, irrespective of whether the Cembureau 'agreement' could also be characterised as a decision of association(s) of undertakings, the Commission was entitled to characterise the conduct referred to in Article 1 of the contested decision as an agreement within the meaning of Article 85(1) of the Treaty, because it had established the existence of a concurrence of wills between the participants at the meetings of the Head Delegates of 14 January 1983, 19 March and 7 November 1984 (see paragraph 1072 above). Moreover, Italcementi's participation in the Cembureau agreement was established not merely on the basis of its capacity as member of Cembureau but also on the basis of its presence at the meeting of Head Delegates on 19 March 1984, at which the Cembureau agreement was confirmed (contested decision, recital 19, paragraph 8, recital 45, paragraphs 1, 2 and 10, and recital 65, paragraph 3, first subparagraph). Italcementi cannot therefore allege that its participation in the Cembureau agreement was based solely on its capacity as member of Cembureau.

1330 All the arguments examined must therefore be rejected.

E — Participation of Cembureau and its direct members in the infringement referred to in Article 1 of the contested decision

1331 The Court must examine first whether the Commission has proved the participation of Cembureau and its direct members in the infringement referred to in Article 1 of the contested decision (1). The Court will then examine the argument based on infringement of the principle of equal treatment raised by some direct members of Cembureau (2). The Court will also examine the arguments of Cembureau and of its direct members relating to inadequacy of the reasoning in the contested decision (3) and infringement of the rights of the defence during the administrative procedure on account of insufficient access to certain passages of the SO and certain documents in the investigation file (4).

1. Proof of participation of Cembureau and its direct members in the infringement referred to in Article 1 of the contested decision

1332 The direct members of Cembureau are identified in recital 15, paragraph 2, second subparagraph, of the contested decision. Article 1 of the contested decision refers to the following direct members: FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, Unicem, BCA, Oficemen, Irish Cement, ATIC, Italcementi, Aker, EUROC, Cementir and AGCI.

1333 The Court must first examine the argument of Aalborg and of BCA to the effect that that they were held responsible for acts committed by another legal entity (1.1). It will then analyse,

separately, the situation of the applicants which participated in one or more meetings of the Head Delegates (1.2), then that of Unicem, which did not participate in any of those meetings (1.3).

1.1. Succession of certain direct members of Cembureau

1334 First, Aalborg (T-44/95) complains that the Commission found it responsible for the actions of Aktieselskabet Aalborg Portland-Cement Fabrik, a company which transferred its cement production site to Aalborg on 1 January 1990. It states that that company has not ceased to exist as a legal person, as it became a holding company which held, under a new name, 50% of shares in Aalborg. As the Cembureau agreement was not in written form, it could not have gained awareness of it upon the transfer. Aalborg also claims that the statement of reasons for the contested decision is defective as regards the finding that it was liable because of acts committed by another undertaking.

1335 The Court points out that at the hearing Aalborg acknowledged that its formation on 26 June 1990 and its acquisition, with retroactive effect to 1 January 1990, of the cement plant of Aktieselskabet Aalborg Portland-Cement Fabrik were part of a reorganisation of the group to which it belongs. The applicant and Aktieselskabet Aalborg Portland-Cement Fabrik must therefore be considered to constitute the same economic entity for the purposes of applying Article 85(1) of the Treaty (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 9). It follows that the Commission was entitled to hold Aalborg responsible for the activities of Aktieselskabet Aalborg Portland-Cement Fabrik.

1336 As to the alleged defect in the statement of reasons, the Court points out that the SO (appendix 5 to the application) was addressed to Aalborg. At the hearing Aalborg acknowledged that in its reply to the SO it had not submitted before the Commission that it could not be held responsible for the activities of Aktieselskabet Aalborg Portland-Cement Fabrik. In such circumstances, and since the latter undertaking and the applicant constituted one and the same economic entity for the purposes of applying Article 85(1) of the Treaty, the Commission was not required to explain further in the contested decision why it held the applicant responsible for the conduct of Aktieselskabet Aalborg Portland-Cement Fabrik.

1337 Second, BCA (T-54/95) complains that the Commission held it responsible for alleged unlawful activities conducted by another body, CMF (see paragraph 91 above), which represented the

British cement industry's interests within Cembureau until 1 June 1988. It states that the activities of BCA, viewed as a whole, were substantially different from those of CMF.

1338 The Court finds that in the contested decision (recital 45, paragraph 12) the Commission sets out the reasons which led it to take the view that BCA ought to bear responsibility for the conduct of CMF. Thus, it observes that the members of CMF were members of the Cement and Concrete Association (hereinafter 'CCA') and that on 1 June 1988 CMF was dissolved and its activities, together with the representation of the interests of the United Kingdom cement producers, were transferred to CCA, which, on the same date, changed its articles and changed its title to BCA. It considered that there was therefore continuity of CMF's activity by BCA and that the members of the two associations were identical.

1339 It is common ground that until 1 June 1988, the date on which BCA became a member of Cembureau, BCA was called CCA and that prior to that date CMF represented the interests of the United Kingdom cement industry within Cembureau. It is apparent from a resolution of CMF of 1 June 1988 (documents 33.126/17259 and 17260) that on that date CMF was in fact dissolved and that the applicant took over its assets. Finally, it is not disputed that the members of the two associations were identical, that the last Chairman of CMF became Chairman of BCA and that the Head Delegate representing CMF in Cembureau (Mr Marshall) became the Head Delegate representing BCA.

1340 Even if, as the applicant alleges, the activities of CMF concerned principally the CPMA (see paragraph 91 above), which were terminated in 1987 before the creation of BCA, and BCA exercises certain functions which were never exercised by CMF, CMF and BCA are obviously identical as regards the activities they pursued within Cembureau and, accordingly, as regards the conduct for which BCA is held responsible in the contested decision (*Suiker Unie and Others* v *Commission*, cited in paragraph 651 above, paragraphs 84 to 88, and *CRAM and Rheinzink* v *Commission*, cited in paragraph 1335 above, paragraph 9). BCA succeeded CMF as member of Cembureau and, following the resumption of the activities of CMF, the same person continued to exercise the function of United Kingdom Head Delegate within Cembureau.

1341 In those circumstances, the Commission was entitled to find that BCA had to answer for the conduct of CMF within Cembureau. BCA's argument must therefore be rejected.

1.2. Applicants which participated in one or more meetings of the Head Delegates

1.2.1. Participation in the meetings of the Head Delegates at which the Cembureau agreement was concluded and then confirmed

1342 It is not disputed that Cembureau was represented by its President, Mr Bailly, assisted by two directors, Mr Collis and Mr Dutron, at the three meetings of the Head Delegates referred to in recital 19 of the contested decision. The presence of those persons is moreover clear from the documents entitled 'Meeting of Head Delegates, Paris, 14 January 1983' (contested decision, recital 19, paragraph 4; document 33.126/11581), 'Meeting of Head Delegates, Noordwijk, 19 March 1984' (contested decision, recital 19, paragraph 8; documents 33.126/11699 and 11700), and 'Meeting of Head Delegates, Paris, 7 November 1984' (contested decision, recital 19, paragraph 13; document 33.126/11752).

1343 Moreover, all the direct members of Cembureau apart from Unicem (see paragraphs 1404 to 1417 below) participated in one or more of the Head Delegates meetings referred to in the contested decision.

1344 As regards, first, the meeting of 14 January 1983, it is apparent from the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983' that the Belgian (Mr Pestalozzi), Netherlands (Mr Platschorre), Luxembourg (Mr Tesch), French (Mr Poitrat), Danish (Mr Stevens Larsen), German (Mr Schuhmacher), United Kingdom (Sir John Milne), Spanish (Mr Bertrán), Irish (Mr Quirke), Portuguese (Mr Toscano Jr), Norwegian (Mr Heiberg), Swedish (Mr Borelius) and Greek (Mr Canellopoulos) Head Delegates were present at it. Furthermore, it is clear from the same document that Cementir sent a member of its staff to that meeting as Head Delegate (Mr Cesareni). The participation of those various Head Delegates has not been disputed in any way in the proceedings before the Court.

1345 As the Head Delegates represented the direct members of Cembureau (see paragraphs 1314 to 1318 above), the Court can already find that FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, CMF/BCA (see paragraphs 1337 to 1341 above), Oficemen, Irish Cement, ATIC, Aker, EUROC, Cementir and AGCI, all direct members, participated in the meeting.

1346 Italcementi (T-65/95) alleges that because of illness its Head Delegate, Mr Pesenti, did not take part in the meeting. It observes in that regard that the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983' is undated. That document shows only that Mr Pesenti forgot to inform Cembureau that he would not be present at the meeting. In support of its argument it refers to the draft record of the meeting of the Executive Committee of 22 December 1982 (contested decision, recital 19, paragraph 3; document 33.126/11565), to the draft record of the Executive Committee meeting held on 9 November 1983 (contested

decision, recital 17, paragraph 5; documents 33.322/286 to 294) and to a record of a telephone conversation between Mr Dutron and Mr d'Agostino (contested decision, recital 19, paragraph 11; document 33.126/11698).

1347 The Court finds that it was envisaged that Mr Pesenti would be present at the meeting of 14 January 1983. The document entitled 'Meeting of Head Delegates, Paris, 14 January 1983' mentions his name amongst the Head Delegates who were going to participate in the meeting.

1348 However, the documents adduced by Italcementi cast doubt on Mr Pesenti's actual presence at the meeting. They show that, for reasons of ill health, Mr Pesenti was absent from several meetings during the period from the end of 1982 to the beginning of 1984. Although the draft record of the meeting of the Executive Committee of 22 December 1982 mentions solely that Mr Pesenti was absent from that meeting, the draft record of the Executive Committee meeting of 9 November 1983 explains that he was prevented from taking part in the previous meetings for reasons of ill health and also refers to his absence from that meeting. The record of a telephone conversation between Mr Dutron and Mr d'Agostino mentions that the latter would attend the meeting of 19 March 1984 as Mr Pesenti would be prevented from attending for reasons of ill health. Lastly, the draft record of the meeting of the Executive Committee of 8 November 1984 (Appendix 4.11 to Cembureau's application) refers to the death of Mr Pesenti.

1349 In those circumstances, the Court finds that the Commission has not established that Mr Pesenti, and therefore Italcementi, took part in the meeting of 14 January 1983.

1350 With regard to the meeting of Head Delegates of 19 March 1984, there is no dispute that the Head Delegates of FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, CMF/BCA (see paragraphs 1337 to 1341 above), Oficemen, Irish Cement, ATIC, Aker, EUROC and AGCI were present at it (see also the document headed 'Meeting of Head Delegates, Noordwijk, 19 March 1984').

1351 Italcementi acknowledges that it sent its general manager, Mr d'Agostino, as delegate to that meeting (application, p. 45). Even though, as a replacement for Mr Pesenti (see paragraph 1348 above), he was not a Cembureau Head Delegate, he represented Italcementi, so that it was bound by his acts.

1352 Lastly, as regards the meeting of Head Delegates of 7 November 1984 the Court must also find that, as has not been disputed, the Head Delegates of FIC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, CMF/BCA (see paragraphs 1337 to 1341 above), Irish Cement, ATIC, EUROC,

Cementir and AGCI (see also the document headed 'Meeting of Head Delegates, Paris, 7 November 1984') and thus those direct members of Cembureau themselves were present at that meeting.

1353 It follows from the whole of the foregoing that Cembureau, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Oficemen, Irish Cement, ATIC, Italcementi, Aker, EUROC, Cementir and AGCI all participated in one or more of the meetings of Head Delegates at which a concurrence of wills emerged or was confirmed on the principle of non-transhipment to home markets and the regulation of cement transfers from one country to another. By virtue of their presence they subscribed to or at least gave the impression to the other participants that they subscribed to the subject-matter of the Cembureau agreement that was concluded and subsequently confirmed at those meetings (*Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 232, and *Tréfileurope* v *Commission*, cited in paragraph 958 above, paragraph 85). Unless they openly distanced themselves, those applicants must therefore be considered to have participated in the Cembureau agreement to which Article 1 of the contested decision refers (*Hüls* v *Commission*, cited in paragraph 155 above, paragraph 155; *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 181; *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 232, Case T-142/89 *Boël* v *Commission* [1995] ECR II-867, paragraph 60; and *Mayr-Melnhof* v *Commission*, cited in paragraph 897 above, paragraph 135). The duration of their participation in the Cembureau agreement will be examined below.

1.2.2. The parties' claims to have distanced themselves and other circumstances relied on in order to contest their participation in the Cembureau agreement

1354 FIC (T-30/95) and Ciments Luxembourgeois (T-34/95) state that their accession to an agreement contrary to Article 85(1) of the Treaty cannot be established by showing that they did not openly distance themselves from it.

1355 That argument is irrelevant. The participation of the direct members of Cembureau in the Cembureau agreement was not established by showing that they did not openly distance themselves from it. It was established on the basis of their membership of Cembureau and their participation in one or more meetings of the Head Delegates at which the Cembureau agreement was concluded and subsequently confirmed (see paragraph 1302 above).

1356 FIC, VNC (T-32/95), Ciments Luxembourgeois, SFIC (T-36/95), Aalborg (T-44/95), BDZ (T-48/95), BCA (T-54/95), Oficemen (T-59/95), Irish Cement (T-60/95), ATIC (T-63/95), Italcementi (T-65/95), Cementir (T-87/95) and AGCI (T-103/95) claim that they openly distanced themselves or that there are other special circumstances which show that they did not participate in the Cembureau agreement.

1357 First, FIC, Aalborg, BDZ, BCA and AGCI claim that they were unaware of the Cembureau agreement until the Commission initiated a proceeding. They could not therefore have participated in the infringement referred to in Article 1 of the contested decision.

1358 FIC also states that it was informed only of the subject-matter of the meeting of 7 November 1984 by a note of its Chairman, Mr Van Hove, of 12 November 1984 (contested decision, recital 44, paragraph 3; documents 33.126/2063 to 2069 and 2436 to 2447) which expressly stated that no internal EC problem had been dealt with or even raised during that meeting (see paragraph 1029 et seq. above). Contrary to the Commission's claims, that is not inconsistent with the minutes of the FIC administrative board meeting No 88 of 23 February 1983 (contested decision, recital 44, paragraph 3; documents 33.126/2035 to 2043; the contested decision wrongly refers to 23 March 1983) which merely refers to Cembureau in the context of the FIC meeting of 11 January 1983 in preparation for the Head Delegates meeting of 14 January 1983. Lastly, FIC disputes the Commission's assertion that 'FIC's minutes do not always reproduce the real content of the discussions held within the administrative board' (contested decision, recital 44, paragraph 3).

1359 BCA adds that its alleged awareness of the Cembureau agreement is based on a legal fiction. Even if CMF had been aware of the agreement, which it disputes, BCA had never been informed of it prior to the initiation of the administrative procedure.

1360 Those arguments must be rejected. It is common ground that the Belgian, Danish, German, United Kingdom and Greek Head Delegates were present at the three Head Delegates meetings at which the Cembureau agreement was concluded and subsequently confirmed (see paragraphs 1344, 1345, 1350 and 1352 above). Since, on those occasions, each of those Head Delegates represented and bound a direct member of Cembureau (see paragraphs 1314 to 1318 above), the awareness which the Belgian, Danish, German, United Kingdom and Greek Head Delegates had of the Cembureau agreement must be ascribed directly to FIC, Aalborg, BDZ, BCA, as successor to CMF (see paragraphs 1337 to 1341 above), and AGCI.

1361 For the sake of completeness, the Court points out that the account given by the Chairman of FIC, Mr Van Hove, of 12 November 1984 to FIC administrative board does not enable any conclusion to be drawn as to the nature of the information which might have been communicated to FIC following the meetings of 14 January 1983 and 19 March 1984. Lastly, the fact that FIC challenges the Commission's assertion that the minutes of FIC did not always reproduce the real content of discussions within the administrative board is irrelevant. That factor is not taken into account in the contested decision in order to show that FIC participated in the Cembureau agreement. It was held to have participated on the grounds that it was a member of Cembureau and had participated in the meetings of the Head Delegates at which the Cembureau agreement was concluded and subsequently confirmed (contested decision, recital 19, paragraphs 4, 8 and 13, recital 45, paragraphs 1, 2 and 10, and recital 65, paragraph 3, first subparagraph).

1362 Second, FIC alleges that if the view had to be taken that Cembureau and its members had concluded an agreement restricting competition, a number of actions by representatives of the Belgian cement industry should be regarded as evidence that they had openly distanced themselves from that agreement. By way of examples, it refers to the memorandum drawn up following the meeting which it organised on 11 January 1983 in preparation for the Head Delegates meeting of 14 January 1983 (Appendix 14 to its application); the documents referred to in paragraph 18 of the minutes of its administrative board meeting No 88 of 23 February 1983 (Appendices 15, 16 and 17 to its application); the statement of the Belgian Head Delegate at the Head Delegates meeting of 19 March 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) and the minutes of its administrative board meeting No 112 of 1 September 1987 (Appendix 20 to its application).

1363 However, none of those documents shows that FIC openly distanced itself from the content of the three meetings of Head Delegates to which the contested decision refers and in which it participated.

1364 As regards the memorandum drawn up following the meeting organised by FIC on 11 January 1983 in order to prepare for the Head Delegates meeting of 14 January 1983, the Court points out that this document 'sent to Mr Pestalozzi, FIC spokesman cc Mr J. Van Hove, Chairman of CLC' is headed 'Cembureau meeting of Head Delegates of 14 January 1983 in Paris in order to examine the factors influencing the cement markets. Note of the preparatory meeting of 11 January 1983 for FIC'. The fact that that document does not refer to a principle that there should be no transhipment to home markets does not preclude that an agreement on that principle was adopted some days later in the course of the meeting of 14 January 1983. Furthermore, the memorandum in question does not contain anything to show that Mr Pestalozzi, the Belgian Head Delegate, and Mr Van Hove, Chairman of FIC, who participated in that meeting (contested decision, recital 19, paragraph 4; document 33.126/11581) intended to distance themselves from what was agreed at that meeting.

1365 Similarly, none of the documents mentioned in paragraph 18 of the minutes of the FIC administrative board meeting No 88 of 23 February 1983 refer to the fact that FIC had openly distanced itself in any way from the content of the Cembureau agreement. The Court points out that a failure to mention the Cembureau agreement in a document, which is not sufficient to shed a different light on the documents establishing that that agreement was concluded at the meeting of 14 January 1983 (see paragraph 1116 above), cannot prove that the author of that document openly distanced itself from the agreement either.

1366 The statement of the Belgian Head Delegate at the Head Delegates meeting of 19 March 1984 is reproduced as follows in the notes concerning that meeting: 'Belgium: Attention is drawn to the fact that although in fact some exports of cement from Germany to the Netherlands are structural and traditional in nature there have been for several years additional "random" exports to the Netherlands and Belgium. Since previous discussions between Head Delegates have not altered this state of affairs, it is considered pointless to continue the discussion within Cembureau.' The fact that the Belgian Head Delegate thought it necessary to inform the other participants of his concerns regarding those '"random" additional exports' clearly shows his

intention to draw the attention of the members of Cembureau to a 'hotspot' endangering the principle that there should be no transhipment to home markets, which had been adopted at the meeting of Head Delegates of 14 January 1983. Far from constituting an expression of distancing from the Cembureau agreement, the Belgian Head Delegate's statement is therefore fully consistent with compliance with that agreement. The alleged pointlessness of a discussion by the Head Delegates relates only to the problem of 'random' exports to Belgium and the Netherlands, not to the other 'hotspots' identified in the memorandum to the Chairman for the meeting of Head Delegates of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) and in the notes concerning that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). Lastly, by virtue of its presence at the meetings of Head Delegates on 19 March and 7 November 1984, at which the Cembureau agreement was confirmed, FIC in any event gave the other participants the impression that it continued to subscribe to the Cembureau agreement.

1367 Lastly, the minutes of the FIC administrative board meeting No 112 of 1 September 1987 contains some observations on the role which Cembureau should play.

1368 The Court points out that at that time discussions were taking place concerning the role and future of Cembureau (see paragraphs 1194 and 1195 above). The minutes No 112 of 1 September 1987 refer to FIC's position in that debate. However, they are unrelated to the discussions which took place at the meetings of the Head Delegates to which the contested decision refers and do not show that FIC openly distanced itself from what was agreed at those meetings.

1369 FIC also states that the note drawn up following the FIC meeting of 11 January 1983 in preparation for the Head Delegates meeting of 14 January 1983 and various other documents illustrate the constant concern of the Belgian cement industry to act within the Community competition rules, in cooperation with the Commission's departments.

1370 However, the references to Community competition rules in the documents on which FIC relies are not of such a nature as to shed a different light on the body of specific documentary evidence showing, first, that at the meeting of 14 January 1983 the Head Delegates agreed on the principle of non-transhipment to home markets and the regulation of sales from one country to another (see paragraphs 979 to 985 above) and that, second, Mr Pestalozzi, Belgian Head Delegate, and Mr Van Hove, Chairman of FIC, participated in that meeting without openly distancing themselves from what was agreed at it. Thus, far from exonerating FIC, the documents on which it relies show the deliberate nature of the infringement committed.

1371 Lastly, FIC alleges that it never ratified *ex post facto* either the agreement allegedly concluded at the meeting of 14 January 1983 or its confirmation at the meetings of 19 March and 7 November 1984.

1372 That argument is irrelevant. There is no assertion in the contested decision that FIC ratified *ex post facto* the agreement concluded on 14 January 1983 and subsequently confirmed on 19 March 1984 and 7 November 1984. It is alleged to have concluded that agreement and to have confirmed it on those dates (contested decision, recital 45, paragraphs 1 and 2). FIC has never disputed that the Belgian Head Delegate was present at the three meetings in question. As the Belgian Head Delegate represented and bound the applicant at those meetings (see paragraphs 1314 to 1318 above) and as the specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision shows the existence of the Cembureau agreement (see paragraph 1095 above), the participation of FIC in that agreement is itself established.

1373 Third, VNC, Ciments Luxembourgeois, BCA, Irish Cement, Italcementi, Cementir and AGCI submit that they had no interest in participating in the Cembureau agreement, that they played a modest role on the cement market and that they had specific reasons for participating in the Head Delegates meetings.

1374 However, the facts and circumstances on which the applicants concerned rely are not of such a nature as to shed a different light on the specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision which establish the existence of the Cembureau agreement (see paragraph 1095 above). As it has been established that Ciments Luxembourgeois, CMF/BCA (see paragraphs 1337 to 1341 above), Irish Cement and AGCI participated in the three meetings in question, that the VNC participated in those of 14 January 1983 and 19 March 1984, that Cementir participated in those of 14 January 1983 and 7 November 1984 and that Italcementi participated in the meeting of 19 March 1984, those applicants, who do not even assert that they openly distanced themselves from what was agreed at those meetings, subscribed, by their very presence at those meetings, to the Cembureau agreement or at least gave the impression to the other participants that they subscribed to it. Their participation in the Cembureau agreement is therefore established.

1375 VNC and Cementir argue that their absence from one of the three meetings of Head Delegates, that of 7 November 1984 and that of 19 March 1984 respectively, shows that they did not participate in the infringement.

1376 That argument must be rejected. The mere presence of the VNC and of Cementir at one of the Head Delegates meetings at which the Cembureau agreement was concluded or confirmed suffices for a finding that they participated in the concurrence of wills which was reached.

1377 Fourth, in contesting that it participated in the Cembureau agreement, Ciments Luxembourgeois asserts that it was not identified in the contested decision as one of the parties to the bilateral contacts which were discussed at the meetings. It states that, unlike the SO (point 13), the contested decision does not refer to quantitative restrictions on cement deliveries from Luxembourg to Belgium. Italcementi considers that the contested decision is contradictory in that it finds that it participated in the Cembureau agreement but does not complain that it participated in the bilateral agreements and concerted practices referred to in Article 3 of the contested decision which are the only measures implementing that agreement. Likewise, AGCI considers that the memorandum to the Chairman for the meeting of the Head Delegates of 19 March 1984 must be related to the infringements referred to in Article 3 of the contested decision, in which neither AGCI nor its members participated.

1378 It must, however, be pointed out that in the contested decision the participation of Ciments Luxembourgeois, Italcementi and AGCI in the Cembureau agreement was established on the basis of their capacity as direct members of Cembureau and their participation in one or more of the Head Delegates meetings in question (contested decision, recital 19, paragraphs 4, 8 and 13, recital 45, paragraphs 1, 2 and 10, and recital 65, paragraph 3, first subparagraph). The fact that in the contested decision those applicants were found to have participated in the Cembureau agreement even though they did not participate in the infringements referred to in Article 3 of the contested decision does not therefore give rise to a contradiction.

1379 As it has been established that Ciments Luxembourgeois and AGCI participated in the three meetings in question and that Italcementi participated in that of 19 March 1984, those applicants, which do not even allege that they openly distanced themselves from what was agreed at those meetings, subscribed, by their very presence in those meetings, to the content of the Cembureau agreement or at least gave the impression to the other participants that they subscribed to it. Their participation in the Cembureau agreement is therefore established, even though they did not participate in bilateral contacts or agreements.

1380 Fifth, SFIC submits that its Chairman participated in the Cembureau Head Delegates meetings in the exercise of the functions provided for in its statutes as an association, functions which, until the contrary is proved, must be presumed to have been exercised lawfully. The various items of evidence adduced by the Commission in the contested decision are not of such a nature as to reverse that presumption of lawfulness. SFIC therefore complains that the Commission did not satisfy that test in submitting that its mere participation in the meetings meant that it had acceded to the Cembureau agreement.

1381 It is not disputed that SFIC participated in the three Head Delegates meetings on 14 January 1983, 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). By its presence at those meetings SFIC, which does not even allege that it openly distanced itself from what was agreed at the meetings in question, subscribed to the content of the Cembureau agreement or at least gave the impression to the other participants that it subscribed to it. In those circumstances, the Commission was entitled to find in the contested decision that SFIC had participated in the Cembureau agreement.

1382 SFIC also stresses that a distinction should be made between trade between members of Cembureau and intra-Community trade. It claims that, given the fact that half of the participants in the Head Delegates meetings of Cembureau came from countries outside the Community, the Commission could not use evidence relating to countries such as Spain and Portugal in order to call in question the conduct of undertakings established in the Member States of the Community.

1383 That argument is irrelevant inasmuch as SFIC is an association of undertakings. In any event, SFIC's participation in the Cembureau agreement was established on the basis of its capacity as a direct member of Cembureau and its participation in the Head Delegates meetings at which the Cembureau agreement was concluded and subsequently confirmed (contested decision, recital 19, paragraphs 4, 8 and 13, recital 45, paragraphs 1, 2 and 10, and recital 65, paragraph 3, first subparagraph). The Commission did not therefore take into consideration factors relating to countries that were not members of the Community.

1384 Sixth, Aalborg alleges that it cannot be considered to be a party to the Cembureau agreement, since at the meeting of 19 March 1984 the discussions were in French, which its representative, Mr Stevens Larsen, could not understand. Moreover, he did not make any statement during the meeting and was not invited to give his views on any decisions adopted, whether in the form of a vote, written acceptance, approval of the minutes or a similar document. At the hearing Aalborg also submitted that discussions at the meeting of 14 January 1983 were also in French.

1385 That argument must be rejected. It is not credible that the Danish Head Delegate travelled on two occasions to be present at meetings held solely in a language which he did not understand. Moreover, as the Commission pointed out at the hearing, Aalborg's argument is contradicted by document 33.126/11582 which makes it clear that simultaneous interpretation from French to English and vice versa was planned for the meeting of 14 January 1983. As to the argument based on Aalborg's alleged passive conduct, it has been established that it participated in the three meetings of 14 January 1983, 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). By its very presence at those meetings, Aalborg, which does not even allege that it openly distanced itself from what was agreed at those meetings, subscribed to the content of the Cembureau agreement or at least gave the impression to the other participants that it subscribed to it. In those circumstances, the Commission was entitled to find in the contested decision that Aalborg participated in the Cembureau agreement.

1386 Seventh, Oficemen contends that even if the Cembureau agreement was concluded there is conclusive evidence to show that it never acceded to it. It refers to the concerns expressed by the Irish producers (draft introductory statement by the Chairman for the meeting of Head Delegates of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)) and the United Kingdom producers (internal memorandum of Blue Circle dated 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334)) in regard to imports from Spain and to the anti-dumping complaints sent in 1983 and in 1985 by the CLC to the Commission regarding those imports. Finally, it

states that the memorandum to the Chairman for the Head Delegates meeting of 19 March 1984 explains that the exports from Spain to Ireland and the United Kingdom were still a 'hotspot' at that time.

1387 The Court points out that the various matters adduced by Oficemen, which illustrate the conduct of its members rather than its own conduct, cannot hide the fact that it actually participated in the meetings of 14 January 1983 and 19 March 1984 (see paragraphs 1344, 1345 and 1350 above). By its presence at those meetings, Oficemen, which does not even allege that it openly distanced itself from what was agreed at the meetings, subscribed continuously to the content of the Cembureau agreement or, at least, gave the impression to the other participants that it subscribed to it. Its participation in the Cembureau agreements at the time of the Head Delegates meetings is therefore established. However, in the contested decision, Oficemen's participation in the Cembureau agreement was considered to constitute an infringement only as from 1 January 1986 (see paragraph 1303 above). It will therefore be necessary to examine below whether Oficemen was still actually participating on 1 January 1986 (see paragraphs 4226 to 4232 below).

1388 Eighth, Aalborg, Irish Cement and Italcementi allege that their behaviour proves that they did not accede to the Cembureau agreement. Aalborg asserts that it organised its sales, in particular its exports, according to independent commercial considerations. Irish Cement claims that the increase in its exports to the United Kingdom during the 1980s shows that it did not accede to any agreement that there should be no transhipment to home markets. Italcementi claims that the Commission has not proved that its behaviour was influenced by the information exchanged at the meetings of Head Delegates referred to in the contested decision.

1389 Those arguments must be rejected. It is established that Aalborg and Irish Cement participated in the three meetings of Head Delegates in question (see paragraphs 1344, 1345, 1350 and 1352 above) and that Italcementi participated in the meeting of 19 March 1984 (see paragraph 1351 above). By their presence at those meetings, Aalborg, Irish Cement and Italcementi, which do not even claim that they distanced themselves openly from what was agreed at the meetings, subscribed to the content of the Cembureau agreement or at least gave the impression to the other participants that they subscribed to it. It is settled law that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the agreement or concerted practice, if it has not openly distanced itself from what was agreed at the meetings (*Mayr-Melnhof* v *Commission*, cited in paragraph 897 above, paragraph 135, and *Tréfileurope* v *Commission*, cited in paragraph 958 above, paragraph 85). Even assuming that the market behaviour of the applicants in question was not in conformity with the agreed 'rules of the game', that does not affect their liability as participants in the Cembureau agreement.

1390 Ninth, Aalborg, BDZ and Cementir contend that they were not referred to in the documents establishing the existence of the Cembureau agreement. In those circumstances, the Commission was not entitled to find in the contested decision that they had participated in that agreement.

1391 That argument must be rejected. The fact that the applicants are not referred to by name in the documents relating to the Cembureau agreement is not of such a nature as to shed a different light on the specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision, which shows that the participants in the meeting of 14 January 1983, the Head Delegates designated by Aalborg, BDZ and Cementir amongst them, concluded the Cembureau agreement (see paragraph 1095 above) but does not show that they openly distanced themselves from what was agreed at that meeting.

1392 Tenth, BDZ states that it has 37 members and that there is no evidence to show that they were informed by it of the alleged Cembureau agreement. Likewise, Oficemen and ATIC submit that they never communicated to or imposed on their members any rule, indication or instruction in pursuance of the alleged Cembureau agreement.

1393 That circumstance, even if it were well founded, could not hide the fact that BDZ, Oficemen and ATIC participated in the Head Delegates meeting of 14 January 1983 and, accordingly, that they participated directly in the Cembureau agreement (see paragraphs 1095, 1344 and 1345 above).

1394 Lastly, AGCI complains that the Commission has not proved that in participating in the Head Delegates meetings in question AGCI had given the other participants the impression that it shared their possibly unlawful objectives. It refers to an internal memorandum of Blue Circle of 24 October 1986 from Mr Horner (document 33.126/11132) which, explaining that the Greek producers were not bound by the same rules of trading as the other European producers, clearly shows that they had always been regarded as undesirable third parties because they did not abide by the large European producers' rules.

1395 The Court points out that the infringement referred to in Article 1 of the contested decision is alleged against both AGCI and the Greek producers Heracles, Titan and Halkis. In those circumstances, even if, as the applicant alleges, the Blue Circle internal memorandum of 24 October 1986 from Mr Horner indicated that the Greek producers had distanced themselves from the content of the Cembureau agreement, such a circumstance cannot be taken into account in assessing whether AGCI in fact participated in the infringement in question. It is common ground that the AGCI participated in the three Head Delegates meetings of 14 January 1983, 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). By its presence at those meetings, it subscribed to the content of the Cembureau agreement or at least gave the impression to the other participants that it subscribed and was continuing to subscribe to that agreement. The participation of AGCI in the Cembureau

agreement is therefore established. The participation of Heracles, Titan and Halkis in the Cembureau agreement will be examined at paragraphs 4074 to 4077, 4096 to 4101 and 4210 to 4213 below.

1.2.3. Alleged inadmissibility of certain documents against direct members of Cembureau

1396 Certain applicants who are direct members of Cembureau, namely VNC (T-32/95), BDZ (T-48/95), Cementir (T-87/95) and AGCI (T-103/95), contend that some documents referred to in recitals 18 and 19 of the contested decision cannot be used to show that they participated in the Cembureau agreement, because those documents do not emanate from them and they had no knowledge of them before the initiation of the administrative procedure (see paragraphs 1050 to 1053 above). At the hearing, Aalborg (T-44/95) and Irish Cement (T-60/95) submitted a similar argument.

1397 That argument must be rejected and it is not necessary to rule on its admissibility in so far as it has been raised by Aalborg and Irish Cement. The fact that the applicants concerned were not party to drawing up one or other document or that they had no knowledge of it prior to the initiation of the administrative procedure is not such as to render those documents inadmissible against them as evidence of the infringement with which they are charged (see to that effect Case T-157/94 *Empresa Nacional Siderúrgica* v *Commission*, cited in paragraph 1053 above, paragraph 312). The Court points out that the body of evidence referred to in recitals 18, 19 and 45 of the contested decision proves that the Commission rightly concluded that the Cembureau agreement existed (see paragraph 1095 above). It is common ground that all the applicants referred to in the preceding paragraph participated in the meeting of 14 January 1983, in at least one of the two meetings of 19 March and 7 November 1984, and did not openly distance themselves from what was agreed at those meetings. Their participation in the Cembureau agreement is therefore established.

1398 At the hearing Irish Cement claimed that the internal memoranda of Blue Circle (contested decision, recital 18, paragraphs 2 and 3; documents 33.126/11332 to 11337) and the statement of Mr Kalogeropoulos of 25 June 1986 (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877) were inadmissible because they had not had an opportunity to cross-examine the authors of those documents.

1399 That argument, raised for the first time at the hearing, must be rejected and there is no need to rule on its admissibility. In the present case, the administrative procedure was governed by the provisions of Regulations Nos 17 and 99/63, which do not provide for any form of cross-examination. In any event, Irish Cement's argument does not pertain to the documents referred to in recital 19 of the contested decision relating to the meetings of the Head Delegates, which show that the Cembureau agreement was concluded at those meetings and that Irish Cement participated in them (see paragraphs 921 to 1095, 1344, 1345, 1350 and 1352 above).

1.2.4. Conclusions regarding the participation of Cembureau and its direct members, other than Unicem, in the infringement referred to in Article 1 of the contested decision

1400 It is established that Cembureau, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Oficemen, Irish Cement, ATIC, Aker, EUROC, Cementir and AGCI participated in the Head Delegates meeting of 14 January 1983 (see paragraphs 1344 and 1345 above). In the light of the evidence adduced in recitals 18, 19 and 45 of the contested decision, which show that the agreement was concluded in the course of that meeting, and with no evidence to show that any of them openly distanced itself from what was agreed in it, the Commission has therefore established that they participated in the Cembureau agreement as from that date.

1401 As regards Cembureau, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Irish Cement, Cementir and AGCI, the Commission could therefore lawfully find that they participated in the infringement referred to in Article 1 of the contested decision as from 14 January 1983. The Court will examine below whether their participation in that infringement was continuous.

1402 As regards Oficemen and ATIC, on the one hand, and EUROC, on the other, which were direct members established at the material time outside the Community, the Commission held them liable for the infringement referred to in Article 1 of the contested decision as from 1 January 1986 and 9 June 1986 respectively. The Commission found that Aker, which is still established outside the Community, participated in the infringement referred to in Article 1 of the contested decision as from 9 June 1986. The Commission explains that 'in the case of Oficemen and ATIC... [it] could deem their accession to the agreement to have had effects within the Community as from the date on which they acceded to the agreement; however, it deems the infringement to have occurred as from 1 January 1986, since the participation of the Spanish and Portuguese undertakings did not, according to the Commission's information, produce any significant effects within the Community until after the accession of their countries to the Community' (contested decision, recital 45, paragraph 11). As to Aker and EUROC, the Commission states that it 'has no evidence that their participation in the Cembureau agreement or principle had any effect within the Community before [9 June 1986]' (contested decision, recital 65, paragraph 4, fourth indent). Although it has been proved that those four parties participated in the Cembureau agreement, it will therefore be necessary to examine whether their participation was continuous and constituted an infringement as from the two dates found in the contested decision (see paragraphs 4226 to 4242 below).

1403 Finally, as regards Italcementi, the Court has found that its participation in the meeting of 19 March 1984 shows that it participated in the Cembureau agreement and, accordingly, in the infringement referred to in Article 1 of the contested decision (see paragraph 1351 below). Italcementi's participation in that infringement is therefore established in any event as from 19 March 1984. The Court will examine below whether the Commission was entitled, on the basis of participation in one or other measure implementing the Cembureau agreement, to fix 14 January 1983 as the starting date of Italcementi's participation in the infringement (see paragraphs 4224 and 4225 below).

1.3. Situation of Unicem, a direct member of Cembureau which did not participate in any of the Head Delegates meetings

1404 Unicem states that it did not participate in any of the Head Delegates meetings to which the contested decision relates. It claims, moreover, that it was never informed that those meetings were being held. It claims that its participation in the infringement referred to in Article 1 of the contested decision has not therefore been established.

1405 In the contested decision (recital 44, paragraph 4) the Commission states as follows: 'The fact that members who were entitled to attend the meetings of the bodies did not do so does not mean that the decisions and/or agreements reached within such bodies do not apply to or do not have to be applied by such absent members. As a general rule, belonging to an association means accepting its rules and conduct and implies awareness that the association and/or organisation acts through the direct or indirect contribution of each member and relies on each member's consent and support. Unless dissent is expressed, this applies not only to the activities provided for in the articles of the association, but also to its *de facto* activities.' It observes moreover (contested decision, recital 45, paragraph 13, *in fine*): 'The fact that [Unicem] did not attend meetings does not mean that [it] was not party to the agreement on non-transhipment to home markets and on the regulation of sales from one country to another, first because other Italian Head Delegates were present and represented their country, secondly because the association acts through the contribution of all members present and absent, and lastly because, at the time when Unicem was, with the other Italian producers, suffering the effects of Greek imports, it received the support of the other Cembureau members (see recital 27), thus benefitting from the solidarity inherent in the home market rule.'

1406 There is no need to rule on whether Unicem was informed of the holding of the Head Delegates meetings, it being common ground that neither Mr Nasi, Head Delegate designated by Unicem to represent it in Cembureau (Unicem's reply of 5 June 1998 to a written question from the Court), nor any other member of Unicem's staff participated in the Head Delegates meetings of 14 January 1983, 19 March and 7 November 1984. That fact is apparent from the lists of persons attending them (contested decision, recital 19, paragraphs 4, 8 and 13; documents 33.126/11581, 11699, 11700 and 11752). Moreover, it was acknowledged by the Commission in the contested decision (recital 45, paragraph 13) and in the proceedings before the Court (defence in Case T-50/95, paragraph 49).

1407 It must therefore be examined whether, in the absence of its Head Delegate, Unicem was represented at the three meetings by another Italian Head Delegate, as the Commission alleges.

1408 The Commission contends that the function of Head Delegate is comparable to that of government representatives in international bodies. In order to show that the Italian Head Delegate present represented the three Italian members of Cembureau, it refers to the following record of a telephone conversation between Mr Dutron and Mr d'Agostino (contested decision, recital 19, paragraph 11; document 33.126/11698): 'Mr G. Pesenti, who has the flu, will not be

at Noordwijk but Mr d'Agostino will represent Italy at the meeting of Head Delegates.' It also refers to the reference to the Member State of origin, rather than the undertaking, of the Head Delegate in the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983' (contested decision, recital 19, paragraph 4; document 33.126/11581).

1409 The Court points out that at the time of the meetings of Head Delegates in 1983 and 1984 Cembureau had three Italian members, namely Unicem, Italcementi and Cementir, which each appointed their own Head Delegate. The fact that the three Italian direct members of Cembureau each had a Head Delegate in itself contradicts the Commission's assertion that a single Italian Head Delegate had power to represent all three of them.

1410 The provision made for the presence of two Italian Head Delegates at the meeting of 14 January 1983, namely Mr Pesenti of Italcementi and Mr Cesareni of Cementir, which is apparent from the document headed 'Meeting of Head Delegates, Paris, 14 January 1983', is also at variance with the existence of a mandate from the three Italian members to the one Italian Head Delegate who was present.

1411 Lastly, if, as the Commission alleges, each of the three Italian Head Delegates represented all the Italian members of Cembureau, Mr Pesenti of Italcementi, who was prevented from attending the meeting on 19 March 1984, would have arranged to have been replaced by the Cementir or Unicem Head Delegate rather than by Mr d'Agostino, an employee of Italcementi.

1412 It must therefore be accepted that Unicem was not represented at the meetings of 14 January 1983, 19 March and 7 November 1984. Consequently, Unicem did not participate directly in the concurrence of wills which emerged at those meetings.

1413 Even if, as the Commission states, an association acts through the contribution of all members present and absent and belonging to an association means accepting its rules and conduct, Unicem can be found to have participated in the infringement referred to in Article 1 of the contested decision only if it is established that it consented, explicitly or implicitly, to the content of the Cembureau agreement. Its mere capacity as member of Cembureau cannot suffice to render Unicem liable for the manifestly unlawful decisions adopted by the Head Delegates in its absence. The Court points out in that regard that the Commission has not refuted Cembureau's assertion that its articles do not confer any power on the Head Delegates as a body (contested decision, recital 15, paragraph 4).

1414 Since there is no documentary evidence of Unicem's consent in regard to the discussions which took place at the three meetings, the Court must examine whether its conduct shows such consent.

1415 On that point, the Commission states that Unicem implemented the Cembureau agreement in the framework of the ETF (contested decision, recital 45, paragraph 13; Article 4, recitals 1, 2 and 3(a) and (b)) and by participating in the activities of the ECEC (contested decision, recital 58 and Article 5).

1416 Thus, for the purpose of proving participation in the infringement referred to in Article 1 of the contested decision, Unicem's situation is comparable to that of an indirect member of Cembureau. As in the case of an indirect member, Unicem can be found to have participated in the Cembureau agreement only if it is proved that it participated in a measure implementing that agreement (see paragraphs 1307 to 1311 above).

1417 The Court will examine below whether Unicem's alleged participation in the activities referred to in Articles 4 and 5 of the contested decision can be regarded as implementation of the Cembureau agreement (see paragraphs 4102 to 4107 below). The Court will therefore reserve its examination of the question whether Unicem participated in the infringement referred to in Article 1 of the contested decision.

2. Infringement of the principle of equal treatment

1418 VNC (T-32/95) considers that the contested decision discriminates against it because not all the members of Cembureau were the subject of a finding of infringement in the contested decision. By way of example, it refers to the members of Cembureau established in a non-member country of the Community. Similarly, ATIC (T-63/95) alleges that consistent application of the principle set out in recital 44, paragraph 4, of the contested decision should have led the Commission to find that all the direct members of Cembureau were liable for the infringements committed within the framework of that association.

1419 The Court points out that the only direct members of Cembureau not covered by the contested decision, namely the Austrian, Finnish, Icelandic, Swiss and Turkish members, were all established in a non-member country of the Community at the time when the contested decision was adopted. Moreover, the contested decision does not contain any evidence that those direct members participated in a measure implementing the Cembureau agreement (see paragraph 1303 above). The situation of the direct members of Cembureau which are not covered by the contested decision therefore differs from that of VNC and ATIC, which, at the date taken as the starting date of their participation in the infringement, were established in the Community and

had participated in one or more measures implementing the Cembureau agreement. The argument alleging infringement of the principle of equal treatment must therefore be rejected.

1420 In any event, even if it were found that some direct members of Cembureau not covered by the contested decision were in a similar situation to that of the applicants concerned, such a finding could not constitute a ground for setting aside the finding of an infringement by VNC and ATIC, provided it was properly established (*Woodpulp II*, cited in paragraph 106 above, paragraph 146).

1421 Aalborg (T-44/95) also alleges that, pursuant to the principle of equal treatment the Commission should have verified whether its participation in the Cembureau agreement had had effects in the Community, as it had done in the case of the Spanish and Portuguese undertakings.

1422 That argument must be rejected for the reasons set out in paragraph 1420 above.

3. Infringement of Article 190 of the Treaty

1423 SFIC (T-36/95) complains that the Commission did not adequately explain the reasons why Article 85 was applicable to it. The Commission combined various concepts without ever explaining how, on the basis of Community case-law, an association could be deemed to have undertaken to conclude and perform an agreement such as the Cembureau agreement. As the infringement which the associations of undertakings are held to have committed is based on the unauthorised conduct of persons exercising functions within those associations, the case-law requires the Commission to set out specific reasons in its decision because of the novelty of that question.

1424 That argument must be rejected. In recital 44 (paragraph 1) of the contested decision the Commission starts its legal assessment with the question of the applicability of Article 85 of the Treaty to associations of undertakings, stating that, since this problem would recur a number of times throughout its account, it would be useful to establish at the outset the essential principles that apply to situations in which associations participate in behaviour prohibited under Article 85 of the Treaty. In the same recital (paragraphs 2 and 3) it analyses the Community case-law applicable to that question and refutes the arguments submitted in that regard by a number of associations, including SFIC, during the administrative procedure. Finally, the contested decision sets out the reasons why the associations of undertakings are held liable for the unlawful actions of persons exercising functions in those associations (contested decision, recital 44, paragraph 3, second subparagraph, and paragraph 4, second subparagraph).

1425 Aalborg (T-44/95) complains that in its legal assessment the Commission did not explain the reasons for the allegedly novel theory that liability attaches to a failure to express dissent, a theory on which the Commission relies in recital 44 of the contested decision.

1426 However, since the Commission established that Aalborg was present at the meetings of 14 January 1983, 19 March and 7 November 1984 (contested decision, recital 19, paragraphs 4, 8 and 13; documents 33.126/11581, 11699, 11700 and 11752) and that the Cembureau agreement was concluded and confirmed at those meetings, it was entitled to take the view that Aalborg had participated in the infringement referred to in Article 1 of the contested decision unless it had expressly distanced itself from it. That approach by the Commission, which is moreover laid down in the case-law (see, for example, *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 232) did not therefore require any special statement of reasons.

1427 Lastly, BCA (T-54/95) submits that the Commission did not clearly explain its reasons for concluding that BCA should be held responsible for the unlawful activities carried on within Cembureau.

1428 However, the reasons why BCA was held responsible for the infringement complained of in Article 1 of the contested decision are clearly set out in recitals 44, 45, especially at paragraphs 1, 2, 7, 10 and 12, and recitals 46 and 65, particularly paragraphs 3 and 8, of the contested decision. BCA's argument must therefore also be rejected.

4. Infringement of the rights of the defence when access was granted to the file

4.1. Incriminating evidence

1429 Unicem (T-50/95) complains that the Commission did not grant it access during the administrative procedure to the 'Members Directory' of Cembureau. Since it is an incriminating document used in the contested decision (recital 45, paragraph 13), its rights of defence were infringed.

1430 The Court points out that in the contested decision (recital 45, paragraph 13) the Commission refers to the Members Directory in order to refute Unicem's allegation that none of its representatives ever bore the title of Head Delegate. According to the Commission, 'this does not correspond to the facts, since Mr Nasi of Unicem was at the time of the relevant events, at least until 1988, Head Delegate (see the Cembureau "Members Directory" of July 1988, p. 56)'.

1431 The argument alleging infringement of its rights of defence is invalid in the present case, because Unicem itself accepted in its reply of 5 June 1998 to a written question from the Court that it had appointed Mr Nasi as Head Delegate during the period taken into consideration by the contested decision. In any event, that argument is devoid of purpose. The Court has already held that the Commission could not rely on the designation of Mr Nasi as Head Delegate in order to find Unicem responsible for the infringement referred to in Article 1 of the contested decision, because Mr Nasi did not participate in any of the meetings at which the Cembureau agreement was concluded and subsequently confirmed (see paragraphs 1404 to 1417 above).

4.2. Exculpatory evidence

1432 In the observations which they lodged following the measures of 2 October 1996 and 18 and 19 June 1997 Cembureau (T-26/95) and Cementir (T-87/95) submit that during the administrative procedure they were not given access to exculpatory evidence relating to their participation in the infringement referred to in Article 1 of the contested decision.

4.2.1. Case T-26/95 *Cembureau* v *Commission*

1433 In its observations of 10 February 1997 Cembureau submits that none of the documents in the national files which it was able to consult show that it had concerns about intra-Community trade in cement. On the contrary, the documents concerning imports support its argument that, first, it had no connection with an alleged international market sharing agreement and, second, that no such agreement existed. Thus, the file relating to France does not contain any evidence to show that Cembureau involved itself in any way in the monitoring by the French industry of import levels (documents 33.126/14809 to 14827 and 33.126/14941 to 14976).

1434 However, Cembureau's argument could not have altered the outcome of the administrative procedure. The comments which it might have made on the basis of the documents referred to in the preceding paragraph would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (recitals 9 and 61) and in the contested decision (recitals 18, 19 and 45) in establishing the existence of the Cembureau agreement. Nor would those comments have been of such a nature as to shed a different light on the documents entitled 'Meeting of Head Delegates, Paris, 14 January 1983' (contested decision, recital 19, paragraph 4; document 33.126/11581), 'Meeting of Head Delegates, Noordwijk, 19 March 1984' (contested decision, recital 19, paragraph 8; documents 33.126/11699 and 11700), and 'Meeting of Head Delegates, Paris, 7 November 1984' (contested decision, recital 19, paragraph 13; document 33.126/11752) which show that

Cembureau participated in the three meetings of Head Delegates to which the contested decision refers and, accordingly, in the conclusion and confirmation of the Cembureau agreement.

4.2.2. Case T-87/95 *Cementir* v *Commission*

1435 In its observations of 10 February 1997 Cementir asserts that in the national files it discovered a series of documents proving that the European cement market was naturally divided into separate zones, that intra-Community trade in cement was necessarily restricted to the frontier zones or, where it was possible, to exports by sea or river transport, and that that trade could at the very most concern certain specific undertakings, but not itself, as it did not carry on any export activities. It could not therefore have been concerned by the alleged Cembureau agreement.

1436 The Court points out that the three Italian producers, Cementir amongst them, have already asserted in their reply to the SO that Italy could not have been involved in the agreement on non-transhipment to home markets, since it did not import or export (contested decision, recital 45, paragraph 14). However, the Commission sets out in the contested decision (recital 45, paragraph 14) the reasons for its view that 'this argument is not correct' adding that 'at all events, ... the fact remains that the undertakings of such countries, being members of Cembureau, participated in an agreement whose object was to prevent competition'. Accordingly, the additional comments which Cementir might have made in order to show that it did not engage in export trade would clearly not have been of such a nature as to alter the outcome of the administrative procedure.

1437 In its observations of 29 December 1997 Cementir also claims that a number of documents show the existence of local agreements between various cement producers. It refers in that regard to documents 33.126/837, 838, 860, 861, 985 to 1009, 1119 to 1134, 1175 to 1179, 1543 to 1551, 1574 to 1577, 2934, 2935, 2945 to 2951, 2954 to 2966, 3065 to 3068, 4066 to 4069, 4251 to 4253, 4263 to 4269 and 5682 to 5687. Those documents prove that Cementir was not involved in any way in those local agreements.

1438 The Court points out that in the contested decision Cementir was found to have participated only in the international agreements and concerted practices (Articles 1, 2, 4(1), (2) and (3)(a) and (b) and Article 5). Accordingly, the comments which Cementir might have made in order to show that it was wholly uninvolved in certain local agreements could not have altered the outcome of the administrative procedure. In any event, even if the documents to which it refers showed that Cementir did not participate in some international agreements and concerted practices, that would not be of such a nature as to shed a different light on the evidence referred to in the SO (recitals 9 and 61) and in the contested decision (recitals 18, 19 and 45), which shows that the Cembureau agreement was concluded at the meeting of 14 January 1983 (see paragraph 1095 above), or on the document entitled 'Meeting of Head Delegates, Paris,

14 January 1983' (contested decision, recital 19, paragraph 4; document 33.126/11581) which is admissible as against Cementir (see paragraphs 329 and 330 above) and from which it is clear that Cementir's Head Delegate, Mr Cesareni, participated in that meeting and, therefore, in the conclusion of the Cembureau agreement.

F — Participation of Unicem, of the indirect members of Cembureau and of Buzzi in the infringement referred to in Article 1 of the contested decision

1439 Unicem was not represented at any of the meetings of Head Delegates at which the Cembureau agreement was concluded or confirmed. The indirect members of Cembureau were indirectly represented by their national association at those meetings. Buzzi is wholly unconnected with Cembureau.

1440 Apart from Hispacement, which has not brought an action to annul the contested decision, the indirect members of Cembureau to which Article 1 of the contested decision refers are: CBR, ENCI, Dyckerhoff, Vicat, Cedest, Ciments Français, Heidelberger, Lafarge, Alsen-Breitenburg, Nordcement, Valenciana, Rugby, Asland, Castle, Heracles, Uniland, Cimpor, SECIL, Titan, Holderbank, Hornos Ibéricos, Blue Circle and Halkis. In the contested decision, the proof of their participation in the infringement referred to in Article 1 is based on their participation in one or more measures implementing the Cembureau agreement. The decision states in regard to them (recital 65, paragraph 3, first subparagraph) that 'for the purposes of this decision, the Commission takes into consideration only the undertakings which were represented within Cembureau by their association and which, in addition to their membership of the association, clearly manifested their accession to the agreement by participating' in a measure implementing the Cembureau agreement.

1441 The Court points out, however, that the Commission also relies on the presence of a Head Delegate, who was a member of staff of certain indirect members of Cembureau, namely Blue Circle, CBR, Ciments Français, Lafarge, Dyckerhoff, Heidelberger, Titan, ENCI, Asland and Cimpor, at the meetings to which the contested decision refers in finding that 'there is ... no doubt as to the participation of these undertakings in the agreement' (contested decision, recital 65, paragraph 3(b)). Although the above passage cited from recital 65, paragraph 3, first subparagraph, of the contested decision may cause confusion, it clearly emerges from the contested decision that the presence of a member of staff of an indirect member undertaking of Cembureau at one of the meetings of Head Delegates did not suffice for a finding that that undertaking had participated in the infringement referred to in Article 1 of the contested decision. Proof that an indirect member participated in the Cembureau agreement was not based on its presence at the meetings in question but rather on its participation in one or more measures implementing the Cembureau agreement. For that reason, the indirect members of Cembureau which had been represented by a member of their staff at one or more meetings of Head Delegates were considered — like the other indirect members and unlike the direct members — to have 'participated indirectly in the [Cembureau] agreement, through their participation in the various arrangements and measures agreed on to supplement the general agreement and/or assist in its implementation' (contested decision, recital 45, paragraph 10).

For that reason also, Ciments d'Obourg, an indirect member of Cembureau whose member of staff, Mr Pestalozzi, was present at the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 4), was not referred to in Article 1 of the contested decision, because the Commission did not find that Ciments d'Obourg had participated in a measure implementing the Cembureau agreement.

1442 As regards Unicem, the Court has found that for the purpose of proving that it, a direct member of Cembureau, participated in the infringement referred to in Article 1 of the contested decision, its situation is comparable to that of an indirect member of Cembureau (see paragraph 1416 above). Thus, it can be found to have participated in the Cembureau agreement only if it is proved that it participated in a measure implementing the Cembureau agreement.

1443 Lastly, as regards Buzzi, which is neither a direct nor an indirect member of Cembureau, the Commission considers that it 'applied, through the concerted practices [referred to in Article 3(1) of the contested decision] with Ciments Français, Lafarge and Vicat, which were associated with Cembureau, the agreement or principle of not transhipping to home markets' (contested decision, recital 65, paragraph 3(c); see also recital 48, paragraph 2). Thus, in the case of Buzzi, its participation in implementing measures, namely the infringements referred to in Article 3(1) of the contested decision, 'must be regarded as providing evidence of its participation in the Cembureau agreement or principle of not transhipping to home markets' (contested decision, recital 65, paragraph 4).

1444 It follows from the foregoing that, in the case of both the indirect members of Cembureau and in the case of Unicem and Buzzi, the proof of their participation in the Cembureau agreement is based on their participation in one or more measures implementing the Cembureau agreement and thus on their accession to that agreement.

1445 Consequently, the argument by Ciments Français and Unicem that their participation in the infringement referred to in Article 1 of the contested decision was proved on the basis that they had not openly distanced themselves must already be rejected at this stage.

1446 The measures implementing the Cembureau agreement are referred to in Articles 2 to 6 of the contested decision. They were regarded not only as constituent elements of the single and continuous Cembureau agreement but also 'as infringements in themselves' (contested decision, recital 46, paragraph 1).

1447 In order to assess whether Unicem, the indirect members of Cembureau and Buzzi participated in the infringement referred to in Article 1 of the contested decision, it will therefore be necessary to establish whether, first, they participated in the arrangements referred to in Articles 2 to 6 of the contested decision (see paragraphs 1450 to 4015 below) and, second,

whether their participation in those arrangements, which might already constitute infringements in themselves, must be considered as implementation by them of the Cembureau agreement (see paragraphs 4016 to 4114 below).

1448 It follows that the Court must reserve its examination of participation in the Cembureau agreement by CBR, ENCI, Dyckerhoff, Vicat, Cedest, Ciments Français, Heidelberger, Lafarge, Alsen-Breitenburg, Nordcement, Unicem, Buzzi, Valenciana, Rugby, Asland, Castle, Heracles, Uniland, Titan, Cimpor, SECIL, Holderbank, Hornos Ibéricos, Blue Circle and Halkis.

G — Conclusions

1449 Subject always to the question which has just been reserved for examination below, the Court must reject the pleas alleging infringements of Articles 85(1) and 190 of the Treaty, the principle of equal treatment and the rights of the defence in that the Commission found in Article 1 of the contested decision that there was an agreement contrary to Article 85(1) of the Treaty and that the various applicants concerned participated in it.

IV — *Pleas alleging infringements of Articles 85(1) and 190 of the Treaty, of the principle of equal treatment and of the rights of the defence in that the Commission finds that there were two infringements of Article 85(1) of the Treaty concerning exchanges of price information at Cembureau level and that the various parties participated in them (contested decision, Article 2(1) and (2))*

Preliminary observations

1450 In Article 2 of the contested decision the Commission finds that there were two infringements of Article 85(1) of the Treaty, each of which related to exchanges of price information at Cembureau level.

1451 In Article 2(1) it finds that at the Cembureau Head Delegates and Executive Committee meetings Cembureau and its direct members participated in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement.

1452 In Article 2(2) it finds that Cembureau and its direct members participated in concerted practices involving periodic exchanges of price information, the purpose of which was also to facilitate the implementation of the Cembureau agreement.

1453 All the applicants referred to in Article 2 of the contested decision put forward arguments seeking the annulment of that article. Some of the arguments are grounded on discrepancies between the SO and the contested decision. Some of the applicants deny that agreements on the exchange of price information were concluded at the Cembureau Head Delegates and Executive Committee meetings. Others claim that certain price information referred to in Article 2(2) was not properly identified by the Commission. A series of arguments seeks to challenge the claim that the exchanges of price information referred to in Article 2 constituted an infringement. Finally, certain applicants deny that they participated in one or other or both of the infringements found or, at the very least, dispute the duration of such participation. When the Court examines the various arguments, it will identify the various applicants concerned.

1454 Furthermore, Cembureau (T-26/95), FIC (T-30/95), VNC (T-32/95), SFIC (T-36/95), Aalborg (T-44/95), Unicem (T-50/95), Irish Cement (T-60/95), ATIC (T-63/95), Italcementi (T-65/95) and Cementir (T-87/95) complain that, when finding the infringements in Article 2, the Commission infringed their rights of defence by not granting them, during the administrative procedure, access to the full SO and to its investigation file, thus depriving them of exculpatory evidence.

1455 Lafarge (T-43/95), Rugby (T-53/95), Castle (T-56/95), Heracles (T-57/95), Cimpor (T-61/95), SECIL (T-62/95), Aker (T-70/95), EUROC (T-71/95), Blue Circle (T-88/95) and Halkis (T-104/95) also put forward a series of arguments contesting, on the substance, the validity of Article 2. However, they are not found to have committed the infringements referred to in that provision. Their arguments are therefore irrelevant and so must be rejected here.

1456 Following the measures of 2 October 1996 and 18 and 19 June 1997, Rugby (T-53/95), Castle (T-56/95), Titan (T-64/95), Aker (T-70/95) and EUROC (T-71/95) also put forward evidence by which they sought to show that the administrative procedure could have had a different outcome, so far as concerns the infringements relating to exchanges of price information at Cembureau level, if they had had the full version of the SO and of the Commission's investigation file in order to prepare their defence against the SO. For the reasons set out in paragraph 257 above, those arguments must also be rejected.

1457 In order to assess the legality of Article 2 of the contested decision, the Court must ascertain whether the Commission rightly found that the agreements and the concerted practices which it found in that provision in fact existed, and whether it infringed the rights of defence of the

applicants mentioned in paragraph 1454 above in not granting them full access to its investigation file during the administrative procedure.

Agreements on the exchange of price information at Cembureau meetings (Article 2(1) of the contested decision)

1458 According to Article 2(1) of the contested decision, Cembureau, FIC, Aalborg, SFIC, BDZ, AGCI, Irish Cement, Italcementi, Unicem, Cementir, Ciments Luxembourgeois, VNC, BCA, from 14 January 1983 to 14 April 1986, and ATIC and Oficemen, from 1 January 1986 to 14 April 1986, 'infringed the provisions of Article 85(1) of the EC Treaty by participating in agreements on the exchange of price information, designed to facilitate the implementation of the agreement referred to in Article 1, at the Cembureau Head Delegates and Executive Committee meetings'.

1459 In the light of the arguments put forward by the applicants contesting the legality of Article 2(1) of the contested decision, the Court must examine whether the infringement found had already been complained of in the SO (A); whether it is established that the agreements on the exchange of price information were reached at the Cembureau Head Delegates and Executive Committee meetings (B); and whether the unlawful nature of those agreements (C), and the participation in them of the various associations and undertakings mentioned in Article 2(1) (D), are established.

A — Consistency between the SO and the contested decision

1460 VNC (T-32/95), SFIC (T-36/95) and Unicem (T-50/95) maintain that the infringement of which they are accused in Article 2(1) of the contested decision is a new objection which did not appear in the SO. SFIC claims that, in the SO, the only objection raised with regard to exchanges of information at Cembureau level concerned a concerted practice relating to the circulation of information on price lists (SO point 60, p. 169). However, in regard to the exchanges of information at issue, the contested decision draws a distinction between, on the one hand, agreements on exchanges of price information at the Cembureau meetings (Article 2(1)) and, on the other, concerted practices relating to the circulation of price lists (Article 2(2)). SFIC goes on to state that, even if it were accepted that the two types of information exchanges were presented separately in the factual part of the SO, there is no consistency between the SO and the contested decision since no conclusion was drawn from that separate treatment in the legal assessment of the SO (*Wood Pulp II*, cited at paragraph 106 above, paragraph 153).

1461 In this connection, the Court points out that point 8 of the SO, dealing with the facts of the 'circulation of prices between members of Cembureau' (Chapter 2), distinguished between, on the one hand, specific exchanges of price information during Cembureau meetings — broadly referring to the documents cited subsequently in recital 16, paragraphs 2 to 7, of the contested decision — (SO, pages 13 and 14) and, on the other, the system of regular circulation of the price lists set up at Cembureau level (SO, pages 14 and 15). In the legal assessment in point 60 of the SO (Chapter 10) on the '"rules of fair competition" and the circulation of price lists', the Commission referred to point 8 of the SO (see the first sentence of point 60 of the SO, p. 168) and therefore, unequivocally, to the distinction between each type of exchange. The objection based on specific exchanges of price information during Cembureau meetings was therefore referred to both in fact and in law in the SO. VNC, SFIC and Unicem, which were specifically mentioned, in point 6 of the SO, as being among the 'members of Cembureau', were thus able to understand that that objection, addressed to 'Cembureau and [to] its members' (SO, point 60, p. 169), concerned them.

1462 There remains to be examined SFIC's argument concerning the legal classification in the contested decision of the specific exchanges of price information.

1463 The SO must clearly set out the facts on which the Commission relies and its legal classification of them (*Akzo* v *Commission*, cited in paragraph 323 above, paragraph 29, and *Cimenteries CBR* v *Commission*, cited in paragraph 11 above, paragraph 33).

1464 In the present case, the specific exchanges of price information were presented in the SO (point 60, p. 169) as being the result of a 'concerted practice', whereas, in the contested decision, the Commission finally considered those specific exchanges to be the result of 'agreements' (Article 2(1)).

1465 Such a reclassification did not infringe the rights of the defence during the administrative procedure. First, the specific exchanges of price information were described in point 60 of the SO as contrary to Article 85(1) of the Treaty. Secondly, that infringement was established, and classified as a concerted practice, on the basis of the specific documentary evidence referred to in point 8 of the SO — evidence which was sent to SFIC at the same time as the SO — and not on the basis of a finding of parallel conduct on the market. In such a case, the only line of defence available to SFIC during the administrative procedure lay in challenging the documents on which the Commission relied in point 8 of the SO in concluding, at point 60, that there had been concerted action contrary to Article 85(1) of the Treaty. The actual classification adopted by the Commission in the SO to describe such allegedly unlawful concerted action was of no relevance in establishing such a defence.

1466 It follows from the foregoing that the argument put forward by VNC, SFIC and Unicem to the effect that there are discrepancies between the SO and the contested decision must be rejected.

B — The existence of agreements on exchanges of price information during the Cembureau Head Delegates and Executive Committee meetings

1467 In Article 2(1) of the contested decision, the Commission finds that there were agreements on the exchange of price information at 'the Cembureau Head Delegates and Executive Committee meetings' between Cembureau and its direct members mentioned in that provision.

1468 Recital 47, paragraph 1, which refers to the presentation of the facts in recital 16 on the 'circulation of information for meetings', states:

'At the meetings of Head Delegates held on 14 January 1983, 30 May 1983 and 19 March 1984, ... the price situation in the various Cembureau countries was examined. Such examination was carried out at meetings during which the problem of increases in trade flows between member countries was discussed and solutions put forward.'

1469 The Court must ascertain whether the Commission has in fact proved that agreements on exchanges of price information were concluded at the Cembureau Head Delegates (1) and Executive Committee (2) meetings.

1. Cembureau Head Delegates meetings.

1470 None of the applicants denies that price information was exchanged during the Head Delegates meeting held on 14 January 1983 and on 19 March 1984, with the exception, first, of Ciments Luxembourgeois (T-34/95), which claims that during those two meetings talks centred exclusively on the economic situation of the cement industry and, secondly, BDZ (T-48/95), which states that the Commission has not proved that there were exchanges of information during the Head Delegates meetings.

1471 The arguments put forward by Ciments Luxembourgeois and BDZ cannot be upheld. The bundle of documents referred to by the Commission in recital 16, paragraphs 2 to 7, recital 17, paragraphs 2 and 3, and recital 19, paragraphs 3, 5, 6, 7, 9 and 10, of the contested decision irrefutably shows that, during the discussions on intra-European trade (Head Delegates meeting held on 14 January 1983) or on the situation of the European market (Head Delegates meeting on 19 March 1984), comparative cement price levels in the Cembureau member countries were examined.

1472 While not denying that price information was exchanged during the Head Delegates meetings on 14 January 1983 and on 19 March 1984, Cembureau (T-26/95), Aalborg (T-44/95) and Irish Cement (T-60/95) claim that the data exchanged principally related to dumped imports originating particularly in Eastern Europe.

1473 None the less, although it is apparent from a number of documents referred to by the Commission in recital 16, paragraphs 2 to 4, 6 and 7, of the contested decision that information on the price of imports originating in Eastern Europe was distributed during the Head Delegates meetings on 14 January 1983 and 19 March 1984, information was also exchanged on intra-European trade prices at the first of those meetings (see the handwritten 'preparatory note for the Head Delegates meeting held on 14 January 1983' (contested decision, recital 16, paragraph 2; document 33126/11590), document 33126/11592, cited in recital 16, paragraph 3, of the contested decision, found among the documents relating to the Head Delegates meeting held on 14 January 1983, as well as a document dated 18 January 1983 entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the President' (contested decision, recital 17, paragraph 3, documents 33.126/11630 to 11633)), and, at the second of those meetings, on the levels of cement prices in the member countries (see the explanatory note to the diagram sent on 22 February 1984 by Cembureau to the Head Delegates, attached to the draft agenda for the meeting on 19 March 1984 (recital 16, paragraph 6, of the contested decision; documents 33.126/11714, 11715 and 11717), and notes for the Head Delegates meeting on 19 March 1984 (recital 16, paragraph 7, and recital 19, paragraph 10, of the contested decision; document 33.126/11735)).

1474 Cembureau, FIC (T-30/95), Irish Cement, ATIC (T-63/95) and Cementir (T-87/95) maintain that the table setting out the domestic prices (exclusive of tax) (document 33126/11599), the only document on which the Commission relies, in recital 16, paragraph 5, of the contested decision, in order to establish that price information was distributed at the Head Delegates meeting on 30 May 1983 was, in actual fact, distributed during the Head Delegates meeting held on 14 January 1983.

1475 The Court finds that there is in fact nothing to connect the document in question to the Head Delegates meeting on 30 May 1983. In recital 19, paragraph 6, of the contested decision, the Commission itself includes that document among those relating to the Head Delegates meeting held on 14 January 1983. The Commission has not therefore established that, during the Head Delegates meeting on 30 May 1983, price information had been exchanged or agreed to be exchanged. Such a conclusion is apposite not only with regard to those applicants which raised

the argument under consideration, but also to the other applicants concerned by Article 2(1), since they all essentially challenge the legality of that provision.

1476 Cembureau, Oficemen (T-59/95), ATIC and Cementir maintain that the Commission did not provide any evidence or explanation in the contested decision to justify the conclusion that exchanges of price information took place any time after the Head Delegates meeting on 19 March 1984.

1477 The Commission, in its description in recital 16, paragraphs 2 to 7, of the contested decision of the 'circulation of information for meetings', does not in fact put forward any document or other evidence to prove that exchanges of price information took place at the Head Delegates meeting on 7 November 1984 referred to in recital 19, paragraphs 12 to 15, or at subsequent Head Delegates meetings. Moreover, in its legal assessment, in recital 47, paragraphs 1 to 5, of the matters set out in recital 16, paragraphs 2 to 7, it refers only to the Head Delegates meetings on 14 January 1983, 30 May 1983 and 19 March 1984. It must therefore be held that it has not proved that price information was exchanged or was agreed to be exchanged at the Head Delegates meeting on 7 November 1984 or at subsequent meetings. Such a conclusion is apposite not only with regard to those applicants which raised the argument under consideration, but also to the other applicants concerned by Article 2(1), since they all essentially challenge the legality of that provision.

2. Cembureau Executive Committee meetings.

1478 Cembureau, FIC, Aalborg, BDZ, BCA (T-54/95), Oficemen and Cementir maintain that there was no exchange of price information during Cembureau Executive Committee meetings, in particular during the meeting on 14 April 1986 — the date taken to mark the end of the infringement referred to in Article 2(1) of the contested decision — or, at the very least, that in the contested decision the Commission did not prove that exchanges took place in the course of those meetings. VNC (T-32/95), BCA and Cementir also complain that the Commission gave no explanation, in recital 47, paragraphs 1 to 5, of the factors and reasons which led it to consider that price information had been exchanged during Executive Committee meetings and to take the date of the Cembureau Executive Committee meeting on 14 April 1986 as the end of the infringement referred to in Article 2(1).

1479 The Commission does not in fact make any allusion to Cembureau Executive Committee meetings either in its presentation of the facts in recital 16, paragraphs 2 to 7, concerning the circulation of specific price information or in the legal assessment which it then makes of those matters in recital 47, paragraphs 1 to 5. The evidence mentioned by the Commission in recital 16, paragraphs 2 to 7 refers exclusively to Head Delegates meetings, namely those on

14 January 1983, 30 May 1983 and 19 March 1984 (see paragraphs 1470 to 1477 above). In recital 47, paragraph 1, the Commission simply states: 'At the meetings of Head Delegates held on 14 January 1983, 30 May 1983 and 19 March 1984 (see recital 16 above), the price situation in the various Cembureau countries was examined.'

1480 At most, one of the handwritten notes found among the documents relating to the Head Delegates meeting held on 14 January 1983 states, with regard to 'European Intra-Trade prices', as follows: 'some informal prices but could be obtained with authority of Executive Committee' (contested decision, recital 16, paragraph 3; document 33.126/11592). However, that document does not, of itself, make it possible to conclude that there were 'agreements on the exchange of price information' at 'the Cembureau Executive Committee meetings' (Article 2(1)).

1481 In recital 47, paragraph 1, the Commission adds that 'examination [of the price situation in the various Cembureau countries] was carried out at meetings during which the problem of increases in trade flows between member countries was discussed and solutions put forward'. The exchanges of price information were thus purportedly the natural corollary to discussions on problems linked to trends in trade between the Cembureau countries.

1482 The Court must ascertain whether it may be concluded from the conduct described in the contested decision, more specifically in recital 17, relating to the meetings of the Cembureau Executive Committee, that such discussions and/or exchanges of price information took place during those meetings.

1483 Of the Executive Committee meeting on 25 March 1983 (contested decision, recital 17(a)) the Commission states that 'according to a handwritten Cimpor note at the top of a page, a five-page document was distributed (documents 33322/308 to 312)' at that meeting (contested decision, recital 17, paragraph 2). As the Commission itself observes in recital 17, paragraph 3, that five-page document, which discusses 'Intra-European trade', and specifically 'price comparisons' (contested decision, recital 17, paragraph 2; document 33.322/311), 'is the same as the document, in English and French versions, found amongst the documents relating to the Head Delegates meeting held on 14 January 1983 (documents 33126/11617 to 11629) and is most of a document in English found amongst the document relating to the Head Delegates meeting held on 14 January 1983 (documents 33.126/11630 to 11633) entitled "Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the President", dated 18.1.83-HC/no ...'.

1484 However, even though that document is of such a nature as to confirm that a comparison of prices in intra-European trade took place during the Head Delegates meeting held on

14 January 1983, it cannot be concluded from it that there was an exchange or an agreement to exchange information on those prices at the Executive Committee meeting on 25 March 1983 in the course of which that document was distributed.

1485 As to the Executive Committee meeting held on 9 November 1983, the Commission states (contested decision, recital 17(b)):

'The draft record of the Executive Committee meeting held on 9 November 1983 (document 33.322/286 to 294), point 2. "Current activities", letter (b) "Other questions currently being pursued by the Committee — Cooperation on exports", after having noted Mr Canellopoulos's finding that export prices had deteriorated, states: "Mr Bertran stated that he was personally optimistic as regards the maintenance of the volume of the overseas markets, but that the problem of price weakness nevertheless remained critical. He felt that it was time to re-examine the scope for improving cooperation, not only between the large exporting countries, but between all the members of Cembureau. One of Cembureau's roles had to be to contribute to the establishment of healthy but realistic competition". The record then noted Mr Heiberg's statement on voluntary restraints on exports by the Japanese and South Korean cement industries, and the statement of Sir J. Milne on the need to establish closer relations between the Export Policy Committee, set up outside Cembureau, and the Executive Committee, after Mr Van Hove had expressed the opinion "that no EEC rules opposed consultations and cooperation in overseas markets".'

1486 The Court finds that that passage does not enable it to be concluded that during the meeting in question, which clearly concerned cooperation on overseas exports, the problem of increases in trade flows between Member States was discussed and the price situation in the various Cembureau countries examined.

1487 As to the Executive Committee meeting on 14 April 1986, the Court points to the statement made by Mr Bertrán, of Asland, recorded in the handwritten Italcementi note on that meeting: 'We must establish rules of the game amongst ourselves to avoid improper competition' (contested decision, recital 17, paragraph 9; document 33.126/3185).

1488 However, whatever was meant thereby, that unilateral statement does not of itself make it possible to take the view that the participants at that meeting examined, or agreed to examine, the price situation in the various Cembureau countries.

1489 It is apparent from the foregoing analysis that the Commission has not proven that price information was exchanged during meetings of the Executive Committee of Cembureau. Such a

conclusion is apposite not only with regard to the applicants which raised the argument under consideration, but also those other applicants concerned by Article 2(1), since they all essentially challenge the legality of that provision.

1490 In conclusion, the Commission was not justified in finding that there were agreements on exchanges of price information at Cembureau meetings other than those of the Head Delegates on 14 January 1983 and 19 March 1984.

1491 The link between the exchange of price information at those two meeting is established by various documents cited in the contested decision. The explanatory note accompanying the diagram on prices sent on 22 February 1984 by Cembureau to the Head Delegates in view of the forthcoming meeting of 19 March 1984 ('Cement price level in member countries on 31/12/83'; contested decision, recital 16, paragraph 6; document 33.126/11715) states: 'As last year, this information is given in the attached diagram, which calls for the following explanations ...'. Secondly, the conclusion reached by the participants at the Head Delegates meeting held on 14 January 1983 as a result of the intra-European trade price comparison, namely that 'the price differentials, which could range from single to double within Europe, explained in part the new flows in intra-European trade' (see the five-page document distributed at the Executive Committee meeting on 25 March 1983 (contested decision, recital 17, paragraph 2; document 33.322/311) and the document entitled 'Meeting of Head Delegates, Paris, 14 January 1983 — Notes for the President' (contested decision, recital 17, paragraph 3; document 33.126/11632)) was reiterated at the Head Delegates meeting held on 19 March 1984, during which it was emphasised that 'the gap between extremes which is between 1 and 2 inevitably constitutes a temptation' (memorandum for the chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11728).

1492 It follows from the whole of the foregoing that Article 2(1) of the contested decision must be annulled with regard to all the undertakings and associations to which it refers in so far as it finds that there were agreements on the exchange of price information at Cembureau Head Delegates meetings held after that on 19 March 1984 or at Cembureau Executive Committee meetings.

1493 BCA also complains that the Commission infringed Article 190 of the Treaty by failing to state why it assumed that an agreement on the exchange of price information (Article 2(1)) had been concluded separately from a concerted practice relating to the circulation of the same information (Article 2(2)).

1494 However, the Court finds that the Commission clearly sets out, in recital 16(a) ('Circulation of information for meetings') and recital 16(b) ('Circulation of periodical information') of the contested decision, the facts and documents on which it relies in order to conclude at recital 47(a) ('The exchanges of price information at the meetings'), that there were, first, anti-competitive agreements on the exchange of price information at Cembureau meetings (Article 2(1)) and, secondly, anti-competitive concerted practices involving periodic exchanges of price information (Article 2(2)).

1495 Moreover, a simple reading of the documents referred to by the Commission in recital 16(a), on the one hand, and 16(b), on the other, reveals the significant differences between the price information distributed 'at the meetings' (contested decision, recital 16(a)) and that periodically exchanged between Cembureau and its members (contested decision, recital 16(b)).

1496 BCA's argument must therefore be rejected.

1497 For its part, Italcementi (T-65/95) maintains that the Commission has not proved the existence of an 'agreement' or 'concurrence of wills' on exchanges of price information at the Head Delegates meetings held on 14 January 1983 and 19 March 1984. Moreover, the information exchanged during those meetings was similar to that communicated periodically via the CPRF (see paragraph 401 above) of the Cembureau member countries, in regard to which the Commission found there to be a concerted practice (contested decision, Article 2(2)).

1498 However, the fact that the exchanges in question took place at meetings of itself suffices to conclude that they were the object of a concurrence of wills between the participants in those meetings, and thus of an agreement within the meaning of Article 85(1) of the Treaty (see the case-law cited in paragraph 1010 above). That analysis is borne out by the passage from the session notes of the Head Delegates meeting on 19 March 1984 (contested decision, recital 16, paragraph 7, and recital 19, paragraph 10; document 33.126/11735), according to which, during that meeting, 'it was agreed that a visual presentation of price ranges was an effective means of highlighting potential causes of conflict'.

1499 Furthermore, it has already been pointed out (see paragraph 1495 above) that the price information which was compared during the Head Delegates meetings on 14 January 1983 and 19 March 1984 and that which was periodically exchanged via the CPRF were materially different, despite a number of similarities illustrated, for example, by the document cited by the Commission in recital 16, paragraph 5, of the contested decision (document 33.126/11599). In those circumstances, subject to the assessment to be made as to the unlawfulness of the specific and periodic exchanges of price information at Cembureau level (see paragraphs 1501 to 1537 and 1620 to 1682 below), it must be concluded that the Commission was able, without

contradiction, to take the view that the former were the subject of agreements (Article 2(1)), and the latter the subject of concerted practices (Article 2(2)).

1500 Italcementi's argument must therefore be rejected.

C — The unlawful nature of the exchanges of price information which took place at the Head Delegates meetings on 14 January 1983 and on 19 March 1984

1501 According to Article 2(1) of the contested decision, the exchanges of specific price information which took place during the Head Delegates meetings on 14 January 1983 and on 19 March 1984 were the result of agreements contrary to Article 85(1) of the Treaty inasmuch as they were designed to 'facilitate the implementation of the agreement referred to in Article 1', that is to say the Cembureau agreement.

1502 In recital 47, paragraph 1, the Commission states:

'... According to the letter convening the meeting held on 14 January 1983 and the chairman's draft introductory statement (see paragraphs 2 and 5 of recital 19) and the memorandum and session notes for the meeting held on 19 March 1984 (see paragraphs 9 and 10 of recital 19), the purpose of the exchanges was "to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices" (see paragraph 5 of recital 19), to "highlight potential causes of conflict" (see paragraph 10 of recital 19) and "gradually to reduce" the price differentials so as to remove any temptation to export (see paragraph 9 of recital 19).'

1503 It adds (first subparagraph of paragraph 2) that 'through the exchanges of price information, Cembureau and its members were aiming to achieve another objective, namely the introduction of fair competition rules amongst themselves for inter-member and external exports', rules whose content and purpose it subsequently sets out (second and third subparagraphs).

1504 Finally, it points out (recital 47, paragraph 4):

'It is also evident from the documents mentioned in recitals 16 and 17 and, in particular, from the documents relating to the Head Delegates meetings held on 14 January 1983 and 19 March 1984 that the purpose of the exchange of information was to reinforce the general agreement on non-transhipment to home markets and, thus, to curb intra-Community trade in cement.'

1505 The applicants mentioned in Article 2(1) of the contested decision put forward essentially five arguments disputing the unlawful nature of those specific exchanges of price information.

1506 First, all those applicants dispute that the exchanges of information which took place during the Head Delegates meetings held on 14 January 1983 and on 19 March 1984 were unlawful, pointing out that the data exchanged during those meetings or, at the very least, those which were distributed during them in connection with their own market were devoid of any confidential, commercial or strategic value.

1507 The applicants assert that the information exchanged during those meetings was official information in the public domain or, at least, obtainable by other means, and relating for the most part to State-controlled prices and, in any event, to current prices. According to the applicants, those data were historical and purely statistical, part of the normal and lawful activity of trade associations or approved statistical organisations. They did not differ fundamentally from the data which was circulated via the CPRF. They were approximate and involved average or hypothetical prices and thus did not reflect the prices actually charged by undertakings. They were in fact mere 'trend indicators'. On the participants' own admission (see the memorandum for the chairman for the Head Delegates meeting on 19 March 1984 (contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11728), and the session notes of the Head Delegates meeting held on 19 March 1984 (contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11735)), the data exchanged was difficult to compare in view of the great heterogeneity of pricing mechanisms, currency fluctuations which inevitably affect any international analysis and the fact that they did not concern the same category of cement for every country. They were devoid of any confidential information on reductions and discounts, transport costs, or rates of VAT, and did not identify any of the undertakings.

1508 The applicants claim that the specific exchanges of information on prices were not only not contrary as such to Article 85(1) of the Treaty, but, moreover, were neither capable nor intended to facilitate either of the anti-competitive objects which the Commission attributes to them in recital 47, paragraphs 1 to 4, namely to reinforce the Cembureau agreement and to

introduce rules of fair competition when exporting within the Community and to non-member countries. At the very least, the Commission neither adduced nor even sought to adduce such evidence. Cembureau, SFIC, Aalborg, Oficemen and Irish Cement maintain that, in actual fact, those exchanges of prices took place only in the framework of discussions at that time, first, on the possible extension, at European level, of the BPS (see paragraph 852 above), which had been notified to the Commission in July 1981, and, secondly, on the problems linked to dumped imports from Eastern Europe and Spain (preparation of anti-dumping proceedings; collection of data to justify and illustrate the extent of the damage sustained). That is the context in which the applicants claim that the various documents on which the Commission bases its legal assessment in recital 47, paragraph 1 (see paragraph 1502 above), ought to be interpreted. Oficemen and AGCI add that those exchanges of information were also intended to enable national associations from a country applying a State control pricing system to substantiate requests for price increases which they intended to lodge with their governmental authorities. For its part, FIC states that the only purpose of such exchanges was to clarify the situation of the cement industry in a period of recession.

1509 FIC and Cementir also maintain that the contested decision is vitiated by failure to state reasons as to the allegedly unlawful nature of the specific exchanges of price information which took place at Cembureau level. FIC claims that the documents mentioned in recital 17 of the contested decision, on 'discussions on "fair or healthy or correct"' competition, are not used against it and that the Commission had no intention of drawing any legal consequences therefrom. In those circumstances, the Commission could not legitimately use them to underpin its line of argument as to the unlawful nature of the specific exchanges of price information. Cementir, on the other hand, criticises the Commission for having merely referred to the documents mentioned in recital 16, paragraphs 2 to 7, without specifying its reasons for alleging that the exchanges of information were restrictive.

1510 In that respect, it should be recalled that, in Article 2(1) of the contested decision, the Commission objects to the exchanges of price information during the Head Delegates meetings held on 14 January 1983 and on 19 March 1984, in that the agreements from which they resulted were 'designed to facilitate the implementation of the [Cembureau] agreement'. Those exchanges are thus considered unlawful not in themselves but in that they were the linchpin or, at the very least, one of the linchpins of the Cembureau agreement.

1511 Accordingly, the Court need only ascertain whether or not they were carried out with the anti-competitive object found by the Commission in the contested decision. There is no need to examine whether the intrinsic nature of the information exchanged might or might not by itself make them unlawful.

1512 In that connection, the Court points to the discrepancy in the contested decision between the operative part and the legal assessment as regards the purpose of the specific exchanges of price information.

1513 Although, in Article 2(1) the Commission finds those exchanges to be contrary to Article 85(1) of the Treaty on the ground that they were designed 'to facilitate the implementation of the [Cembureau] agreement', it attributes a twofold objective to them in its legal assessment of those exchanges in recital 47(a): first (paragraph 2), 'the introduction of fair competition rules amongst themselves for inter-member and external exports'; secondly (paragraph 4), 'to reinforce the general agreement on non-transhipment to home markets and, thus, to curb intra-Community trade in cement'. That discrepancy is not, however, of any consequence, since the passages of the contested decision (paragraph 17) on the 'discussions on "fair or healthy or correct" competition' were not ultimately the subject-matter of an objection upheld in the operative part of the decision, as the Commission has confirmed on various occasions during the written and oral procedures.

1514 Thus it is only necessary to examine whether or not, in Article 2(1) of the contested decision, the Commission was justified in finding that the exchanges of price information which took place during the Head Delegates meetings held on 14 January 1983 and on 19 March 1984 were contrary to Article 85(1) of the Treaty, on the ground that their purpose had been to 'facilitate the implementation of the [Cembureau] agreement'. There is no purpose in examining the applicants' arguments that those exchanges were neither liable nor intended to introduce fair competition rules for inter-member exports and exports to third countries.

1515 So far as concerns the Head Delegates meeting held on 14 January 1983, the Chairman's draft introductory statement — to which the Commission refers in recital 47, paragraph 1 — states as follows (contested decision, recital 19, paragraph 5; document 33.126/11584):

'I shall now give a very precise description of the aim and scope of our discussions:

— the first task, with your help, is to set out all the data we have in the three fields in question [namely the three items set down in the agenda for the meeting, including inter-European trade and, in particular, the national price situation].

— we shall thus be able to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices, before this phenomenon has had time to spread in extent and gravity.

— our objective is..., with your assistance, to identify possible solutions capable of modifying market developments and to propose, at least in regard to principles, certain rules of the game which it is in the interests of all of us to follow.

...'

1516 So far as concerns the Head Delegates meeting held on 19 March 1984, the memorandum prepared on 15 March 1984 for the Chairman — also referred to in recital 47, paragraph 1 — states as follows in item 2 dealing with the 'situation on the European market' (contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11728):

'Comments on the table summarising the prices situation:

— the price levels indicated are approximate but none the less significant.

...

— the gap between extremes which is between 1 and 2 inevitably constitutes a temptation.

— it is therefore desirable gradually to reduce the gap, essèntially by increasing the lowest prices (two thirds of output are sold at under $50, i.e. well below Japanese and US domestic prices), and also by moderating high price trends.'

1517 The notes on that meeting — also mentioned by the Commission in recital 47, paragraph 1 — draw the following conclusions from the comments generated by the 'table showing cement

prices (in principle ex-works) in the member countries and in Japan and the USA' (contested decision, recital 16, paragraph 7, and recital 19, paragraph 10; document 33.126/11735):

'Although the data collected were not fully comparable in view of differences in price quotations, it was agreed that a visual presentation of price ranges was an effective means of highlighting potential causes of conflict ...'

1518 In view of those various extracts, the Commission was justified in considering that the purpose of the exchanges of price information during the Head Delegates meetings on 14 January 1983 and on 19 March 1984 was (recital 47, paragraph 1) '"to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices"... as well as to "highlight potential causes of conflict"... and "gradually to reduce" the price differentials so as to remove any temptation to export'. It was thus fully entitled, and gave adequate reasons, to conclude that the purpose of the exchanges of information on the Cembureau member countries' prices which had taken place during the discussions on intra-Community trade or on the European market situation in the course of the Head Delegates meetings on 14 January 1983 and 19 March 1984 was 'to reinforce the general agreement on non-transhipment to home markets' which had been concluded and then confirmed at those meetings and thus, 'to curb intra-Community trade in cement' or, in short (Article 2(1) of the contested decision), to 'facilitate the implementation of the [Cembureau] agreement'.

1519 Contrary to what Cembureau maintains, in order to do so, the Commission is not obliged to show that those exchanges were the result of a mandate to reduce price differentials in Europe.

1520 Secondly, Irish Cement complains that, with regard to the Head Delegates meeting held on 14 January 1983, the Commission put forward only three handwritten notes (contested decision, recital 16, paragraphs 2 to 4; documents 33.126/11590, 11592 and 11614), two of which were merely preparatory (documents 33.126/11590 and 11592), in order to submit that the exchanges of price information during that meeting were intended to assist the implementation of the Cembureau agreement.

1521 That argument must be rejected. The three handwritten notes in question were put forward by the Commission principally in order to prove that '[at] the meeting of Head Delegates held on 14 January 1983 ... the price situation in the various Cembureau countries was examined' (contested decision, recital 47, paragraph 1, first sentence). The Commission infers the anti-competitive object of those exchanges from the analysis of all the document extracts which it cites in the third sentence of recital 47, paragraph 1. Those extracts contain precisely, so far as concerns the Head Delegates meeting held on 14 January 1983, a passage from the Chairman's

draft introductory statement which shows that the purpose of that meeting was 'to assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices' (contested decision, recital 19, paragraph 5; document 33.126/11584). Read in their context (see paragraph 1515 above), they clearly signify that the purpose of the exchanges of information on prices in Cembureau member countries during that meeting was to point up the differences between various national price levels, some of which had been sharply reduced, in order 'to identify possible solutions capable of modifying market developments' before the 'phenomenon' of an increase in imports and a sharp reduction in certain prices 'had time to spread in extent and gravity' (Chairman's draft introductory statement, cited above). The Commission was therefore right to consider that the exchange of information in question was intended to assist the implementation of the Cembureau agreement concluded at that meeting (see paragraphs 979 to 985 above).

1522 Thirdly, Aalborg, Irish Cement, Italcementi, Cementir and AGCI state that a large amount of the information exchanged during the Head Delegates meetings held on 14 January 1983 and on 19 March 1984, at least the information distributed in regard to their own market, related to State-controlled prices, so that the exchanges referred to in Article 2(1) of the contested decision could not have had an anti-competitive interest or purpose, at least so far as they were concerned.

1523 BCA claims that under the CPMA (see paragraph 91 above) in force on its market at that time the CMF would have been incapable of contributing during the Head Delegates meetings to any arrangement intended to lead to alignment of prices in Europe. BCA explains that, because of the CPMA, which had entrusted to the Independent Costs Committee the calculation of price variations on the basis of a series of specific criteria, no external factor — not even changes in prices abroad — was capable of influencing the level of United Kingdom prices.

1524 Such a line of argument cannot be upheld. The information on the prices in the various Cembureau member countries exchanged during the Head Delegates meetings held on 14 January 1983 and 19 March 1984 was in the framework of comparisons whose purpose was to 'assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices' (Chairman's draft introductory statement for the Head Delegates meeting held on 14 January 1983; contested decision, recital 19, paragraph 5; document 33.126/11584) and to 'highlight potential causes of conflict' (session notes of the Head Delegates meeting held on 19 March 1984; contested decision, recital 16, paragraph 7, and recital 19, paragraph 10; document 33.126/11735), in the light of which it was deemed 'desirable', so as to avoid 'temptation[s]' to export, 'gradually to reduce the gap [between extremes], essentially by increasing the lowest prices ... and also by moderating high price trends' (memorandum for the Chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11728). As to the rest, the existence, in certain countries, of mechanisms for controlling or setting prices did not prevent the industries concerned from taking into account general trends expressed by those price comparisons either — on markets characterised by high price levels — by 'moderating' requests for price increases lodged with the public authorities or competent bodies or — on markets

experiencing low price levels — by submitting requests for price increases in order gradually to reduce the gap between extremes, in compliance with the wish expressed at the Head Delegates meeting.

1525 Fourthly, Cembureau and Irish Cement maintain that, contrary to what is claimed in recital 47, paragraph 3, of the contested decision, the Commission has not shown that 'price guidelines' were defined or applied during the Head Delegates meeting on 14 January 1983.

1526 Although, in fact, there is nothing to prove that guidelines were defined or applied, so far as concerns prices, at the Head Delegates meeting on 14 January 1983, it is however clear that at the Head Delegates meeting of 19 March 1984 it was deemed 'desirable gradually to reduce [the gap between extremes, which remained from 1 to 2], essentially by increasing the lowest prices ... and also by moderating high price trends' (memorandum for the Chairman for the Head Delegates meeting on 19 March 1984; contested decision, recital 16, paragraph 7, and recital 19, paragraph 9; document 33.126/11728).

1527 In all events, the submissions by Cembureau and Irish Cement cannot obscure the findings of fact on which the Commission relied in recital 47, paragraph 1, of the contested decision as a basis for concluding in Article 2(1) that the exchanges of price information which took place during the Head Delegates meetings held on 14 January 1983 and on 19 March 1984 were 'designed to facilitate the implementation of the [Cembureau] agreement', a conclusion which the analysis set forth in paragraphs 1515 to 1519 shows to be justified.

1528 The argument put forward by Cembureau and Irish Cement must therefore be rejected.

1529 Fifthly, a number of the applicants put forward a series of arguments disputing the anti-competitive effects of the specific exchanges of price information referred to in Article 2(1) of the contested decision.

1530 Italcementi thus claims that the Commission neither showed nor even claimed in the contested decision that, following such exchanges of information, the prices of Italian cement were realigned on the prices charged on other markets. AGCI maintains that those exchanges of prices did not hinder the expansion of intra-Community trade for Greek cement as from the mid-1980s.

1531 Such an argument cannot be upheld. It should be recalled that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement when it is apparent that it has as its object the prevention, restriction or distortion of competition within the common market (see the cases cited in paragraph 837 above). In such a case, the absence in the contested decision of any analysis of the effects of the agreement on competition does not therefore constitute a defect in the decision capable of entailing its annulment. In the present case, the Commission has shown that the agreements on the exchanges of price information at the Head Delegates meetings held on 14 January 1983 and on 19 March 1984 were designed to facilitate the implementation of the Cembureau agreement. Since it had proved that the purpose of those agreements was anti-competitive, it did not have to show in addition that the exchanges of price information resulted in restriction of competition in the common market.

1532 FIC maintains that the Commission cannot take the view that the following extract of the notes of the Head Delegates meeting of 19 March 1984: 'Although the data collected were not fully comparable in view of the differences in price quotations, it was agreed that a visual presentation of price ranges was an effective means of highlighting potential causes of conflict' (contested decision, recital 19, paragraph 10; document 33.126/11735) is evidence that 'the price guidelines established at the meetings on 14 January 1983 and 30 May 1983 were followed' (contested decision, recital 47, paragraph 3).

1533 It is true that the extract in question illustrates not the anti-competitive effects of the specific exchanges of price information, but rather their unlawful purpose and their capacity for serving such an end, even though the data collected were not fully comparable.

1534 However, the confusion in the Commission's assessment in this regard is of no consequence, since the agreements on the exchange of price information in Article 2(1) of the contested decision were found to be an infringement on the basis of their anti-competitive purpose, which was proven by the Commission (see paragraphs 1515 to 1519 above).

1535 Finally, Aalborg maintains that the Commission infringed Article 190 of the Treaty by failing to explain in what way the agreements referred to in Article 2(1) of the contested decision appreciably affected trade between Member States.

1536 However, since, in Article 2(1), it found the agreements on the exchange of price information to be an infringement solely on the ground that their purpose was anti-competitive, namely to facilitate the implementation of the Cembureau agreement, the Commission could confine itself to explaining, in recital 52 of the contested decision, how the purpose of those agreements had been to affect trade between Member States.

1537 Aalborg's argument must therefore be rejected.

D — The participation of the applicants in the infringement referred to in Article 2(1) of the contested decision

1538 The infringement referred to in Article 2(1) is alleged against Cembureau and the following direct members: FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, Unicem, BCA, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI.

1539 First, VNC (T-32/95) claims that it was only indirectly concerned by the Head Delegates meetings, which were in any case purely informal. It adds that, by reason of the special features of the Netherlands industry, it had no interest in facilitating the implementation of the Cembureau agreement by means of any agreement whatsoever.

1540 However, those arguments cannot hide the fact that VNC participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984, which gave rise to exchanges of price information designed to facilitate the implementation of the Cembureau agreement. Since VNC adduced no evidence to show that, during those meetings, it had openly distanced itself from the anti-competitive purpose of those exchanges or indicated to the other participants that it was present for reasons different from theirs, it must be considered to have subscribed to, or at least given the other participants the impression that it subscribed to, the unlawful objective of those exchanges. The Commission was therefore entitled to find that its participation in the agreements at issue was unlawful (see, to this effect, the case-law cited in paragraph 1353 above).

1541 VNC's argument must therefore be rejected.

1542 Secondly, SFIC (T-36/95) maintains that the Commission has not proved that it sent price information for the Head Delegates meetings.

1543 However, the Court points out that in Article 2(1) of the contested decision Cembureau and its direct members, including SFIC, are not accused of having communicated price information during or for the meetings at issue, but of having participated during those meetings in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement. Since SFIC has neither denied having participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984 nor adduced any evidence of any reservation or dissent on its part with regard to the anti-competitive object of the exchanges of

price information during those two meetings, it must be considered to have subscribed to, or at least given the other participants the impression that it subscribed to, the unlawful object of those exchanges. The Commission was therefore justified in finding that it had unlawfully participated in the agreements on the exchange of price information during those meetings (see, to that effect, the case-law cited in paragraph 1353 above).

1544 SFIC's argument must therefore be rejected.

1545 Thirdly, BDZ (T-48/95) states that none of the documents which led to the finding of the infringement referred to in Article 2(1) of the contested decision was found in its files. It denies having participated in that infringement, observing, first, that none of the documents relating to the meetings at issue make any reference to statements or to any particular action by it in relation to the exchanges of price information during those meetings and, secondly, that the evidence relied upon by the Commission does not prove that it received from its members any price information or sent them such information itself. It adds that it always considered that it was pointless to send its members the information exchanged in the course of Cembureau meetings, because of the lack of value of that information.

1546 It must however be observed that the fact that none of the evidence put forward as proof of the infringement referred to in Article 2(1) of the contested decision was found in BDZ's files is not of such a nature as to affect the evidential value of the documents in question (see paragraph 1397 above), to hide the fact that BDZ participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984, or to prevent a finding that the BDZ participated in that infringement.

1547 BDZ has not adduced any evidence to show that, during the meetings, in question, it openly distanced itself from the anti-competitive purpose of the exchanges on price information. It must be considered to have subscribed to, or at least given the other participants the impression that it subscribed to, the unlawful object of those exchanges. In those circumstances, and in view of what has been pointed out in paragraph 1543 above with regard to the infringement complained of in Article 2(1) of the contested decision, the Commission was justified in finding that BDZ participated unlawfully in the agreements on the exchange of price information during the Head Delegates meetings of 14 January 1983 and 19 March 1984 (see the case-law cited in paragraph 1353 above), and was not required to prove that BDZ had gathered information on prices from its members in preparation for those meetings, and/or that following those meetings it had passed on to its members the information exchanged during the meetings.

1548 BDZ's argument must therefore be rejected.

1549 Fourthly, Unicem (T-50/95) claims that, since it did not participate in any of the meetings which gave rise to the exchanges of price information referred to in Article 2(1) of the contested decision, no liability can attach to it for them. It adds that its capacity as direct member of Cembureau alone does not demonstrate that it participated in that infringement.

1550 In the present case, it is not disputed that Unicem did not attend the Head Delegates meetings of 14 January 1983 and 19 March 1984 (see paragraph 1406 above).

1551 In holding Unicem responsible for the infringement referred to in Article 2(1) of the contested decision, the Commission (defence in Case T-50/95, paragraph 49) bases itself on the fact that Unicem was allegedly represented at those two meetings by the Italian Head Delegates who did attend, namely Cementir (meeting of 14 January 1983) and Italcementi (meeting of 19 March 1984).

1552 For the reasons set out in paragraphs 1407 to 1412 above, that assessment cannot be upheld.

1553 Nor does the fact that Unicem was a direct member of Cembureau, on which the Commission relies in its defence in Case T-50/95 (paragraph 50), demonstrate that it participated in the unlawful agreements referred to in Article 2(1) of the contested decision. Membership of a trade association, in this case Cembureau, cannot result automatically in a finding that the member concerned is liable for unlawful conduct by the association, doing away with the need to prove actual participation of that member in the unlawful conduct complained of.

1554 The Commission was therefore wrong to find that Unicem participated in the infringement upheld in Article 2(1) of the contested decision.

1555 It follows that that provision must be annulled in so far as it finds that from 14 January 1983 to 14 April 1986 Unicem participated in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement.

1556 Fifthly, in its reply, BCA (T-54/95) claims not to know what information was exchanged at the Head Delegates meetings and, therefore, not to be able to express an opinion on the purpose and effect of those exchanges of information.

1557 However, BCA cannot claim not to know the type of information was exchanged during Head Delegates meetings and also assert (application, paragraph 36) that that information was not fundamentally different from the periodical information on prices which was already circulating via the CPRF.

1558 In all events, it is not disputed that Sir John Milne, who had been appointed United Kingdom Head Delegate by the CMF, attended the Head Delegates meetings of 14 January 1983 and 19 March 1984 (contested decision, recital 19, paragraphs 4 and 8). The CMF could not therefore have been unaware of the fact that there were exchanges of price information during those meetings, and of the anti-competitive purpose of those exchanges. The Commission was therefore justified in finding that BCA, as successor to the CMF (see paragraphs 1337 to 1341 above), participated unlawfully in the agreements to exchange price information at the Head Delegates meetings of 14 January 1983 and 19 March 1984.

1559 Sixthly, Oficemen (T-59/95) and ATIC (T-63/95) maintain that, throughout the period of the infringement found against them in Article 2(1) of the contested decision — that is to say from 1 January to 14 April 1986 — there is no evidence of their having participated in the Cembureau meetings which gave rise to agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement.

1560 It has been found in paragraphs 1489, 1490 and 1492 above that the Commission has not in fact shown that there were agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement subsequent to the Head Delegates meeting of 19 March 1984.

1561 Article 2(1) of the contested decision must therefore be annulled, in so far as it finds that from 1 January 1983 to 14 April 1986 Oficemen and ATIC participated in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement.

1562 Seventhly, Irish Cement (T-60/95) states that its reply of 5 January 1983 (annex 18 to its application; documents 33.126/11576 and 11577) to circular number 104 Hc/gm sent by Cembureau on 28 December 1982 contains only information relating to imports from Eastern Europe.

1563 That argument must be rejected. Even supposing that the information sent to the Head Delegates meeting of 14 January 1983 concerned only imports from Eastern Europe, the fact remains that Irish Cement participated in that meeting and in the meeting of 19 March 1984. Since the applicant has not shown that at those two meetings it expressed any reservation or dissent with regard to the anti-competitive purpose of the exchanges of price information, it

must be considered to have subscribed to, or at least given the other participants the impression that it subscribed to, the unlawful object of those exchanges. The Commission was therefore justified in finding that it had unlawfully participated in the agreements on the exchange of price information at those meetings (see, to that effect, the case-law cited in 1353 above).

1564 Eighthly, the Commission has not established that Italcementi participated in the Head Delegates meeting of 14 January 1983 (see paragraphs 1346 to 1349 above). That applicant cannot therefore be held to have taken part in the unlawful agreement on the exchange of price information concluded at that meeting. On the other hand, Italcementi was represented at the Head Delegates meeting of 19 March 1984 (see paragraph 1351 above). Failing evidence to the contrary, the Commission was entitled to find that it had participated in the agreement on the exchange of price information at that meeting.

1565 Accordingly, in the absence of evidence that Italcementi participated in the infringement in question before 19 March 1984, Article 2(1) of the contested decision must be annulled in so far as it finds that it participated in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement before that date.

1566 Ninthly, Cementir (T-87/95) maintains that the only Head Delegates meeting in which it participated at which price information was exchanged was that of 14 January 1983.

1567 It is not disputed that Cementir attended only one of the two meetings at which exchanges of price information took place, namely that of 14 January 1983.

1568 The Commission claims (defence in Case T-87/95, paragraph 25) that Cementir was represented by Italcementi at the meeting of 19 March 1984.

1569 However, it should be pointed out that as a direct member of Cembureau, Cementir had its own Head Delegate (see paragraph 1409 above). In those circumstances, and in the absence of any evidence that Cementir asked Italcementi to represent it at the meeting of 19 March 1984, the Commission was not justified in inferring from Italcementi's presence at that meeting that Cementir had been represented at it and, thus, that it had subscribed to the agreement on the exchange of price information on that date.

1570 Nor, for the reasons set forth in paragraph 1553 above, does the fact that Cementir was a direct member of Cembureau make it possible to hold it liable for the agreement on the exchange of price information reached at a meeting which it had not itself attended.

1571 In the absence of evidence that Cementir participated in the infringement in question after 14 January 1983, Article 2(1) of the contested decision must be annulled in so far as it finds that Cementir participated in agreements on the exchange of price information designed to facilitate the implementation of the Cembureau agreement after that date.

1572 Tenthly, Italcementi (T-65/95), Cementir (T-87/95) and AGCI (T-103/95) submit that they — or, in AGCI's case, its members — had no interest in or fear of intra-Community trade at the time of the disputed meetings, so that, as far as they were concerned, the exchanges on price information which took place at those meetings could not have had an anti-competitive purpose.

1573 However, whatever might have been the Italian and Greek undertakings' feelings with regard to intra-Community trade at that time, the fact remains that Italcementi did take part in the Head Delegates meeting of 19 March 1984, Cementir in that of 14 January 1983 and AGCI in both those meetings.

1574 Since none of those applicants has shown that, during those meetings, they expressed any reservation or dissent with regard to the ant-competitive purpose of those exchanges of price information, they must be considered to have subscribed to, or at least given the other participants the impression that they subscribed to the unlawful object of those exchanges. The Commission was therefore justified in finding that they had unlawfully participated in one and/or both agreements on the exchange of price information reached at those meetings (see to that effect the case-law cited in paragraph 1353 above).

1575 The arguments put forward by Italcementi, Cementir and AGCI must therefore be rejected.

Concerted practices involving the periodic exchanges of price information (Article 2(2)(a) and (b) of the contested decision)

1576 According to Article 2(2) of the contested decision, Cembureau, FIC, Aalborg, SFIC, BDZ, AGCI, Irish Cement, Italcementi, Unicem, Cementir, Ciments Luxembourgeois, VNC, BCA,

from 1 January 1984 to 31 December 1988, and ATIC and Oficemen, from 1 January 1986 to 31 December 1988, 'infringed the provisions of Article 85(1) of the EC Treaty by participating in concerted practices designed to facilitate the implementation of the agreement referred to in Article 1 and relating to:

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

(b) the circulation of information on the Danish and Irish producers' individual price-lists, on the trade price-lists in force in Greece, Italy and Portugal, and on the average prices charged in Germany, France, Spain and the United Kingdom.'

1577 It is not disputed that, at least during the period covered by Article 2(2), there was, at Cembureau level, a system of periodically exchanging information, in the context of which 'Cembureau receiv[ed] from and communicat[ed] to its members information on the prices applicable in the various countries' (contested decision, recital 16, paragraph 8). In recital 16, paragraphs 8 to 22, the Commission analyses the documents on which it relies in reaching the conclusion that information was circulated via that system between Cembureau and its members, at least on Belgian, Danish, French, German, Greek, Irish, Italian, Luxembourg, Netherlands, Portuguese, Spanish and United Kingdom prices.

1578 In the light of the arguments put forward by the applicants in contesting the legality of Article 2(2) of the contested decision, the Court must examine whether the infringement found had already been complained of in the SO (A); whether the Commission properly identified the price information referred to therein (B); whether the unlawful nature of those periodic exchanges of information (C) and the participation in the infringement by the various associations and undertakings concerned (D) are established; and whether the duration of the infringement was correctly assessed so far as concerns those undertakings and associations (E).

A — Consistency between the SO and the contested decision

1579 VNC (T-32/95), SFIC (T-36/95), Aalborg (T-44/95) and Irish Cement (T-60/95) maintain that their rights of defence were infringed during the administrative procedure, either in that the objection relating to 'the circulation of information on the Belgian and Dutch producers' minimum prices for supplies of cement by lorry and of the Luxembourg producer's prices, inclusive of rebates' (Article 2(2)(a) of the contested decision) was not set out in the SO, or in

that that objection was upheld in the contested decision on the basis of evidence which was not referred to in the SO and of which they were not informed during the administrative procedure.

1580 VNC thus states that documents 33.126/15136 to 15157, on which the Commission relied in recital 16, paragraph 18, and recital 47, paragraph 9, in concluding that 'information on the ... Dutch producers' minimum prices for supplies of cement by lorry' (Article 2(2)(a)) circulated between Cembureau and its direct members, including VNC, were not referred to in the SO.

1581 SFIC maintains that, in the SO, none of the Commission's claims related even cursorily to the objection upheld in Article 2(2)(a), an objection which in fact arose from a question raised during the hearings in March 1993.

1582 Aalborg states that documents 33.126/15099 to 15114 and 15136 to 15157, on which the Commission relies in recital 16, paragraphs 10 and 18, and recital 47, paragraphs 7 and 9, in concluding that 'information on the Belgian and Dutch producers' minimum prices for supplies of cement by lorry' (Article 2(2)(a)) circulated between Cembureau and its direct members, including Aalborg, were not referred to in the SO and were not in the Box (see paragraph 95 above) which accompanied the SO.

1583 Finally, Aalborg and Irish Cement observe that, in concluding that 'information on the ... Luxembourg producer's prices, inclusive of rebates' (Article 2(2)(a) of the contested decision) had been circulated, the Commission relied in recital 16, paragraph 17, and recital 47, paragraph 8, on a document they had not received in the course of the administrative procedure, namely annex 2a to Cembureau's reply to the SO.

1584 Before considering the merits of those various arguments, the Court points out that although, as will be stated below (paragraphs 1633 to 1638), the periodic exchanges of price information referred to in Article 2(2) are all held to have been unlawful on the ground that their object was to 'facilitate the implementation of the [Cembureau] agreement' and not because of the intrinsic nature of the data concerned, the Commission not only complains of that common anti-competitive object, but also highlights, in recital 47(b)(i), the particular seriousness of the periodic exchanges on Benelux prices, emphasising that 'Cembureau and, through it, all its members receive[d] information that was particularly likely to influence their competitive behaviour vis-à-vis the Belgian, Dutch and Luxembourg producers' (contested decision, recital 47, paragraph 10; see also recital 47, paragraph 12). Far from being irrelevant statements regarding the quality of the information exchanged on the Benelux countries' prices, the specific arguments in recital 47(b)(i) dealing with that information, which led to the finding in Article 2(2)(a), thus emphasise the gravity of the periodic exchanges of such information and of the infringement of Article 85(1) of the Treaty which they constitute. In any event they show

that in the contested decision the Commission takes a more severe view of them than the regular circulation of information on the other Cembureau countries' prices (see, to that effect, recital 47, paragraph 13, second subparagraph).

1585 Having made that observation, the Court points out that in point 8 of the SO (pp. 14 and 15) on 'the circulation of prices between Cembureau members' the Commission described 'the system of circulating prices that has been in force at least since 1980' in the following terms:

'Each member sends Cembureau, usually before the prices enter into force, the new price list or amendments to the existing price list with the date on which they take effect; as soon as it receives this information from each member, Cembureau sends its members a "cement price reference file" which refers to the member communicating the information and contains the new prices (normally ex-works) for each type of cement and the terms of sale (ex-works, delivered in terms of distance, minimum delivery quantities) and a file on "price development for cement" containing the dates of price changes since 1980 and the prices ex-works and the percentage increases of each change to the price list.

The Cembureau memorandum sent to the Commission along with the documents on the circulation of price lists between members contains a number of comments, some of which are quoted here: ["Belgium" since 1986 "confirmation of prices by telephone once a year". "France ... Prices for two types of cement. As from 1987, France no longer wants to see these prices published in the Cembureau documents. They may be communicated by telephone to the Members". "Spain ... We stopped publishing cement prices in 1984, a price average is communicated to us once a year, for information, by telephone". "United Kingdom ... We have not received any official communication of prices since 1985. We obtain prices from different sources (i.e. builders) which we communicate as an approximate estimate by telephone]".

The memorandum adds: "[We generally communicate prices only to our members. ... Unfortunately, the price structures and cement types chosen as references by each country are so different that all the comparisons which have been carried out have proved erroneous]".

The memorandum concludes: "[A cement producer who is familiar with the standards and with the costs of transport can of course make use of such prices. However, we never carry out this work for our members]".'

1586 Thus, the SO did not allude, in its presentation of the periodic exchanges of price information, to the special nature of the information which was alleged to circulate between Cembureau and its members on Benelux prices. In the legal assessment, in point 60 of the SO, of the facts described in point 8, the Commission complained generally about the 'circulation of price lists' (SO, p. 168) or the 'circulation of information on price lists' (SO, p. 169) between Cembureau and its members, but did not highlight the allegedly more sensitive nature, under competition law, of the information on Benelux prices.

1587 Furthermore, it has already been found (see paragraphs 367 and 368 above) that documents 33.126/15099 to 15114 and 15136 to 15157, on which the Commission relied in recital 16, paragraphs 10 and 18, and recital 47, paragraphs 7 and 9, in concluding in Article 2(2)(a) that the information which had circulated periodically between Cembureau and its direct members related, so far as concerned Belgium and the Netherlands, to 'minimum prices for supplies of cement by lorry', were documents that had not been referred to in the SO and were not in the Box (see paragraph 95 above).

1588 As regards the objection concerning the periodical circulation of price lists, there were, among the documents contained in that Box, in document 33.126/15096 — cited, in particular, in recital 16, paragraph 8(i), of the contested decision — only the following particulars on Belgian and Netherlands prices:

'The prices sent on to Cembureau are exclusive of VAT and without rebate. Each country has a different price structure, prices may be ex-works, delivered to the site or delivered at the station, by road, by waterway, etc.

— Belgium

Photocopies of the prices from 1984 to 1986 — more price increases after 1986

System of prices (full control until 1986, public price list sent on to Cembureau)

Confirmation over telephone of prices once a year

...

— Netherlands

Photocopies of the prices from 1984 to 1986

System of prices (practically free since 1985)

ENCI's public price list.'

1589 Finally, it is not disputed that annex 2a to Cembureau's reply to the SO, on which the Commission relies in recital 16, paragraph 17, and recital 47, paragraph 8, of the contested decision in concluding in Article 2(2)(a) that the periodical information which circulated between Cembureau and its members related, so far as concerned Luxembourg, to the 'Luxembourg producer's prices, inclusive of rebates' was not sent by the Commission to the addressees of the SO in the course of the administrative procedure (see paragraph 401 above).

1590 As regards the objection concerning regular circulation of price lists, there were, among the documents contained in the Box, in document 33.126/15096, mentioned in paragraph 1588 above, only the following particulars on Luxembourg prices:

'The prices sent on to Cembureau are exclusive of VAT and without rebate. Each country has a different price structure, prices may be ex-works, delivered to the site or delivered at the station, by road, by waterway, etc.

— Luxembourg

Photocopies of the prices from 1984 to 1986 (last price change received)

System of prices (control)

Prices communicated by Ciments Luxembourgeois, the only cement producer.'

1591 The Court must therefore uphold the arguments put forward by VNC, SFIC, Aalborg and Irish Cement claiming that their rights of defence were infringed inasmuch as Article 2(2)(a) of the contested decision finds that the periodical circulation of information between Cembureau and its members related, so far as concerned the Belgian and Netherlands prices, to '[those two countries'] producers' minimum prices for supplies of cement by lorry' and, so far as concerns Luxembourg, '[that country's] producer's prices, inclusive of rebates'.

1592 As regards infringement of essential procedural requirements, the Court finds of its own motion (*Interhotel* v *Commission*, cited in paragraph 487 above, paragraph 14) that the rights of defence of the other applicants referred to in Article 2(2) of the contested decision were also infringed.

1593 It follows that Article 2(2)(a) of the contested decision must be annulled in so far as it finds that the periodical circulation of information between Cembureau and its members related, so far as concerned Belgian and Netherlands prices, to '[their] producers' minimum prices for supplies of cement by lorry' and, so far as concerns Luxembourg, '[its] producer's prices, inclusive of rebates'. Such annulment does not however affect the finding — which is not contested by the applicants — that information on Belgian, Dutch and Luxembourg prices circulated between Cembureau and its members during the period in question.

1594 Cembureau (T-26/95) criticises generally the lack of precision in the arguments in the SO dealing with the periodic exchanges of price information. It submits that the very detailed analysis of the price information set out in recital 16, paragraphs 8 to 22, of the contested decision did not appear in the SO, which contained only a general account of Cembureau's practices regarding the circulation of information on prices lists.

1595 VNC (T-32/95) and BCA (T-54/95) assert that the objection upheld in Article 2(2) of the contested decision is an entirely new objection. BCA states that The Facts in the SO included only a brief description of the system of regular circulation of price information in force at Cembureau level (SO, pp. 14 and 15) and that the Legal Assessment in the SO contained only general references to the circulation of the price lists (SO, pp. 168 to 170).

1596 In this connection, it should be observed that, although the SO must clearly set forth the facts on which the Commission relies and its legal classification of them, that may be done summarily and the decision is not necessarily required to be a replica of the statement of objections (see *Musique Diffusion Française* v *Commission*, cited in paragraph 439 above, paragraph 14).

1597 In the present case, it has already been pointed out (see paragraph 1585) that point 8 of the SO (Chapter 2, pp. 14 and 15) gave a general description of the system for circulating prices in force at Cembureau level, setting out several observations, as well as final remarks, contained in Cembureau's note accompanying the documents sent to the Commission in response to a request for information concerning the periodical circulation of price lists (documents 33.126/15096 and 15097). That note, which was referred to in the SO and was in the Box (see paragraph 95 above), contains (see document 33.126/15096) a succinct country-by-country description of the type of price information provided by Cembureau for distribution to its members during the period under consideration.

1598 In point 60 of the SO (pp. 168 and 169) the Commission explained how, in its view, 'Cembureau and its members' had infringed Article 85(1) of the Treaty, 'from 1983 at least', by participating in a system of periodic exchanges of price information: first, that system was intended to 'to provide information on the conduct of Cembureau members in the various countries and thus to allow the "rules of fair competition" to be complied with'; secondly, its objective was 'to get Cembureau members to reduce price differences between the various countries so as to remove or reduce the temptation to export to the other members' markets'.

1599 Without prejudice to the conclusions arrived at in paragraph 1593 above with regard to the findings in Article 2(2)(a) concerning the periodical circulation of information on Benelux prices, Cembureau, VNC and BCA were thus able to realise, in the light of the various passages of the SO, that the Commission was alleging that they had participated in the infringement ultimately upheld in Article 2(2) of the contested decision. The additional particulars provided by the Commission in recital 16, paragraphs 11 to 16 and 19 to 21, which led it, in Article 2(2)(b), to group the information exchanged on the 'non-Benelux' countries' prices under three categories — that is, 'individual price-lists' (for Denmark and Ireland, countries which at the time had only one national producer), 'trade price-lists' (for Greece, Italy and Portugal) and 'average prices' (for Germany, France, Spain and the United Kingdom) — cannot be held to be an infringement by the Commission of the rights of the defence during the administrative procedure. Those particulars do no more than substantiate evidence which, for the most part, was already apparent from document 33.126/15096 — referred to in paragraph 1588 above. Moreover, they did not increase the gravity of the objection set forth in the SO relating to the periodical circulation of price lists within Cembureau, unlike in the case of the additional details provided by the Commission in the contested decision regarding information on Benelux prices (see paragraph 1584 above).

1600 The arguments put forward by Cembureau, VNC and BCA must therefore be rejected.

1601 In its reply, Aalborg also argues that the objection in respect of the periodic exchanges of price information was reformulated in the contested decision, inasmuch as, in the decision, the Commission claims that those periodic exchanges were intended to enable alignment of prices for exports which would have taken place notwithstanding the Cembureau agreement, whereas in the SO (point 60) the Commission interpreted those exchanges as an infringement that was closely linked to the rules of fair competition. Unicem (T-50/95) claims that in the SO (point 60, third paragraph) the circulation of price lists was considered to be the subject of a separate agreement or concerted practice, intended to set up coordination between the participants and to impose conditions that differed from normal market conditions, whereas in the contested decision (recital 47) the exchange of price lists was described as a supplementary agreement designed to facilitate the Cembureau agreement. Unicem considers it was unable to refute, during the administrative procedure, that 'facilitation' of the Cembureau agreement.

1602 The Court points out first of all that according to Article 2(2) of the contested decision, the periodic exchanges of price information were held contrary to Article 85(1) of the Treaty inasmuch as they were allegedly 'designed to facilitate the implementation of the [Cembureau] agreement'. It is therefore necessary to ascertain whether it was sufficiently clear from the SO that it was that particular anti-competitive purpose that was being complained of.

1603 In point 59 of the SO (Chapter 10, p. 168), the Commission stated, with regard to the various 'agreements and practices described in Chapter 2 — Section 1 and Section 2 [of the SO]':

> 'Within the framework of and through Cembureau, the European cement producers agreed on plans, arrangements and measures, adopted under Cembureau's institutional structure and within the framework of a system of meetings and continuous bilateral and multilateral contacts promoted by the Cembureau institutions, designed to ensure non-encroachment on respective home markets, the sharing of markets in accordance with quotas or target volumes or temporary measures designed to regulate and control sales volumes, and the exchange of information on prices and exports and imports so as to enable them to coordinate their action more effectively.'

1604 In the legal assessment of 'the "rules of fair competition" and the circulation of price lists', the Commission explained — as pointed out above (see paragraph 1598) — that the circulation of price lists was intended, in its view, not only to provide information on the conduct of Cembureau members in the various countries and thus to allow the rules of fair competition to be complied with, but also 'to get Cembureau members to reduce price differences between the various countries so as to remove or reduce the temptation to export to the other members' markets' (SO, point 60, first paragraph, p. 168).

1605 On reading those various passages of the SO, Aalborg and Unicem were in a position to take cognizance of the fact that the Commission was objecting to the system of periodic exchanges of price information between Cembureau members, not only because this had the result of artificially changing the competitive conditions on the market or of imposing fair competition rules, but also because it was intended to get the Cembureau members to reduce price differences and, consequently, the temptation to export, in short, to ensure compliance with the Cembureau agreement.

1606 The arguments put forward by Aalborg and Unicem must therefore be rejected.

B — Identification of the information referred to in Article 2(2)(b) of the contested decision

1607 Cembureau (T-26/95) and Italcementi (T-65/95) claim that, in Italy, determination of cement prices was subject to the approval of the public authorities until 1993, rather than 1985, as the Commission states in recital 16 of the contested decision.

1608 The Court finds, however, that the Commission does not claim in the contested decision that Italian cement prices were liberalised from 1985. It only observes (recital 16, paragraph 16) that, from December 1985, the system of price controls was replaced by 'supervisory arrangements, under which each undertaking, on the basis of the cost trend survey carried out by the CIP amongst a number of producers, submits to the relevant Ministry the price list which it intend[ed] to apply, on which the Ministry [had to] reach a decision within 30 days'.

1609 In any event, neither Cembureau's nor Italcementi's assertions are of such a nature as to invalidate the conclusion drawn by the Commission, in Article 2(2)(b) of the contested decision, from the analysis set out in recital 16, paragraph 16, thereof, namely that the system of periodic exchanges of price information in force at Cembureau level related, so far as Italian prices were concerned, to 'trade price lists'.

1610 SFIC (T-36/95) claims that it only transmitted average price lists to Cembureau, not individualised data on French producers' actual prices. Those average prices were drawn up on the basis of price lists sent by its members, so that they cannot be described as 'average prices', contrary to what the Commission states in Article 2(2) of the contested decision.

1611 It must, however, be held that the Commission does not allege in the contested decision that the information on French prices which circulated between Cembureau members, was individualised data. In Article 2(2)(b) it finds only that information was circulated on 'average prices charged in ... France'. In recital 47, paragraph 14, third subparagraph, it points out that 'the price averages sent for ... France ... did not include any identification of producers'. Nor does it submit that the information on the French market related to real prices actually charged by the domestic producers.

1612 Moreover, the various documents referred to in recital 16, paragraph 12, in order to illustrate the kind of information which was circulated at Cembureau level in respect of the French market (documents 33.126/15096, 15170 to 15182 and 15230 to 15243) all use the word 'prices', which nullifies the argument put forward by SFIC grounded on the distinction which it claims the Commission should have drawn in the present case between 'prices' and 'price lists'.

1613 The Commission was therefore justified in finding, in Article 2(2)(b), that the system of periodical circulation of price information in force at Cembureau level related, so far as concerns France, to 'average prices charged' on that market.

1614 Irish Cement (T-60/95) considers that the information on Ireland, as described in recital 16, paragraph 15, of the contested decision, does not convey the real nature of the information sent to Cembureau, since the description contains the words 'minimum' and 'maximum', which do not feature in the actual information sent (see document 33.126/15122, cited in recital 16, paragraph 15).

1615 It should, however, be pointed out that, according to document 33.126/15122 referred to in the preceding paragraph, the following information was sent on 8 July 1985 by Irish Cement to Cembureau:

'The following are cement prices from 8 July 1985

...

Bagged:

ordinary portland cement — from ...
— to ...

...'

1616 The Commission cannot reasonably be accused of having distorted the real nature of the information sent by Irish Cement to Cembureau on the ground that it states in recital 16, paragraph 15, that 'judging from the example supplied by Cembureau, Irish Cement provided price data for: ... bagged ordinary Portland cement from ... (minimum) to ... (maximum)'.

1617 In any event, Irish Cement's argument is not of such a nature as to invalidate the analysis which led the Commission to find, in Article 2(2)(b) of the contested decision, that the periodical circulation of price information organised at Cembureau level related, so far as concerned Ireland, to 'the Irish producer's individual price-lists'.

1618 AGCI (T-103/95) denies having distributed 'market price lists' or 'price lists', as the Commission claims in recital 47, paragraphs 13 and 15, of the contested decision. At the hearing it stated that by that argument it meant that the data on prices which it had provided to Cembureau during the period under consideration had never contained confidential commercial information.

1619 That argument, which seeks to deny that there was any significant value in the price information circulated on Greek prices at Cembureau level, will be considered below in paragraphs 1622 to 1647. At this stage it need only be observed that the Commission does not claim in the contested decision that the periodical circulation of information on prices in force at Cembureau level concerned, so far as concerns the Greek market, confidential commercial information. It states (recital 47, paragraph 14, second indent) that, 'as regards ... Greece ... the price lists transmitted [were] those approved by the public authorities and relate[d] to the entire trade in each country', a finding which leads it to conclude, in Article 2(2)(b) of the contested decision, that the periodical circulation of price information between Cembureau members related, so far as concerned Greece, to 'trade price lists'. AGCI's argument is not of such a nature as to invalidate that finding.

C — The unlawful nature of the periodic exchanges of price information

1620 In Article 2(2) of the contested decision, the Commission objects to the system of periodical circulation of prices set up at Cembureau level because it was the result of 'concerted practices designed to facilitate the implementation of the [Cembureau] agreement'.

1621 The applicants referred to in Article 2(2) of the contested decision put forward, in substance, eight arguments to contest that the periodic exchanges of price information were unlawful.

1622 First, those applicants put forward a series of arguments emphasising the total absence of commercial, confidential or strategic value of the price information circulated between them during the period under consideration or, at least, of the value of the information relating to the prices applicable in their own markets.

1623 The applicants claim that the information in question was official data in the public domain or at least obtainable from other sources and was always distributed by Cembureau to its members after the entry into force of the prices communicated, on the occasion of annual updates. It is clear from the description in recital 16, paragraphs 8 to 22, of the contested decision that much of that information concerned prices subject to State control or supervision or, as in the case of the United Kingdom, prices set under market agreements whose legality was acknowledged. The information in the CPRF (see paragraph 401 above) consisted of historical and statistical data, collected as part of the normal activity of trade associations or approved State organisations. That information was unreliable, approximate and incomplete, since it related to 'price lists' or 'averages' of price lists and covered only a limited range of cement types. The data were difficult to compare, bearing in mind the enormous heterogeneity of the price mechanisms and the currency fluctuations which affect any international analysis. The information was globalised and no more than a 'trend indicator' which made no reference to VAT rates, rebates, transport costs or conditions of sales, and did not individualise undertakings or give a breakdown by regional markets of the country concerned or by production area of the domestic operators. In no case did the exchanges complained of reveal the actual prices charged on the market. AGCI, for its part, believes that it was conceivable that the information contained in Cembureau's CPRF was inaccurate. It points to the wide discrepancy between the official information on export volumes provided by Cembureau to its members and the Eurostat documents.

1624 The applicants claim that not only were the periodic exchanges of information on prices not as such contrary to Article 85(1) of the Treaty, but they were not capable of nor intended to serve either of the anti-competitive purposes which the Commission ascribes to them in the contested decision, namely of ensuring compliance with the Cembureau agreement and compliance with the rules on fair competition in intra-Cembureau exports. At the very least, the Commission adduced no evidence to substantiate its accusations. Cembureau adds that the CPRF's data

could have provided useful information on another undertaking's intention to break the home-market rule only if it had contained details on factors such as transport costs, excess capacity, the ability to acquire a position in the export markets, the ability to comply with local legislation and an assessment of the likelihood of possible retaliatory measures. AGCI, for its part, disputes the Commission's argument that the regular circulation of prices at Cembureau level would enable the producers to align their export prices with prices charged by the local price leaders; it states that the setting of export prices also depended on the particular method of international maritime trading, and on the existence, at the time, of exchange controls.

1625 Cembureau, FIC, SFIC, BCA, Oficemen and ATIC state that, as the Commission itself observes in recital 47, paragraph 13, of the contested decision, the information system at issue existed long before the adoption of the Cembureau agreement, which makes it impossible to take the view that the periodic exchanges referred to in Article 2(2) were intended to ensure or facilitate the implementation of that agreement. BCA considers that, before it came to the conclusion that from 1984 the system was intended to facilitate the implementation of the Cembureau agreement, the Commission should at least have shown that, from 1984, the date taken as the starting point of the infringement referred to in Article 2(2), a change had taken place in the way that system operated.

1626 Cembureau, BCA, Oficemen, Irish Cement, ATIC and AGCI maintain that, in actual fact, the periodic exchanges in question served a number of perfectly lawful ends, such as the dissemination of statistical studies to the public, the State and industrial authorities, performance of technical, academic and economic analyses in order, for example, to assess the competitive position of the cement industry by comparison with other industries producing construction materials, or to show general trends in cement prices in Europe with a view to supporting requests for price increases lodged with the relevant public authorities by industries in markets subject to a system of price control or supervision.

1627 Cembureau, FIC and Cementir also claim that the contested decision is vitiated by failure to provide an adequate statement of reasons concerning the allegedly unlawful nature of the periodic exchanges of price information found in Article 2(2). Cembureau and Cementir thus criticise the Commission for not having explained in what way the periodic exchanges of general and historic information could have constituted a measure which was supplementary to the Cembureau agreement. FIC states that, since the evidence referred to in recital 17 with regard to 'discussions on "fair or healthy or correct"' competition is not used against it and the Commission had no intention of drawing any legal conclusions from it, the Commission could not legitimately use them to underpin its argument as to the unlawful nature of the periodic exchanges of price information

1628 On that question, the Court points out first that the price information circulated via the CPRF was not as neutral as the applicants make out.

1629 Thus, as the Commission rightly states in recital 47, paragraph 14, first indent, of the contested decision:

'The price lists for Denmark and Ireland relate to individual undertakings [Aalborg and Irish Cement respectively, the only domestic producers on their market at the material time]. The claim that the information is not individualised is thus invalidated.'

1630 Moreover, although the CPRF information actually related only to applicable price lists, the fact remains that, as the Commission rightly points out in recital 16, paragraph 8(i), of the contested decision, certain members sometimes sent to Cembureau notification of changes to the price list before they took effect. In those circumstances, in view of the regularity with which the price data was updated (see documents submitted by Cembureau to the Commission; documents 33.126/15098 to 15305), the arguments of the applicants seeking to reduce the value of the information exchanged to that of purely statistical or historical interest cannot be upheld.

1631 Finally, according to a note from Cembureau to the Commission (contested decision, recital 16, paragraph 22; document 33.126/15097), although 'the price structures and cement types chosen as references by each country were so different that all the comparisons which have been carried out have proved erroneous', '[a] cement producer who was familiar with the standards and with the costs of transport [could] of course make use of such prices'. Thus, the information contained in the CPRF could be profitably exploited by those in the trade, even though, according to Cembureau, they were inadequate for international comparisons.

1632 The argument put forward by AGCI based on a comparison between Cembureau and Eurostat documents (see paragraph 1623 above) must be rejected, since it is based on mere suspicions arising from a comparison between sources of information which relate to volumes of exports rather than to prices; it is not supported by the slightest concrete evidence.

1633 In any event, it should be recalled that although in its legal assessment, the Commission distinguishes between the exchanges of information on Benelux prices (contested decision, recital 47(b)(i)) — exchanges which, in its view (recital 47, paragraph 10), related to 'information which is particularly likely to influence their competitive behaviour vis-à-vis the Belgian, Dutch and Luxembourg producers' — and exchanges of information on other

countries' prices (contested decision, recital 47(b)(ii)) — exchanges which, in its view (recital 47, paragraph 13), were 'less serious' —, all those periodic exchanges are, in the end, held to be unlawful in Article 2(2) on the ground that they were part of the framework for the Cembureau agreement, whose implementation they facilitated.

1634 The Court must therefore ascertain whether or not those periodic exchanges were motivated by the anti-competitive object which the Commission attributes to them in the contested decision, irrespective of whether the intrinsic nature of the information thus exchanged could, by itself, have rendered unlawful the system by which they were periodically circulated.

1635 So far as concerns the alleged object of the periodic exchanges of price information, a comparison between the operative part and the legal assessment of the contested decision shows the same discrepancy as that pointed out in paragraphs 1512 and 1513 above with regard to the specific exchanges of price information at Cembureau meetings.

1636 Although in Article 2(2) the Commission finds those exchanges to be contrary to Article 85(1) of the Treaty because they are designed 'to facilitate the implementation of the [Cembureau] agreement', in the legal assessment of those exchanges in recital 47(b) it attributes a twofold objective to them:

— 'implementing the agreement on non-transhipment to home markets and on the regulation of sales from one country to another' (recital 47, paragraph 13; see also recital 47, paragraph 15)

— 'prompting compliance [or getting competitors to comply] with the rules of fair competition in [or for] intra-Cembureau exports' (recital 47, paragraphs 10 and 13).

1637 For the reasons set out in paragraph 1513 above, that discrepancy is however of no significance.

1638 It is therefore necessary only to examine, in the light of the terms of Article 2(2), whether the Commission was justified in finding the concerted practices relating to the periodical circulation of information on prices in Cembureau countries to be anti-competitive, on the ground that they were intended 'to facilitate the implementation of the [Cembureau] agreement'. It is

pointless to examine the arguments of the applicants to the effect that such periodic exchanges of price lists were neither capable of nor intended to encourage compliance with the rules of fair competition for exports between Cembureau members.

1639 In recital 47, paragraph 13, second and third subparagraphs, of the contested decision, the Commission sets out the reasons which led it to consider that, from 1984, the object of the periodic exchanges of price information was to facilitate the implementation of the Cembureau agreement:

'... Even if the exchange of information began in 1981, the Commission cannot in its assessment ignore the fact that the exchange of information continued after the discussions at the Head Delegates meetings (see recitals 16, 17 and 19) and that it is a suitable means of implementing the agreement on non-transhipment to home markets and on the regulation of sales from one country to another ...

As pointed out in paragraph 1 above, the discussions at the meetings of Head Delegates related essentially to the need to avoid the risks of any increase in imports, to check the causes of conflicts and to reduce price differences so as to prevent any temptation to export.'

1640 The fact that, on the one hand, periodic exchanges of price information continued after the Head Delegates meetings at which the Cembureau agreement was adopted and price differentials between the various member countries were discussed, and that, on the other, those exchanges were such as to ensure the implementation of that agreement therefore means, in the Commission's opinion, that as from that time they intended to implement that agreement.

1641 So far as concerns the temporal aspect, it is not disputed that the periodic exchanges of price information took place after the Head Delegates meetings of 1983 and 1984, at least until the end of 1988 (see, in particular, documents 33.126/15066 and 15096, cited in recital 16, paragraphs 8 and 9, of the contested decision).

1642 As regards whether those periodic exchanges were capable of ensuring implementation of the Cembureau agreement, the CPRF 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. Simple knowledge of official or average prices in force on the market in question, which the system of periodic exchanges of information organised by the CPRF offered for each Cembureau member country, sufficed for those in the trade in order to pitch their export prices at a sufficient

deterrent level in order to comply with the Cembureau agreement, without the need to have detailed knowledge of the prices actually charged on the various markets by local producers.

1643 Furthermore, even though, according to Cembureau, 'the price structures and cement types chosen as references by each country were so different that all the comparisons which have been carried out have proved erroneous' (contested decision, recital 16, paragraph 22; document 33.126/15097), the CPRF were undeniably a good indicator of trends in the price differences between the various member countries of Cembureau which the Head Delegates, at their meetings of 14 January 1984 and 19 March 1984, had considered 'desirable gradually to reduce' in order to eliminate the 'temptation' to export (memorandum to the Chairman for the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 9, and recital 47, paragraph 1; document 33.126/11728).

1644 In those circumstances, the Commission was right to consider that, with effect from the Head Delegates meetings referred to in recital 19 of the contested decision, one of the objectives assigned to the system for the periodic exchanges of price information had been to ensure the implementation of the Cembureau agreement adopted at those meetings. The fact that the system had been in place well before the adoption of the Cembureau agreement did not preclude the Commission from finding — without the need to show that a change had taken place in the way that system functioned — that, from the moment when the Cembureau agreement had been adopted, one of the functions of such periodic exchanges of price information was to facilitate the implementation of that agreement. The Commission was thus justified in finding that from that time the system of periodic exchanges of price information had taken over and subsequently extended the anti-competitive object pursued by the discussions which took place during the Head Delegates meetings of 14 January 1983 and 19 March 1984 on 'the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices' (Chairman's draft introductory statement for the Head Delegates meeting held on 14 January 1983; contested decision, recital 19, paragraph 5; document 33.126/11584), on the 'pressure from inter-member trade' (notes of the Head Delegates meeting of 19 March 1984; contested decision, recital 19, paragraph 10; document 33.126/11736), and by the specific exchanges of price information at those two meetings.

1645 The validity of that assessment is borne out by a document included among those cited by the Commission in recital 16 of the contested decision in order to illustrate the circulation of price information between Cembureau members.

1646 The table headed 'Domestic prices (exclusive of tax)' distributed at the Head Delegates meeting of 14 January 1983 (contested decision, recital 16, paragraph 5; document 33.126/11599) refers to 'Prices listed Cement Price Reference File'. The data contained in the CPRF were thus used in compiling that document, which served as an aid for the discussions during that meeting which sought to 'assess the risks entailed by an increase in certain imports coupled with a sharp reduction in certain prices, before this phenomenon has had time to spread in extent and gravity' (Chairman's draft introductory statement for the Head Delegates meeting held on

14 January 1983; contested decision, recital 19, paragraph 5; document 33.126/11585). It is thus clear from that table that the data in the CPRF were employed for the anti-competitive object of the discussions which took place, in particular with regard to prices, at the Cembureau Head Delegates meetings on the subject of the intra-European trade situation.

1647 In conclusion, the Commission, having given adequate reasons, was entitled to find in Article 2(2) of the contested decision that the periodic exchanges of price information on various Cembureau member countries were designed 'to facilitate the implementation of the [Cembureau] agreement'.

1648 Secondly, Aalborg complains that the Commission did not express a view on the arguments, submitted by Aalborg during the administrative procedure, that its prices had been subject to supervision by the Danish competition authorities until 1989 and that the prices sent to Cembureau had previously been approved by those authorities and had been published.

1649 The Court points out, first of all, that in recital 16, paragraph 11, of the contested decision, the Commission reproduces the extract from Aalborg's reply to the SO (p. 13, footnote 2) in which Aalborg explains:

'The prices of Aalborg have until 1989 been subject to advance approval by the Monopoly Control Authorities, and revised price lists have been sent to Cembureau after approval and publication in Denmark.'

1650 In recital 47, paragraph 14, second indent, of the contested decision, it expresses a view on the observations made by 'some undertakings' during the administrative procedure to the effect that 'the distribution of such price information [could not] have [had] any influence on the market, since the information [concerned] ... the price lists approved by the authorities'.

1651 It also explains, with regard to the Italian, Greek and Portuguese price lists which were also subject to State control at the time that:

'... even though it is public, [the undertakings] felt it necessary to send the information and to have it circulated. If the undertakings deemed it necessary to have the price lists for the trade in their country circulated, the reason is that such circulation of information was relevant to the

discussions at the Head Delegates meetings, discussions which, as stated in paragraph 1 above, related to the need to avoid the risks entailed by an increase in imports, to identify the causes of conflicts and to reduce price differences so as to avoid any temptation to export'.

1652 The view thus expressed applies necessarily also to Aalborg's price lists which, clearly, were not included with the Greek, Italian and Portuguese price lists because, unlike the latter lists, they concerned the individual price lists of the only Danish undertaking, which the Commission took into consideration under a different head (contested decision, recital 47, paragraph 14, first indent), rather than the price lists of 'the entire trade in that country' (recital 47, paragraph 14, second indent).

1653 Aalborg's argument must therefore be rejected.

1654 Thirdly, BCA submits that, although the changes to the price list were notified by the CMF to Cembureau on 8 May 1985, undoubtedly before the entry into force of that increase on 1 June 1985 (contested decision, recital 16, paragraphs 8(i) and 21; document 33.126/15117), that increase had been announced in the press on 6 March 1985, as is shown by documents 33.126/15118 and 15119, referred to in recital 16, paragraph 8(i), of the contested decision. BCA further complains that the Commission failed to fulfil its obligation to state reasons since it failed to explain why it had not taken account of facts put forward by BCA during the administrative procedure, namely that prices notified to Cembureau by the United Kingdom association were public and easily obtainable.

1655 The Court finds that documents 33.126/15118 and 15119 do in fact show that the changes made to the price list in the United Kingdom on 1 June 1985 and notified to Cembureau by the CMF on 8 May 1985 had been announced by CMF in the press on 6 March 1985.

1656 Moreover, in its reply to the SO (point 53, p. 35), BCA pointed out:

'Since the Common Price and Marketing Agreement (the CPMA) was registered under the Restrictive Trade Practices Act (having been examined by the United Kingdom Restrictive Practices Court) the current price schedules prevailing under the CPMA (in addition to the CPMA itself) were available for public inspection during business hours at the offices of the Office of Fair Trading, the UK competition authority. All price changes made under the CPMA were registered promptly with the Office of Fair Trading and were also open to public inspection.'

1657 If those statements had been taken into consideration by the Commission, they would at the very most have led it to alter its assessment, in recital 47, paragraph 14, third subparagraph, of the contested decision, of the characteristics of the 'price averages sent for ... the United Kingdom'. They would not however have led it to reverse the factual findings set forth in recital 47, paragraph 13, following which it rightly concludes (see paragraphs 1639 to 1647 above), in Article 2(2) of the contested decision, that the periodic exchanges of price information on the various Cembureau member countries were designed, from 1984, to facilitate the implementation of the Cembureau agreement.

1658 Fourthly, Cembureau and Irish Cement claim that the Commission misunderstood the significance of the remark recorded in document 33.126/15097 and reproduced in recital 16, paragraph 22, of the contested decision, which Cembureau made in its note accompanying the documents sent to the Commission on the periodic circulation of price information. Cembureau claims that all it had intended to point out was that a producer who knew the special features of his market was likely to make greater use of the information in the CPRF than an undertaking operating in another market without specific knowledge of that market, as is always the case where statistical information is concerned. In Irish Cement's view, the fact that Cembureau stated, in the note in question, that 'a cement producer who [was] familiar with the standards and with the costs of transport [could] of course make use of such prices' does not, contrary to what the Commission maintains in recital 47, paragraph 15, second subparagraph, of the contested decision, mean that the price lists exchanged often allowed a perfect comparison of prices in various countries. In actual fact, Cembureau sought at most to explain that the comparisons made were erroneous because of the wide divergence between the price structures and cement types chosen as a reference by the various Cembureau members.

1659 It must, however, be stated that neither Cembureau nor Irish Cement dispute that, according to the note in question, the prices provided by the CPRF for each market could be used by the cement producers of the various Cembureau member countries. The interpretations of that note put forward by those two applicants are thus not of such a nature as to invalidate the analysis set forth in paragraphs 1639 to 1647 above as to the validity of the Commission's assessment, in recital 47, paragraph 13, of the contested decision, of the anti-competitive purpose assigned to the periodic exchanges of price information as from the Head Delegates meetings of 1983 and 1984.

1660 With regard to that note, BDZ also maintains that the Commission cannot rely, against it, on Cembureau's statement that 'a cement producer who [was] familiar with the standards and with the costs of transport [could] of course make use of such prices' (contested decision, recital 16, paragraph 22, and recital 47, paragraph 15; document 33.126/15097). The note did not concern German average prices, calculated and regularly published by the German National Statistical Office.

1661 It should, however, be observed that the extract in question refers without distinction to all the price information described in the document preceding it (document 33.126/15096), which includes information on German average prices.

1662 In any event, BDZ's contention is not of such as nature as to invalidate the analysis set forth in paragraphs 1639 to 1647 above as to the correctness of the assessment made by the Commission in recital 47, paragraph 13, of the contested decision regarding the anti-competitive purpose of the periodic exchanges of information on prices in the Cembureau member countries, including the distribution of German average prices, after the Head Delegates meetings of 1983 and 1984.

1663 BDZ's argument must, therefore, be rejected.

1664 Fifthly, Cembureau submits, in its reply, that the Commission, by stating in its defence that it objected to the exchanges of price information at Cembureau level not because they related to commercially confidential information but because they were intended to facilitate the implementation of the Cembureau agreement, contradicts the wording of its order in Article 8 of the contested decision. ATIC considers for its part that Article 8 reveals the error committed by the Commission in its assessment of the nature of the price information referred to in Article 2(2), inasmuch as it enjoins the undertakings to bring to an end 'any exchange of confidential commercial information designed to monitor the performance of any express or tacit agreement or any concerted practice involving the sharing of markets in the Community'.

1665 It should be pointed out that in Article 8 the Commission orders the 'undertakings specified in Articles 1 to 7 ... forthwith [to] bring the infringements referred to in those Articles to an end (if they have not already done so) and ... henceforth [to] refrain, in relation to the markets for grey cement and white cement, from any agreement or concerted practice which may have the same or similar object, including any exchange of confidential commercial information designed to monitor the performance of any express or tacit agreement or any concerted practice involving the sharing of markets in the Community'. That order, a general one, applies to the whole of the conduct found in Articles 1 to 7 of the contested decision. No definitive conclusion may therefore be drawn from Article 8 as regards the Commission's assessment of the nature of the various kinds of price information referred to in Article 2(2).

1666 In any event, whatever interpretation or argument might be submitted on that point on the basis of Article 8, the periodic exchanges of price information referred to in Article 2(2) were found to be unlawful because they were intended to facilitate the implementation of the Cembureau agreement, an anti-competitive object which was in fact proved by the Commission (see paragraphs 1639 to 1647 above).

1667 The arguments put forward by Cembureau and ATIC must therefore be rejected.

1668 Sixthly, Cembureau complains that the Commission did not provide any evidence that the periodic exchanges of price information had been used in order to align prices or to ensure the implementation of the Cembureau agreement. Italcementi considers that, by failing to prove that its conduct had actually been influenced by the periodic exchanges of price information at Cembureau level, the Commission failed to show the material factor distinguishing a concerted practice from an agreement, namely the existence of anti-competitive conduct on the part of the undertaking concerned. AGCI maintains that the periodic exchanges of price information relating to the various Cembureau countries never hindered intra-Community movements of Greek cement, even when the Greek industry considerably increased its exports to the Community markets following the collapse of its traditional export markets.

1669 Those arguments, which assert the lack of proof of market conduct corresponding to the concerted action which took place and lack of restriction on trade, must be rejected since they are based on a misconception of the requirements for proving a concerted practice within the meaning of Article 85(1) of the Treaty.

1670 As is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to that concerted practice, and a relationship of cause and effect between the two (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 118, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 161).

1671 However, subject to proof to the contrary, which it was for the parties concerned to adduce, it must be held that the price information exchanged periodically at Cembureau level influenced the market conduct of the direct and indirect members of Cembureau. That is all the more so since the concerted action in question took place on a regular basis over a long period and the direct and indirect members of Cembureau remained active on the market during that period (see, to that effect, the judgments cited in *Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

1672 Moreover, concerted practices such as those found in this case fall within the scope of Article 85(1) of the Treaty, even in the absence of anti-competitive effects on the market.

1673 First, it follows from the actual wording of that provision that concerted practices are prohibited, regardless of their effect, where they have an anti-competitive object, as they do in the present case (see paragraphs 1639 to 1647 above).

1674 Next, although the very concept of a concerted practice presupposes conduct on the market, it does not necessarily mean that that conduct should have the specific effect of restricting, preventing or distorting competition (*Commission* v *Anic*, cited in paragraph 270 above, paragraphs 122 to 124, *Hüls* v *Commission*, cited in paragraph 155 above, paragraphs 163 to 165, and *Montecatini* v *Commission*, cited in paragraph 270 above, paragraphs 123 to 125).

1675 As regards the anti-competitive effects of those periodic exchanges of price information, Aalborg maintains that the Commission infringed Article 190 of the Treaty by failing to explain in what way the concerted practices found in Article 2(2) of the contested decision appreciably affected trade between Member States.

1676 That argument must be rejected for reasons analogous to those set out in paragraph 1536 above.

1677 Seventhly, SFIC claims that the Commission contradicts itself when it states, on the one hand, that the exchanges of information on minimum prices between Belgian, Dutch and Luxembourg producers were the result of concerted practices intended to facilitate the implementation of the Cembureau agreement (contested decision, recital 47(b) and Article 2(2)) and, on the other, that Ciments Luxembourgeois did not introduce any measures to implement that agreement (contested decision, recital 65, paragraph 9(b)).

1678 The Court finds, however, that SFIC's observation is not of such a nature as to invalidate the factual findings on which the Commission relied in recital 47, paragraph 13, of the contested decision in concluding, in Article 2(2), that from 1984 the periodic exchanges of price information relating to the Benelux countries which took place between Cembureau and its members, including SFIC, were intended, just like the periodical circulation of information on the prices in the markets of Cembureau's other European members, to facilitate the implementation of the Cembureau agreement.

1679 SFIC's argument must therefore be rejected.

1680 Eighthly, Unicem, referring to Case T-34/92 *Fiatagri and New Holland Ford* v *Commission* [1994] ECR II-905, paragraph 91, maintains that in a non-oligopolistic market such as the

cement market the exchanges of information referred to in Article 2(2) of the contested decision, in actual fact, had a positive effect on competition.

1681 However, it must be observed that the description of the cement market put forward by Unicem, unsupported by any reasons, is refuted by the Commission's analysis in recital 12, in particular paragraphs 3 and 5, of the contested decision, concerning the nature of supply on the cement market, an analysis which the Italian undertaking does not even attempt to refute.

1682 In any event, Unicem's claim is not of such a nature as to invalidate the analysis set forth in paragraphs 1639 to 1647 above as to the correctness of the assessment made by the Commission in recital 47, paragraph 13, of the contested decision regarding the anti-competitive purpose of the periodic exchanges of price information from 1984 onwards.

D — The participation of the applicants in the infringement referred to in Article 2(2) of the contested decision

1683 Cembureau and the following direct members, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, Unicem, BCA, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI, are alleged to have committed the infringement referred to in Article 2(2) of the contested decision.

1684 In the first place, as regards Aalborg (T-44/95), it should be recalled that, for the reasons set out in paragraph 368 above, documents 33.126/15096 to 15305, cited by the Commission in recital 16, paragraphs 8 to 22, of the contested decision, may not be used against it. Moreover, as has already been stated (paragraph 401 above), the extracts from the replies of FIC and Irish Cement to the SO, cited at recital 16, paragraphs 10 and 15 respectively, may not be used against Aalborg. It must therefore be ascertained whether, in the absence of those items of evidence, Aalborg's participation in the infringement referred to in Article 2(2) is established.

1685 First of all, as has already been pointed out (see paragraph 1597 above) document 33.126/15096, referred to in the SO and sent to the parties in the course of the administrative procedure, contains the succinct description, made by Cembureau in its note to the Commission accompanying documents on the periodic exchanges of price information, of what price information was provided by the European members of Cembureau (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom) during the period 1984 to 1989, with a brief mention of the price system in force at the time in each of those countries.

1686 So far as concerns specifically Denmark — Aalborg's country of origin — as well as Belgium and Ireland — the countries of origin of FIC and Irish Cement respectively — the document states as follows:

'— Belgium

Photocopies of the prices from 1984 to 1986 — more price increases after 1986

System of prices (full control until 1986, public price list sent on to Cembureau)

Confirmation over telephone of prices once a year

— Denmark

Photocopies of the prices from 1984 to 1989 — Prices communicated by Aalborg, sole producer

System of prices (control)

Prices changes approximately once a year, ordinary cement prices supplied to Cembureau

— Ireland

Photocopies of the prices for 1985 (no price changes since then, and nothing in 1984)

System of prices (practically free since 1986).'

1687 In document 33.126/15097, large parts of which were reproduced in the SO (see paragraph 1585 above), and which was also sent to the parties in the course of the administrative procedure, Cembureau states as follows:

'We generally communicate prices only to our members. External requests always originate from companies or consultants offices wishing to carry out price comparisons. Unfortunately, the price structures and cement types chosen as references by each country are so different that all the comparisons which have been carried out have proved erroneous. A cement producer who is familiar with the standards and with the costs of transport can of course make use of such prices. However, we never carry out this work for our members.'

1688 Finally, in connection with the objection raised against the periodic exchanges of price information at Cembureau level, there was also, among the documents sent in the Box (see paragraph 95 above) to the addressees of the SO, document 33.126/15066, cited at recital 16, paragraph 9, of the contested decision. That document, which accompanied the documents sent by Cembureau to the Commission, dealing in particular with the periodic exchanges of prices, in response to its request for information, states among other things: 'Please find attached, in Annex 3, all the documents which we have been able to find concerning the information on domestic cement prices, received from our associates and passed on to our associates from 1984 to the end of 1989.'

1689 The three abovementioned documents, 33.126/15096, 15097 and 15066, thus prove that Aalborg participated both actively (communicating information) and passively (receiving information) in the periodic exchanges of information on prices applicable in the Cembureau member countries throughout the period covered by Article 2(2) of the contested decision.

1690 The anti-competitive purpose of those exchanges was proved by the Commission on the basis of the factual findings set out in recital 47, paragraph 13, of the contested decision (see paragraph 1639 above). Since Aalborg participated, as the Danish Head Delegate, in the Head Delegates meetings of 14 January 1983 and 19 March 1984, those findings must be upheld in regard to it.

1691 It is clear from the foregoing that, without prejudice to the conclusions arrived at in paragraph 1593 above with regard to the findings in Article 2(2)(a) concerning the periodic exchanges of price information on the Benelux countries, Aalborg's participation in the infringement referred to in Article 2(2) is proven, notwithstanding the fact that the evidence mentioned in paragraph 1684 above may not be used against it.

1692 Secondly, BDZ (T-48/95) claims never to have sent to its members — who allegedly never asked it to do so — information gathered on the prices applicable on the markets of the other Cembureau member countries; the information was of no commercial interest whatsoever.

1693 However, it should be observed that, even supposing that that claim were true, it does not alter the fact that BDZ participated both actively (communicating information on the average German prices (contested decision, recital 16, paragraph 13; documents 33.126/15096 and 15161 to 15167)) and passively (receiving information on the prices applicable in the other Cembureau member countries) in the periodic exchanges of information on prices.

1694 BDZ's argument must therefore be rejected.

1695 Thirdly, Unicem (T-50/95) maintains that, since it did not participate in the Cembureau agreement, it cannot be accused of having sought to 'facilitate' the implementation of that agreement by way of an exchange of information.

1696 It should be recalled that according to Article 2(2) of the contested decision, the participation of Cembureau and of its direct members to whom the decision was sent, including Unicem, in the concerted practices relating to the periodic exchanges of price information is held contrary to Article 85(1) of the Treaty inasmuch as it sought to facilitate the implementation of the Cembureau agreement.

1697 It is not disputed that Unicem did not attend the Head Delegates meetings of 1983 and 1984, at which the Cembureau agreement was adopted (see paragraph 1406 above). It is therefore not certain that on 1 January 1984, the date taken as the start of the infringement referred to in Article 2(2), it had already acceded to that agreement.

1698 On the other hand, as will be seen below (paragraphs 4243 to 4247), Unicem's accession to the Cembureau agreement is established as from 9 September 1986. As from that date, Unicem must have participated in the periodic exchanges of price information referred to in Article 2(2), motivated by a desire to see the Cembureau agreement applied. It therefore participated in the infringement as from 9 September 1986.

1699 In conclusion, Article 2(2) of the contested decision must be annulled in so far as it finds that Unicem participated, before 9 September 1986, in concerted practices involving the periodic

exchanges of information on prices in the Cembureau member countries intended to facilitate the implementation of the Cembureau agreement.

1700 Unicem also observes that the Associazione Italiana Tecnico Economica del Cemento ('AITEC'), which collected and forwarded to Cembureau information relating to the Italian market, was not accused of having committed an infringement relating to the periodic exchanges of price information. Accordingly, it claims that there is no reason to hold it liable for that infringement either. Unicem adds that such a breach of the principle of equal treatment also affected its rights of defence in that it was allegedly forced to defend itself on its own in respect of conduct which involved other parties possessing information essential for the conduct of that defence.

1701 None the less, the fact that AITEC was not charged with the infringement found in Article 2(2) of the contested decision cannot absolve Unicem of its liability for that infringement, provided that it is properly established (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 146).

1702 Moreover, the fact that AITEC was not held responsible for the infringement relating to the periodic exchanges of price information did not preclude Unicem from obtaining access, for example, through that association, to documents which might have supported its defence during the course of the administrative procedure.

1703 Unicem's arguments must therefore be rejected.

1704 Fourthly, BCA (T-54/95) claims that it has not been proven that it asked its members for, or received from them, any price information or that it helped to forward such information to Cembureau.

1705 It should be pointed out, however, that the documents concerning the information exchange system at issue include in particular a letter of 8 May 1985, whereby the CMF informed Cembureau of the changes to the price lists which were to enter into force in the United Kingdom on 1 June 1985 (contested decision, recital 16, paragraph 21; documents 33.126/15115 and 15116). Next, Cembureau, in its note to the Commission accompanying the abovementioned documents, states, with regard to the United Kingdom: 'We have not received any official communication of prices since 1985' (contested decision, recital 16, paragraph 21; document 33.126/15096). By contrary inference, that statement means that until 1985 the United Kingdom member of Cembureau, at that time the CMF, officially communicated to Cembureau the prices applicable on its market.

1706 All those various factors therefore show the active participation of the CMF in the periodic exchanges of price information organised at Cembureau level. Subject to examination of BCA's argument contesting the duration of its participation in the infringement for which it is held liable in Article 2(2) of the contested decision (see paragraphs 1743 to 1747 below), it must be held that the Commission was justified in finding that BCA, as successor to the CMF (see paragraphs 1337 to 1341 below), participated in that infringement.

1707 Fifthly, Oficemen (T-59/95) maintains that the sending by the Belgian, Dutch and Luxembourg producers of information on their prices to Oficemen and, through it, to the Spanish producers cannot be deemed to constitute a concerted practice contrary to Article 85(1) of the Treaty, since the Spanish producers were not actual or potential competitors of the Benelux producers. Irish Cement (T-60/95) and Italcementi (T-65/95) submit that the information on the Benelux countries' prices never had any particular value for them at a competitive level, since they had never exported to those countries or even contemplated doing so. Irish Cement criticises, in this regard, the reference made by the Commission to the judgment in Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 213 to 220, in footnote 215 to the contested decision when it alleged that Irish Cement had participated, together with other undertakings and associations, in a concerted practice relating to the periodic exchanges of price information on the Benelux countries (recital 47, paragraph 12). It states that the Commission did not seek to ascertain whether its participation in the alleged infringement was liable to restrict competition.

1708 The Court points out first of all that, although the applicants claim that they — or, in the case of Oficemen, its members — were neither actual nor potential competitors of the producers in the Benelux countries, they do not argue that they were neither actual nor potential competitors of producers from other markets about whose prices information was circulated through the CPRF. The information exchanged via the CPRF could thus have been useful to Oficemen and its members, to Irish Cement and to Italcementi from the point of view of observing the Cembureau agreement vis-à-vis those other markets.

1709 In any event, the claims made by Oficemen, Irish Cement and Italcementi are not of such a nature as to conceal the fact that they participated both actively and passively in the periodic exchanges of information on prices nor to refute the findings of fact on which the Commission relied in recital 47, paragraph 13, of the contested decision in concluding that, following the Head Delegates meetings of 1983 and 1984, the system of periodic exchanges of price information at Cembureau level was intended, as regards Cembureau and its members, including Oficemen, Irish Cement and Italcementi, to facilitate the implementation of the Cembureau agreement, findings which are corroborated by the analysis in paragraphs 1639 to 1647 above.

1710 The arguments put forward by Oficemen, Irish Cement and Italcementi must therefore be rejected.

1711 Sixthly, as regards Irish Cement (T-60/95) again, it should be recalled that, for the reasons set out in paragraph 401 above, Annex 2b to Cembureau's reply to the SO, cited in recital 16, paragraph 11, of the contested decision, and the extracts from the replies of FIC, Aalborg and BDZ to the SO, cited in recital 16, paragraphs 10, 11 and 13 of the contested decision respectively, constitute evidence which may not be used against it. The Court must therefore ascertain whether, in the absence of those items of evidence, Irish Cement's participation in the infringement referred to in Article 2(2) is established.

1712 The extract from FIC's reply to the SO, cited in recital 16, paragraph 10, of the contested decision, merely sets out the passage from Cembureau's note referred to in paragraph 1588 above (document 33.126/15096) — a memorandum which had been sent to the addressees of the SO during the administrative procedure and which is therefore admissible against Irish Cement — and which says that, so far as concerns Belgium, 'confirmation [was given] of prices by telephone once a year'.

1713 Annex 2b to Cembureau's reply to the SO is used by the Commission in recital 16, paragraph 11, of the contested decision in order to show that the prices sent to Cembureau by the Danish undertaking Aalborg (see documents 33.126/15183 to 15188 and 15244 to 15249) were then reproduced by Cembureau in the CPRF and sent out to all its members. The extract from Aalborg's reply to the SO, cited in the same place in the contested decision, explains that 'the prices of Aalborg have until 1989 been subject to advance approval by the Monopoly Control Authorities, and revised price lists have been sent to Cembureau after approval and publication in Denmark'. The fact that those two documents may not be used against Irish Cement does not preclude the finding following from reading document 33.126/15066 in conjunction with 15096 and 15097 — all of which may be used against Irish Cement for the reasons set out in paragraphs 1685, 1687 and 1688 above — namely that, so far as concerns Denmark, Cembureau had received from Aalborg, the 'sole producer' (document 33.126/15096), and then sent on to its 'members'/'associates' (documents 33.126/15066 and 15097), including Irish Cement, the 'ordinary cement prices' from '1984 to 1989' (document 33.126/15096).

1714 BDZ's reply to the SO, cited in recital 16, paragraph 13, of the contested decision merely confirms the information in the Cembureau note referred to in paragraph 1588 above, according to which 'the price average supplied to Cembureau by the German Association [was] the price average calculated by the German National Statistical Office' (document 33.126/15096).

1715 It is clear from the foregoing (paragraphs 1712 to 1714) that, without prejudice to the conclusions set out in paragraph 1593 above as to the findings in Article 2(2)(a) regarding the periodical circulation of price information on the Benelux countries, the fact that the various items of evidence referred to in paragraph 1711 above may not be used against Irish Cement does not preclude the finding that Irish Cement participated in the system of periodic exchanges

of information on prices, including Belgian prices, the 'Danish producer's individual price-lists' and the 'average prices charged in Germany' (Article 2(2)(b)).

1716 Seventhly, Italcementi (T-65/95) claims that AITEC did not receive any mandate from its members to communicate the data on Italian prices to Cembureau.

1717 The Court points out, however, that AITEC was not a member of Cembureau. It could not therefore have decided on its own initiative to pass on information on the Italian prices to Cembureau. As the Commission rightly points out in recital 16, paragraph 16, of the contested decision, AITEC was responsible for passing on that information to Cembureau 'on behalf of the Italian members of Cembureau', including Italcementi. Moreover, Italcementi does not deny having received, as a direct member of Cembureau, regular information on the prices in force in the other Cembureau member countries during the period under consideration. It is thus proved that Italcementi participated both actively and passively in the periodic exchanges of information on prices organised at Cembureau level.

1718 Italcementi's argument must therefore be rejected.

1719 Eighthly, Italcementi (T-65/95) and Cementir (T-87/95) deny that they participated in the concerted practices referred to in Article 2(2) of the contested decision, on the ground that, since prices are subject to control on their market, the information gathered on prices in the other Cembureau member countries could not have influenced their commercial conduct. AGCI (T-103/95) submits that, on account of the system of price controls in force at the time in Greece, it was impossible for its members to align their prices on those of local producers so as to ensure application of the home-market rule.

1720 That argument cannot be accepted.

1721 First of all, it is common ground that the systems of price controls in force in Greece and in Italy during the period under consideration related only to domestic prices and excluded export prices. Information on the prices received from the various Cembureau member countries were therefore of interest to both the Greek and the Italian undertakings which, in the event of an order from customers based abroad, had available, in the shape of the CPRF, a useful reference tool to enable them to adapt their export prices with a view to complying with the Cembureau agreement.

1722 Next, the existence of a system of State control of prices in Greece and Italy did not preclude the cement industries of those countries from contributing, in accordance with the wish expressed at the Head Delegates meetings of 14 January 1983 and 19 March 1984, to the gradual reduction of the gap between the prices of the various Cembureau member countries by taking into account the general trends identified in the CPRF when requesting price increases from their public authorities.

1723 Ninthly, the three Italian producers Unicem (T-50/95), Italcementi (T-65/95) and Cementir (T-87/95) deny that their participation in the periodic exchanges of price information could have had an anti-competitive nature linked to compliance with the Cembureau agreement, since they did not export to the other Community markets.

1724 That argument cannot be accepted.

1725 First of all, the alleged absence of export activities by those Italian cement producers in the Community may be explained, at least in part, by their concern to respect the home markets of the other Cembureau members, in accordance with what had been agreed at the Head Delegates meetings of 1983 and 1984. The information exchanged on the prices applicable in the various Cembureau member countries could thus be of interest to the Italian producers who, faced with possible orders from customers from other Community markets, had available, through such information, the necessary data to align their export prices with a view to complying with the Cembureau agreement.

1726 In any event, even supposing that the Italian cement producers did not export at that time, and whatever the reasons for that decision, those producers did have an interest in making known to the other Cembureau members the prices applicable on their market, so that any foreign competitors could take into account that information in order to comply with the Cembureau agreement with regard to the Italian market.

1727 Next, the fact that, at a given time, undertakings adopting conduct restrictive of competition did not have any interest in intra-Community trade does not support the conclusion that the conduct in question was not likely to affect trade between States, given that the situation may vary from one year to the next as changes in the conditions or composition of the market occur, both in the common market as a whole and in the various national markets (see Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 14, and *AEG* v *Commission*, cited in paragraph 364 above, paragraph 60).

1728 Tenth, AGCI (T-103/95) explains that, because of the abnormally low prices on its market, the Greek industry had not felt any need to protect itself against possible imports or to respect any market-sharing rule. It adds that the conduct of its members throughout the period in question did not make it possible to assert that, as far as they were concerned, the purpose of the periodic exchanges of price information had been to promote the application of the home-market rule. Prior to 1985 the Greek industry had not been interested in the Community markets. After 1985, driven by its economic interests, it exported massively to the Community markets, in defiance of the home-market rule.

1729 In this regard, the Court points out, first of all, that only the direct members of Cembureau to whom the contested decision is addressed are accused of the infringement referred to in Article 2(2). As regards the Greek market, AGCI was thus alone in being charged with that infringement; its member undertakings were not.

1730 In those circumstances, the conduct adopted by the Greek undertakings with regard to the Community markets during the period covered by Article 2(2) cannot be taken into consideration when assessing whether AGCI did in fact participate in the infringement in question.

1731 So far as concerns specifically that participation, it must be observed that, after having taken part in the Head Delegates meetings of 1983 and 1984, AGCI continued to participate actively throughout that period in the periodic exchanges of price information by sending 'all the price changes for three types of cement' (contested decision, recital 16, paragraph 14; documents 33126/15291 to 15305) — see also Cembureau's note accompanying the documents sent to the Commission on those periodic exchanges, which states in respect of Greece: 'Photocopies for prices from 1984 to 1989' (contested decision, recital 16, paragraph 8; document 33.126/15096). In so doing, it helped to highlight the gap between the prices of the various member countries which it had been deemed desirable, at those Head Delegates meetings, to reduce gradually in order to prevent any temptation to export. Its participation in the infringement referred to in Article 2(2) of the contested decision is thus proved.

1732 AGCI's arguments must accordingly be rejected.

1733 AGCI further criticises the Commission for not having drawn a distinction in the operative part of the contested decision (Article 2(2)) between the associations which were members of Cembureau, according to the gravity of the exchanges of price information in which they participated (Benelux countries — other markets), when such a distinction had been made in the legal assessment (contested decision, recital 47, paragraphs 6 to 15).

1734 In the light of the conclusions arrived at in paragraph 1593 above, there is no longer any need to examine that argument.

1735 Finally, AGCI complains that the Commission did not take into consideration the means used by the various members of Cembureau to transmit price information. In this connection, it points out that from 1987 SFIC transmitted its information to Cembureau only by telephone, refusing moreover to have it published in Cembureau's official documents (contested decision, recital 16, paragraph 12; document 33.126/15096). In AGCI's view, such a decision revealed that SFIC no longer intended to transmit information on the prices applicable on its market to certain members of Cembureau, including AGCI, in view of their or their members' activities on the French market.

1736 It must be stated that AGCI's line of argument is contradicted by the contents of the document to which it specifically refers. Although it is true that as from 1987, France 'no longer [wanted] to see these prices published in the Cembureau documents', the fact remains that 'they [could] be communicated by telephone to the Members' (contested decision, recital 16, paragraph 12; document 33.126/15096).

1737 In any event, the fact that SFIC refused, as from 1987, to see information which it provided on French price lists published in Cembureau's documents does not make it possible to rule out AGCI's participation, both active and passive, in the periodic exchanges of price information throughout the whole period under consideration. Nor does it undermine the analysis set forth in paragraphs 1639 to 1647 above as to the correctness of the assessment made by the Commission in recital 47, paragraph 13, of the contested decision on the anti-competitive purpose pursued by Cembureau and its members, including AGCI, through those exchanges of price information, with effect from the Head Delegates meetings of 1983 and 1984.

E — The duration of the infringement referred to in Article 2(2) of the contested decision

1738 On the basis of the documents supplied by Cembureau on the periodic exchanges of price information, the Commission considers that those exchanges lasted 'at least from 1 January 1984 to 31 December 1988' (contested decision, recital 47, paragraphs 12 and 15). In Article 2(2) it therefore finds that there was an infringement between those two dates relating to periodic exchanges of price information committed by Cembureau and its various direct members to which the contested decision was sent, apart from Oficemen and ATIC, Spanish and Portuguese direct members, in respect of which it takes the infringement into account only as from 1 January 1986, for the reasons set out in recital 45, paragraph 11, and recital 46, paragraph 3, of the contested decision.

1739 Unicem (T-50/95) points out that in the note referred to in paragraph 1588 above, Cembureau states that it was provided with no information from Italy for 1987 and 1988 (document 33.126/15096). In the case of Unicem, the infringement found in Article 2(2) of the contested decision could not therefore have continued until 31 December 1988.

1740 The Court points out that the note in question, cited in recital 16, paragraph 8, of the contested decision, states with regard to Italy: 'Photocopies of the prices from 1984 to 1986 (no price changes up to 1989, 1989 prices communicated by telephone)'. It is clear from this that the communication of the Italian prices to Cembureau continued beyond the date adopted by the Commission as marking the end of the infringement referred to in Article 2(2).

1741 Furthermore, Unicem does not deny having received, as a direct member of Cembureau, the information provided on the prices applicable in the other Cembureau member countries, at least until 31 December 1988.

1742 On those grounds, Unicem's arguments must be rejected.

1743 BCA (T-54/95) points out that, as may be seen from Cembureau's note, referred to in paragraph 1588 above, neither the CMF nor itself sent price list information to Cembureau after 1985. BCA considers that the Commission failed to fulfil its obligation under Article 190 of the Treaty to provide reasons, as it did not explain in the contested decision how, after having noted that the CMF had ceased to provide price information to Cembureau after 1985, and failing evidence of transmission of such information by the BCA to Cembureau at any time, it could conclude that the CMF and BCA had participated in unlawful concerted practices involving the exchange of prices without interruption throughout the period under consideration.

1744 So far as concerns the alleged failure to provide reasons, it is nevertheless clear from recital 47(b) of the contested decision, which deals with the legal assessment of the facts relating to the periodical circulation of price information, that in Article 2(2) the Commission intended to find as an infringement not only active participation in such periodic exchanges through the supply of information on prices to Cembureau, but, more widely, involvement with the system of periodic information organised at Cembureau level, even if such involvement was restricted to receiving information on the other markets.

1745 On the merits, the Court finds the fact of having remained involved in the system of periodic exchanges of price information during the period under consideration was sufficient proof of participation in the infringement found in Article 2(2) throughout that period. The periodic receipt of information on prices applicable in the various Cembureau member countries

brought data which could be used to ensure application of the Cembureau agreement in cases of orders from potential foreign customers and/or to seek to reduce gradually the various price levels applicable on the European market, in accordance with the wish expressed by the Head Delegates at their meetings of 14 January 1983 and 19 March 1984.

1746 However, in this case, although Cembureau stated in its note, mentioned in paragraph 1588 above, with regard to the United Kingdom, that it had 'not received any official communication of prices since 85' (contested decision, recital 16, paragraph 21; document 33.126/15096), it is nevertheless the case that the CMF, and then BCA, remained involved, as members of Cembureau, in the system for the periodic exchanges of information throughout the duration of the infringement found in Article 2(2). They thus continued to benefit, and to allow their members to benefit, at least until 31 December 1988, from the information on the prices applicable on the various markets of the Cembureau member countries, which could be used to comply with the Cembureau agreement.

1747 BCA's argument must therefore be rejected.

1748 The participation of Italcementi (T-65/95) in the Head Delegates meeting of 14 January 1983 has not been established (see paragraphs 1347 to 1349 above). Moreover, as will be held below (paragraph 4224), there is no evidence, such as evidence showing that Italcementi participated in a measure implementing the Cembureau agreement, to prove that it had acceded to that agreement before taking part in the Head Delegates meeting of 19 March 1984, at which the agreement was confirmed.

1749 Since the periodic exchanges of price information were found to be infringements in Article 2(2) of the contested decision in that they had been designed to facilitate the implementation of the Cembureau agreement, the Commission had no basis for finding that Italcementi participated in the infringement in question before 19 March 1984.

1750 It follows that Article 2(2) of the contested decision must be annulled in so far as it finds that Italcementi participated in the concerted practices involving the periodic exchanges of price information before 19 March 1984.

1751 Cementir (T-87/95) complains that no reasons whatsoever are given in the contested decision as regards the duration of the infringement relating to the periodic exchanges of price information.

1752 It should none the less be observed that, so far as concerns the periodic exchanges of information on prices in the Benelux countries, the Commission states (contested decision, recital 47, paragraph 12):

'According to the price information supplied by Cembureau, covering the period 1984 to 1988 for these countries (doc. 33126/15096), this infringement lasted at least from 1 January 1984 to 31 December 1988.'

1753 As for the periodic exchanges relating to the prices of the other Cembureau member countries, it states (contested decision, recital 47, paragraph 15):

'In the context described above, the circulation of information on price lists, an arrangement which according to the documents available was engaged in at least from 1984 to 1988, constituted, from 1 January 1984 to 31 December 1988, a concerted practice between Cembureau and its members, identified in paragraph 5 above.'

1754 Those statements constitute an adequate statement of reasons with regard to the duration of the concerted practices found in Article 2(2).

1755 Cementir's argument must therefore be rejected.

Access to the file

1756 Cembureau (T-26/95), FIC (T-30/95), VNC (T-32/95), SFIC (T-36/95), Aalborg (T-44/95), Unicem (T-50/95), Irish Cement (T-60/95), ATIC (T-63/95), Italcementi (T-65/95) and Cementir (T-87/95) put forward a series of observations based on documents which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 regarding access to the file (see paragraphs 164 and 168 above). They sought to show that, by granting them only limited access to the SO and to its investigation file during the administrative procedure, the Commission infringed their rights of defence when it found the infringements alleged in Article 2 of the contested decision, since they did not have access to exculpatory documents.

1757 Those parties put forward essentially eight arguments to that effect.

1758 First, they all claim that several of the documents to which they were given access following the abovementioned measures of organisation of procedure would have enabled them to show that, because of their general and approximate nature, the price information which was exchanged specifically and periodically at Cembureau level was of no commercial value or use, and that they could not have pursued the anti-competitive object alleged in the contested decision.

1759 Cembureau also states, in its observations of 10 February 1997, that the documents relating to price information included in the national files corroborate its argument that the information distributed through the CPRF was of an average statistical nature incapable of facilitating any price alignment or market-sharing agreements. Those documents also enabled it to substantiate its argument that it was difficult to draw market price comparisons between the various European countries, different types and qualities of cement and between different methods of delivery.

1760 Cembureau refers in this connection to a letter, in the file on France, which had been sent to it by SFIC on 27 November 1986 and which provides information on prices for four categories of cement following increases applied between 1 July and 1 November 1986 (document 33.126/14938). According to Cembureau, the prices mentioned in that document, like those appearing in documents 33.126/15026, 15029, 15040 to 15051, were average prices. If its purpose in disseminating that information had been to enable the producers of various countries to align their prices, it would have been necessary to send them a range of prices rather than a weighted average. Cembureau further states that SFIC had price data that was much more detailed than that which it sent to Cembureau, but that data was only sent to the French authorities to enable them to monitor trends in the national economy. Cembureau also states that a letter of 25 November 1986 from the CMF to the OFT (see paragraph 1147 above), found in the United Kingdom file, attests to the difficulties encountered in attempting to compare prices between Member States (documents 33.126/17641 to 17654).

1761 In its observations of 28 November 1997, it submits that the documents to which it was able to obtain access following the measure of 18 and 19 June 1997 demonstrate that there were a great variety of factors, such as transport costs, rebates, product specifications and sale conditions, which had a significant and varying impact on the pricing of cement, from one Member State to another, and even from one producer to another within a single State. To illustrate the extent to which transport costs can vary, it refers to documents 33.126/14536 (list of transport rates for a French producer) and 17905 to 17917 ('Typical example of internal haulage rates per tonne from Castle Ketton works for 1989 by various load sizes'). In support of its claims in relation to the great diversity in commercial policies on rebates and discounts, it relies on documents 33.126/4982/54 to 70 (note from a French producer on its 'commercial policy'), 17881 to 17886 ('Castle Cement Limited specific terms — 1990'), 11221 to 11223 (internal Blue Circle memorandum of 12 April 1989 entitled 'Cement Pricing', a letter of 15 December 1988 from Blue Circle to RMC concerning 'BCC price and rebate proposals to RMC 1 January 1989 to 31 December 1989') and 17436 to 17438 (documents from Rugby on 'Quantity rebate scales 1990', 'Merchant rebates' and 'Off-invoice discounts'). In support of its arguments on the differences in technical specifications, it refers to documents 33.322/1410 to 1412 (minutes of a meeting of 6 March 1987 between Spanish and Portuguese cement

producers) and 33.126/17623 to 17625 (draft letter of 6 September 1985 from the CMF to the OFT). In order to show the great diversity in conditions of sale, it submits documents 33.126/17368 to 17431 (documents from Rugby between 1985 and 1990 showing the prices set for a variety of cement products), 17888 and 17889 (letter of 10 May 1985 from Ribble Cement containing 'cement prices in Great-Britain') and 4853 ('factory price list for February 1988' of a French producer). Cembureau claims that, if it had had access to those documents during the administrative procedure, it would have been able to use them in support of the arguments it put forward in its defence to the effect that the data exchanged between its members through its offices, specifically (for the Head Delegates meetings) and periodically (through the CPRF), could not reasonably have had the object or effect of serving the anti-competitive objectives alleged in the SO and in recital 47 of the contested decision, since they did not contain the many elements involved in fixing actual prices to customers.

1762 FIC states, in its observations of 10 February 1997, that certain documents of the United Kingdom file confirm that the exchange of statistics at Cembureau level had concerned general data, with no commercial significance or value, so that there was nothing reprehensible about it. It relies, in that regard, on the minutes of the CMF meeting of 2 October 1985 (documents 33.126/17092 to 17098), which sets out the criticisms made by the chairman of Cembureau of its members for their unequal contribution to the statistics exchanged for the 'Cembureau European Annual Review'. It makes reference not only to documents 33.126/17623 to 17625 and 17641 to 17653, mentioned in paragraphs 1760 and 1761 above, but also to a letter of 22 September 1986 from the OFT to the CMF (documents 33.126/17635 to 17638). Those various documents are claimed to illustrate the anodyne and approximate nature of the data exchanged through Cembureau. The documents relating to the SO's chapter on France (see in particular document 33.126/14938, referred to in paragraph 1760 above) also confirms the lack of commercial importance of the statistical exchange organised by Cembureau and the approximate nature of the data provided by its members, including SFIC.

1763 In its observations of 10 February 1997, VNC illustrates its arguments in that respect by reference to documents 33.126/14938, 17623, 17635 to 17637 and 17641 to 17653, referred to in paragraphs 1760, 1761 and 1762 above.

1764 In its observations of 7 January 1998, SFIC relies on an extract from the minutes of the sixth meeting of the CLC on 7 July 1977 (documents 33.126/2545 to 2548), and on the minutes of the 'Pricing Working Party' meeting of 26 July 1978 (documents 33.126/2591 to 2609) to show the wide diversity in cement prices among the nine Community Member States at that time.

1765 Aalborg, in its observations of 12 January 1998, points to a series of documents which it claims show that many factors of major significance in the setting of cement prices were not included in the information on prices distributed through Cembureau. It thus mentions not only documents 33.126/4853, 11221 to 11223, 17436 to 17438 and 17881 to 17886, referred to in paragraph 1761 above, but also Lafarge documents (documents 33.126/4850 to 4852) as well

as correspondence between Blue Circle and its customer RMC (documents 33.126/11224 to 11241), in order to show the influence of rebates on the setting of prices, and their confidential and personal nature in relation to each customer. It goes on to cite documents 33.126/17905 to 17917, mentioned in paragraph 1761 above, a CBR memorandum from 1981 (documents 33.126/7555 and 7556), a Lafarge study (documents 33.126/4869 to 4910), a draft letter of 21 June 1983 from the NCH company to the Commission (documents 33.126/5038 to 5051), as well as a letter of 6 October 1986 from Blue Circle to the OFT (documents 33.126/11119 to 11121) in order to show the relative importance of transport costs in the make-up of cement prices. Finally, it relies on documents 33.126/17624, 17625 and 17641 to 17653, mentioned in paragraphs 1760 and 1761 above, and on the abovementioned letter of 6 October 1986 from Blue Circle to the OFT, in order to illustrate the fact that the differences in technical specifications made price comparisons between member countries uncertain. Aalborg further points out that, according to document 33.126/15170, the indications of the French prices were approximate, 'ex-works excluding taxes' and covered by the following warning: 'These are approximate average values — any comparison with previously published prices is unreliable and no significance attaches to any price differential between categories.'

1766 Unicem puts forward, in its observations of 28 November 1997, a series of documents intended to show that the data on prices distributed through Cembureau were neither reliable, comparable nor useful for anti-competitive commercial purposes, since they did not contain, nor could they contain, any indication of transport costs, rebates, product quality and terms of sales and delivery, variables which are essential for assessing the actual sales prices applied.

1767 It shows the significance and the variability of:

— transport costs in setting cement prices, relying on documents 33.126/5038 to 5051, 11119, 17905 to 17917 et 4869 to 4910, mentioned in paragraphs 1761 and 1765, as well as documents 33.126/9659, 8155, 9672, 9673 and 4994 to 5000;

— rebates, relying on documents 33.126/4982, 11221 to 11241 and 17437, mentioned in paragraphs 1761 and 1765;

— the quality of the product, relying on documents 33.126/17624, 17625 and 17641 to 17646, mentioned in paragraphs 1760 and 1761;

— conditions of sales and delivery, referring to documents 33.126/4850 and 4853, mentioned in paragraphs 1761 and 1765.

1768 In its observations of 5 January 1998, Irish Cement puts forward documents 33.126/14536, 17905 to 17917, 17881 to 17886, 11221 to 11223, 17436 to 17438, 17888 and 17889, mentioned in paragraph 1761 above, in order to illustrate the fact that a large variety of factors, such as product specifications, credit conditions, delivery costs and discounts have a considerable influence on the setting of cement prices in the various countries.

1769 ATIC states, in its observations of 10 February 1997, that the rare references to the exchanges of information in the national chapters of the SO and in the documents in the national files make it clear that the information transmitted between the national associations and Cembureau were anodyne. It refers to point 52 of the SO, contained in the chapter on Greece, to a letter of 10 July 1990 from AGCI to Cembureau (documents 33.126/19395 to 19397), to a letter of 12 October 1989 from AITEC to its members (documents 33.126/12051 and 12052), and to the letter of 27 November 1986 from SFIC to Cembureau (document 33.126/14938), mentioned in paragraph 1760 above.

1770 Italcementi submits, in its observations of 10 February 1997, that, in the national files, there were a number of documents which would have enabled it, during the administrative procedure, to support its argument that the statistical data disseminated through Cembureau was overall information of a general nature, relating in every case to the past, rather than individualised data on each and every undertaking. In particular, it would have been better able to show that the information to which it had access at Cembureau level was totally devoid of any commercial usefulness, since it did not give any indication as to rebates or payment terms. It claims that documents 33.126/15026 and 15040 to 15051, mentioned in paragraph 1760 above, document 33.126/15025, and the letter of 27 November 1986 from SFIC to Cembureau (document 33.126/14938), mentioned in paragraph 1760 above, indicate that the information provided in respect of the French market consisted of approximate figures, and when sent to Cembureau was accompanied by the following warning: 'any comparison with previously published prices is unreliable and no significance attaches to any price differential between categories'. It refers also to the draft letter from the CMF to the OFT (documents 33.126/17624 and 17625), mentioned in paragraph 1761 above, containing a full explanation of the various factors which made it impossible to make any comparison of sales prices of cement in the various Member States. It also refers to the extract from the minutes of the CMF meeting of 2 October 1985 (document 33.126/17097) mentioned in paragraph 1762 above, relating to the statements of the Chairman of Cembureau complaining about the unequal contribution of the members to the exchanges of statistics for the 'Cembureau European Annual Review'.

1771 In its observations of 26 November 1997, Italcementi claims first that a Lafarge memorandum of 7 October 1986 (documents 33.126/4919 to 4921) shows just how little use was the information on prices collected through Cembureau: 'Subject: Cement prices in Europe. The

enclosed table brings together the information collected in respect of each country by the most reliable means. In the absence of more precise information, those are the figures published by Cembureau.' Documents 33.126/17370 to 17374, mentioned in paragraph 1761 above, indicate that because of various factors prices in a single company could vary widely according to the customer or the sales area. Document 33.126/3826 shows, for its part, in the view of the applicant, that hundreds of pages were sometimes necessary to describe the pricing policy of a single company, which proves that the prices transmitted by Cembureau could not have favoured comparisons with anti-competitive objectives. Finally, documents 33.126/17396 to 17399, 14536 and 4853, mentioned in paragraph 1761 above, show that the extreme simplification of the data provided by Cembureau (no mention of essential elements such as VAT, transport costs, discounts and terms of sale) is in marked contrast to the complexity of the structure of the prices actually applied by each individual undertaking.

1772 Cementir refers, in its observations of 29 December 1997, to documents 33.126/4982/54 to 70, 4869 to 4910, 14536, 4850 to 4853 and 17905 to 17917, mentioned in paragraphs 1761 and 1765 above, document 33.126/17918, and to documents 33.126/4919, 4920, 4954 to 4982 and 3826, which it claims show that the prices of a single company could vary greatly, in particular according to the location of its factory or customer, rebates, transport costs, payment methods, type of packaging, services provided according to product type, distribution system, national and/or local taxes and charges, etc. The data provided by Cembureau, which did not include those various factors, would thus have been of no use in determining with precision what price was actually applied by the various cement producers.

1773 The Court points out, however, that the various elements put forward by the applicants all relate to arguments which were duly taken into account by the Commission in the contested decision. At recital 16, paragraph 22, the Commission sets out the extract included in the memorandum which Cembureau had sent with the documents on the circulation of price lists: 'Unfortunately, the price structures and cement types chosen as references by each country are so different that all the comparisons which have been carried out have proved erroneous' (document 33.126/15097). In recital 47(b)(ii), it expresses a view on the observations made during the course of the administrative procedure by the addressees of the SO which had argued that 'the distribution of ... market price lists, which generally [related] to current prices and not to future prices, [had] no effect on competition, or less effect than the direct exchange of price information between the undertakings' (recital 47, paragraph 13) and that 'the distribution of such price information [could not have had] any influence on the market, since the information is not individualised, giving in some cases the price lists approved by the authorities and in others price averages' (contested decision, recital 47, paragraph 14).

1774 With regard to Aalborg and Italcementi, it should be added that the particulars in documents 33.126/14938 and 15170 on French prices — documents which were mentioned in paragraphs 1765 and 1770 above — are set forth in full in recital 16, paragraph 12, of the contested decision.

1775 Despite those various arguments, the Commission was justified in concluding (see paragraphs 1515 to 1519 and 1639 to 1647 above), in the light of the factual findings in recital 47, paragraphs 1, 4 and 13, of the contested decision, that the specific and periodic exchanges of price information referred to in Article 2(1) and (2) were designed, contrary to Article 85(1) of the Treaty, 'to facilitate the implementation of the [Cembureau] agreement' (Article 2 of the contested decision).

1776 Any additional comments which the applicants could have made at the time in order to emphasise the general and approximate nature of the price information exchanged, specifically and periodically, at Cembureau level, could not therefore have had even a small chance of altering the outcome of the administrative procedure.

1777 Finally, document 33.126/15170, put forward by Aalborg, was accessible throughout the course of the administrative procedure (see paragraph 250 above). Aalborg could thus have used it to support its reply to the SO. In those circumstances, it cannot now rely upon it to prove that its rights of defence were infringed during the course of the administrative procedure.

1778 Secondly, Cembureau points out, in its observations of 10 February 1997, that a report of the CMF meeting of 11 February 1987 (documents 33.126/17203 to 17205) records the suspension, pending legal advice, of the transmission of price information by CMF to Cembureau in the light of the ending of the CPMA (see paragraph 91 above). It considers that, if it had been aware of that document during the course of the administrative procedure, it would have been justified in claiming that it was highly unlikely that the CMF (and its members) would consciously participate in illegal arrangements at European level, when it was taking such care to comply with competition law, both at Community and national level.

1779 However, the Court points out that, in recital 16, paragraph 21, of the contested decision, the Commission states that Cembureau had not received any official communication of prices via the CMF since 1985 and that it obtained prices from different sources which they communicated as an approximate estimate by telephone.

1780 Furthermore, any comments which Cembureau could have made during the course of the administrative procedure as to the alleged concern of the United Kingdom association to comply with competition law could not have hidden the fact that Cembureau was actively involved in specific and periodic exchanges of price information, which took place within it, or the fact that the United Kingdom association remained a member of the system for the periodic exchanges of price information throughout the period of the infringement referred to in Article 2(2).

1781 Any comments which Cembureau could have made on the basis of the documents mentioned in paragraph 1778 above could not therefore have had even a small chance of altering the outcome of the administrative procedure.

1782 Thirdly, Cembureau refers, in its observations of 10 February 1997, to documents from 1990 in the file on Greece (documents 33.126/19394 to 19401), concerning the sending of statistics by Titan to AGCI, and by AGCI to Cembureau, in which there is no price information.

1783 However, that document, if it could have been put forward by Cembureau during the administrative procedure, would not have been of such a nature as to invalidate the evidence contained in the bundle of documents referred to in recital 16 of the contested decision, which shows that there were specific and periodic exchanges of price information, including Greek price information, at Cembureau level during the period under consideration.

1784 Fourthly, SFIC claims, in its observations of 10 February 1997, that it would have been useful for its defence if it had had available to it, during the administrative procedure, various documents from the files on Portugal (documents 33.322/1019 and 1020, 1406 to 1408, and 1410 to 1412) and on Italy (documents 33.126/11919, 11990 and 11991, 11993, 11994 and 11995) which concern the system of price control for cement in force in those two countries at the material time. It claims that those documents would have enabled it to show that, like the price information which it transmitted to Cembureau, the information on price lists which it received from those two markets contained no sensitive data. In its observations of 7 January 1998, SFIC also claims that a document from the Blue Circle file (documents 33.126/11007 and 11008), relating to the CPMA, would have enabled it to support its argument on the rigidity of prices in Europe as a result of the State control to which they were subject in a number of Member States during the period under consideration.

1785 In its observations of 12 January 1998, Aalborg puts forward documents 33.126/15134 and 15135 in order to show that the Italian prices distributed via Cembureau had previously been published. It also produces document 33.126/15201 in support of its contention that the Portuguese prices were fixed by the State and were therefore totally transparent.

1786 It is however clear that the arguments put forward by SFIC and Aalborg concern matters already taken into account by the Commission in the contested decision.

1787 Thus, in recital 16, paragraph 16, the Commission explains that, during the period under consideration, prices in Italy were subject, first, to a control system and, subsequently, from the

end of 1985, to supervisory arrangements. It points out that until 30 November 1985 AITEC sent to Cembureau the Italian prices 'as authorised for the entire country by the public authority and officially published' and that although, from December 1985, prices were no longer officially published, 'each producer made it prices public' and 'an AITEC announcement [was] published in the specialised press'.

1788 In recital 16, paragraph 19, it notes that, in Portugal, prices were subject to the declared prices system up to 1987 and that, since then, they have been subject to the 'price agreement system'.

1789 In recital 16, paragraph 21, it points out that until February 1987 there existed a Common Price and Marketing Arrangement among the United Kingdom producers. Under that agreement, 'prices and terms of sale were decided on jointly and notified to the British authorities'.

1790 In recital 47(b)(i), the Commission expresses its view on the observations put forward during the course of the administrative procedure by some addressees of the SO, according to which 'the distribution of such price information [could not] have any influence on the market, since the information [was] not individualised, giving in some cases the price lists approved by the authorities and in others price averages' (contested decision, recital 47, paragraph 14). It again points out that, 'as regards Italy ... and Portugal, the price lists transmitted [were] those approved by the public authorities and [related] to the entire trade in each country' (recital 47, paragraph 14, second indent), and that 'the price averages sent for ... the United Kingdom did not include any identification of producers' (contested decision, recital 47, paragraph 14, third indent).

1791 The Court has already pointed out (see paragraph 1775 above) that despite those various arguments the Commission was justified in concluding (see paragraphs 1515 to 1519 and 1639 to 1647 above), in the light of the factual findings set forth in recital 47, paragraphs 1, 4 and 13, of the contested decision, that the specific and periodic exchanges of price information referred to in Article 2(1) and (2) were designed, contrary to Article 85(1) of the Treaty, 'to facilitate the implementation of the [Cembureau] agreement' (Article 2 of the contested decision).

1792 Any comments which SFIC and Aalborg could have submitted during the administrative procedure in order to illustrate the rigidity of the systems of price control and fixing in force in a number of Cembureau member countries during the period under consideration were therefore unlikely to have had even a small chance of altering the outcome of the administrative procedure.

1793 As regards Aalborg, it should be added that documents 33.126/15134, 15135 and 15201, which that applicant relies on in its observations of 12 January 1998 (see paragraph 1785

above), were accessible to it during the administrative procedure (see paragraph 250 above). Aalborg could thus have used them in support of its reply to the SO. In those circumstances, it cannot now rely upon them to prove that its rights of defence were infringed during the administrative procedure.

1794 For its part, ATIC maintains, in its observations of 10 February 1997, that had the documents referred to in paragraph 1769 above been made available to it during the administrative procedure, it would have been possible for it to strengthen its argument that the information which it had transmitted to Cembureau had not contained any confidential material and were not therefore of such a nature as to facilitate the adoption of conduct which restricted competition.

1795 However, none of the documents relied on by ATIC relate to the price information which it transmitted to Cembureau during the period under consideration. Accordingly, none of them would have enabled ATIC to emphasise the anodyne nature of the data which it had itself provided to Cembureau at that time.

1796 For its part, Cementir, without relying on any specific documents in support of its statements, submits, in its observations of 29 December 1997, that in many countries prices were subject to the control of the public authorities.

1797 That argument, which is not supported by any concrete evidence in the documents which Cementir was able to consult following the measures of 2 October 1996 and 18 and 19 June 1997, cannot be upheld in the context of the examination of a plea alleging infringement of rights of the defence because full access was not given to the SO and to the investigation file during the course of the administrative procedure. In any event, it cannot be upheld on the grounds set forth in paragraphs 1787 to 1792 above.

1798 Fifthly, SFIC, Aalborg, Unicem and Cementir claim that, if they had been given full access to the text of the SO and the investigation file during the administrative procedure, they would have been able to shed a different light on the objective pursued by the exchanges of price information referred to in Article 2 of the contested decision.

1799 In its observations of 7 January 1998, SFIC states that the two documents mentioned in paragraph 1764 above show that the information on prices gathered at Cembureau level was intended for the Commission, at its request.

1800 In its observations of 12 January 1998, Aalborg, relying principally on document 33.126/516, states that the documents to which it was given access following the measures of 2 October 1996 and 18 and 19 June 1997 attest to the fact that the exchanges of price information which took place at Cembureau level were fulfilling a classic task of a trade association, namely the drawing up of general statistics on prices designed to enable construction costs to be calculated or to support requests for price increases lodged by the industries with the price control authorities.

1801 In its observations of 28 November 1997, Unicem maintains that a thorough examination of the Commission's investigation file reveals that the frequency of the exchanges of data on prices at the time was at its highest around 1983, when the European cement producers studied, under the auspices of the Commission, the feasibility of the basing point pricing system; that proves that the exchanges of price information at Cembureau level were lawful. It refers specifically to documents 33.126/814 and 815.

1802 Cementir relies, in its observations of 29 December 1997, on documents 33.126/2167, 18081 and 18082, which it claims illustrate the existence in certain markets of price information exchange mechanisms which deprived the systems of exchanges of price information set up at Cembureau of any usefulness, or at least of any anti-competitive effect.

1803 The Court observes, however, that the various arguments put forward by those four applicants would not have enabled them to invalidate the factual findings on which the Commission justifiably relied (see paragraphs 1515 to 1519 and 1639 to 1647 above) in recital 47, paragraphs 1, 4 and 13, of the contested decision in order to conclude, first, that the object of the specific exchanges of price information of Cembureau member countries during the Head Delegates meetings of 14 January 1983 and 19 March 1984 was to facilitate the implementation of the Cembureau agreement and, secondly, that, as from 1 January 1984, the system of periodic exchanges of price information which existed at that time at Cembureau level was also designed to facilitate the implementation of that agreement.

1804 So far as concerns SFIC and Unicem, it should also be added that their allegations are not substantiated by any relevant document, since documents 33.126/2545 to 2548 and 2591 to 2609 and 33.126/814 and 815, relied on by SFIC (see paragraph 1799 above) and by Unicem (see paragraph 1801 above), respectively, go back to the 1977 to 1978 period, that is to say, to a period largely before the commencement dates of the infringements found in Article 2(1) (14 January 1983) and Article 2(2) (1 January 1984) of the contested decision.

1805 Sixthly, in its observations of 7 January 1998, SFIC refers to a document in the Ciments Français file (documents 33.126/4125 to 4127) which it claims proves that the information used by that company for the Belgian market was not the result of exchanges between FIC and itself, but came from the customs authorities. SFIC is of the view that that document would have been useful in its defence against the objection raised in respect of the exchange of statistics with FIC.

1806 The Court observes, however, that that document would not have been of such a nature as to invalidate the evidence contained in the bundle of documents referred to in recital 16 of the contested decision, which attest the existence, at Cembureau level, of specific and periodic exchanges of price information among Cembureau's direct members, including FIC and SFIC, the purpose of which was to facilitate implementation of the Cembureau agreement.

1807 For its part, ATIC maintains, in its observations of 10 February 1997, that none of the documents to which it had access following the measure of 2 October 1996 mentions the contacts it allegedly had with other national associations concerning exchanges of price information.

1808 However, even if such information were to have been adduced by ATIC during the administrative procedure, it would not have enabled it to invalidate the evidence contained in the bundle of documents referred to in recital 16 and, more particularly, in paragraph 19, of the contested decision, which proves its participation in the system of exchanges of price information organised at Cembureau level.

1809 Italcementi relies, in its observations of 10 February 1997, on a series of documents (documents 33.126/14810, 14811, 14814, 14818 to 14821, 14823, 14825, 14827, 14894, 14941 to 14955, 16383, 16386, 16548, 16601 to 16604, 16605 to 16608, 16618 to 16623, 14896 and 14897, and documents 33.322/1410 to 1412, 314 and 315) as illustrating the existence, without the least involvement of Cembureau, of a large number of exchanges of information on the flow of imports and exports, as well as on prices and terms of sale, between the cement producers of the various countries.

1810 However, even if Italcementi had been able to put those facts forward during the course of the administrative procedure, they would not have been of such a nature as to hide the fact that it participated, at Cembureau level, in the exchanges of price information which took place during the Head Delegates meeting of 19 March 1984 and through the CPRF. Neither would the various arguments put forward by Italcementi have enabled it to invalidate the factual findings on which the Commission was justified (see paragraphs 1515 to 1519 and 1639 to 1647 above), in recital 47, paragraphs 1, 4 and 13, of the contested decision, in concluding that the said exchanges were designed to facilitate the implementation of the Cembureau agreement.

1811 Seventhly, Aalborg maintains, in its observations of 10 February 1997, that access to the CPMA notification file (file IV/27.997) would have enabled it to explain that the handwritten note entitled 'United Kingdom Prices' (document 33.126/11614) reproduced by the Commission at recital 16, paragraph 4, of the contested decision, which deals with the Head Delegates meeting of 14 January 1983, in actual fact did no more than describe the arithmetic method behind the basing-point system in force in those countries and did not refer to any confidential price information.

1812 It should, however, be recalled that the exchange of price information which took place during the Head Delegates meeting of 14 January 1983 was found to be objectionable in Article 2(1) of the contested decision not because of the degree of sensitivity of the data to which it related but because its object was to facilitate the implementation of the Cembureau agreement. Any comments which Aalborg could have made during the administrative procedure on the basis of the CPMA notification file would not have enabled it to invalidate the factual findings on which the Commission relied (see paragraphs 1515 to 1519 above), in recital 47, paragraphs 1 and 4, of the contested decision, in concluding that, during the Head Delegates meeting of 14 January 1983, the object of the exchange of information during which specific indications on United Kingdom prices were given was to facilitate the implementation of the Cembureau agreement. Those comments did not therefore have even a small chance of altering the outcome of the administrative procedure.

1813 Eighthly, ATIC claims, in its observations of 10 February 1997, that it is apparent from the national chapters of the SO and from the national files that the involvement of the other associations in the conduct referred to in Article 2 of the contested decision was much more flagrant that its own. Access to those national documents during the administrative procedure would have enabled it to avoid being dealt with as severely as those other national associations in the contested decision.

1814 That argument lacks precision and is supported only by a vague, general reference to the national chapters of the SO and to the files relating to them, without any specific example. For that reason alone, it cannot be upheld.

1815 Moreover, its contradictory nature must be emphasised. AITEC relies, on the one hand, on documents emanating from other associations which are members of Cembureau, specifically SFIC and AGCI, in order to support its argument that the price information exchanged at Cembureau was not sensitive (see paragraph 1769 above), but claims, on the other hand, that the involvement of the other associations which are members of Cembureau, including SFIC and AGCI, in the infringements referred to in Article 2 of the contested decision was considerably greater than its own.

1816 In conclusion, it is apparent from the foregoing considerations (see paragraphs 1758 to 1815 above) that, so far as concerns the infringements found in Article 2, none of the applicants has

shown that its rights of defence were infringed during the course of the administrative procedure because access was given to only part of the SO and the Commission's investigation file.

Conclusions

1817 It is apparent from the whole of the foregoing considerations (see paragraphs 1450 to 1816 that:

— Article 2(1) of the contested decision must be annulled in its entirety in so far as it concerns Unicem, Oficemen and ATIC;

— Article 2(1) of the contested decision must be annulled with regard to Italcementi in so far as it finds that it participated in the infringement in question before and after 19 March 1984;

— Article 2(1) of the contested decision must be annulled with regard to Cementir in so far as it finds that it participated in the infringement in question before and after 14 January 1983;

— Article 2(1) must be annulled with regard to FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Irish Cement and AGCI in so far as it finds that they participated in agreements on the exchange of price information intended to facilitate the implementation of the agreement referred to in Article 1 of the contested decision at Head Delegates meetings subsequent to the meeting of 19 March 1984, and at Cembureau Executive Committee meetings;

— Article 2(2)(a) of the contested decision must be annulled with regard to all the applicants concerned in so far as it finds that the circulation of information which took place between them related, so far as concerns Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— Article 2(2) of the contested decision must be annulled with regard to Unicem in so far as it finds that it participated in the infringement in question before 9 September 1986;

— Article 2(2) of the contested decision must be annulled with regard to Italcementi in so far as it finds that it participated in the infringement in question before 19 March 1984.

1818 The remainder of the pleas examined must be rejected.

V — *The pleas alleging infringements of Article 85(1) of the Treaty and of the rights of the defence in that the Commission finds the existence of three Franco-Italian concerted practices which infringed Article 85(1) of the Treaty and that the applicants in question participated in them (Article 3(1)(a), (b) and (c) of the contested decision)*

Introduction

1819 The Commission alleges, in Article 3(1)(a), (b) and (c) of the contested decision, three concerted practices corresponding to a similar number of bilateral relationships allegedly constituting infringements between the Italian cement producer Buzzi, on the one hand, and the three French cement producers Lafarge, Ciments Français and Vicat, on the other.

1820 In Article 3(1)(a) it complains that Lafarge and Buzzi infringed, from 26 November to 31 December 1988, the provisions of Article 85(1) of the EC Treaty by participating in a concerted practice involving the sharing of the market in southern France and the restriction of their autonomy of conduct with regard to production sources.

1821 In Article 3(1)(b) it complains that Ciments Français and Buzzi infringed, from 17 March to 31 December 1988, the provisions of Article 85(1) of the Treaty by participating in a concerted practice involving information on current prices and a forecast of price increases, with a view to the restriction of their autonomy of conduct.

1822 In Article 3(1)(c) it complains that Vicat and Buzzi infringed, from 11 May 1983 to 31 December 1988, the provisions of Article 85(1) of the Treaty by participating in a concerted

practice involving the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France.

1823 Lafarge (T-43/95) claims that the Commission infringed Article 85(1) of the Treaty by finding that it had participated in an anti-competitive concerted practice with Buzzi. During the present proceedings, and in particular in the documents which it sent to the Court of First Instance on 10 February 1997 and 28 January 1998 following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 and 168 above), Lafarge has not argued that that finding was made in detriment of its rights of defence.

1824 Ciments Français (T-39/95) submits that the Commission made several manifest errors of assessment and that it breached its rights of defence in finding that it participated in an anti-competitive concerted practice with Buzzi.

1825 Vicat (T-37/95) claims that the Commission made an error of assessment and that it breached its rights of defence in finding that it had participated in an anti-competitive concerted practice with Buzzi.

1826 Buzzi (T-51/95) complains that the Commission made several errors of assessment and breached Article 85(1) of the Treaty and its rights of defence in finding that it had participated in three anti-competitive concerted practices with Lafarge, Ciments Français and Vicat respectively.

1827 As stated above (see paragraphs 1819 to 1822 above), although the Commission finds that 'continuity is thus evident in Buzzi's conduct', whose 'information ..., even though it was provided individually to the three French producers, ultimately benefited all three' (contested decision, recital 48, paragraph 7), separately finds, in Article 3(1) of the contested decision, three concerted practices, without mentioning on each occasion the same addressees, while deeming each of those practices to have been of different duration. The only result common to all of them, which it bases on its findings with regard to Buzzi's conduct, is the date on which the three infringements ended, which it fixes at 31 December 1988 for each of them (recital 48, paragraph 7, of the contested decision).

1828 In order to assess the legality of Article 3(1) of the contested decision, it is necessary to ascertain whether the Commission was entitled to find three concerted practices and whether it breached the rights of defence of Vicat, Ciments Français and Buzzi.

Concerted practice between Lafarge and Buzzi found in Article 3(1)(a) of the contested decision

A — Introduction

1829 As a basis for its conclusion that the infringement of which it accuses Lafarge and Buzzi (see paragraph 1820 above) existed, the Commission relies on the following extract from the record drawn up by Pierre Saint-Hillier of Lafarge at a meeting held with Emmanuello Buzzi of Buzzi, on 26 November 1988 (contested decision, recital 20, paragraph 3; document 33.126/6857 bis):

'Several subjects were discussed:

1. South of France

Emmanuello understood (following meeting with G. Liduena) that he had three possibilities:

— Build a clinker plant near the sea

— Build a grinding plant

— Close the plant. Negotiate markets. Set up supply company, for supplies either from La Malle, or from Robilante, or through imports (e.g. Greece).

I said there was no urgency as we had 15 or 20 years of reserves. The problem was chiefly the operating licence.

Buzzi's position:

— The market belonged to Ciments Lafarge.

— No desire to enter Côte d'Azur to upset the market.

— They have had only two or three customers in 20 years.

— A war is pointless.

— Agreements must be concluded to avoid conflict.

— Prepared to consider joint venture.'

1830 The Commission sees in this extract 'a statement of intent to share the Côte d'Azur market and to share cement supply sources in the medium and long term' (contested decision, recital 20, paragraph 3). It finds that there was a concerted practice between Lafarge and Buzzi in contravention of Article 85(1) of the Treaty asfollows: 'Whereas the provisions of that Article prohibit any direct or indirect contact intended to reveal to a competitor the conduct which one has decided or plans to adopt on the market, Buzzi and Lafarge, through the contact which they had on 26 November 1988, took concerted action ... to restrict their autonomy of behaviour and, in particular, Buzzi's autonomy of behaviour and, ultimately, to share the market in the south of France and restrict their future autonomy regarding sources of supply in the regions along the Franco-Italian frontier' (contested decision, recital 48, paragraph 3).

B — Correspondence between the Statement of Objections (SO) and the contested decision

1831 Buzzi states that it is surprised to be accused of having participated in a concerted practice with Lafarge with the object of restricting their autonomy of behaviour in the management of their sources of supply, when no such allegation appeared in the SO.

1832 It must first of all be observed that, in the 'Facts' of the SO on the 'Implementation of the "Cembureau agreement or Principle of not transhipping to internal European markets" France-Italy' and in particular on 'relations between Buzzi and Lafarge', the only passage of the abovementioned record of the meeting of 26 November 1988 between Lafarge and Buzzi which the Commission mentioned was that summarising Buzzi's position (see paragraph 1829 above). The Commission further stated: 'The introduction to the record states that: "Cette rencontre fait suite à celle que nous avions eue à Paris avec Sandro et Emanuele Buzzi en septembre dernier, au cours de laquelle nous avions envisagé la possibilité d'un accord sur les affaires de béton" (That meeting followed the one we held in Paris with Sandro and Emanuele Buzzi last September, during which we envisaged the possibility of an agreement on cement)' (SO, point 10, p. 21). On the other hand, the Commission did not refer in the facts of the SO to the excerpt from the record of the meeting relating to the 'three options' envisaged by Buzzi 'following the meeting with G. Liduena' — namely to build a clinker plant near the sea, build a grinding plant or close the plant, negotiate markets and set up a supply company for supplies either from La Malle, or from Robilante, or through imports (e.g. Greece) — at the end of which Lafarge had said to Buzzi that there was no urgency because there were 15 or 20 years of reserves.

1833 In point 61(b) of the SO (p. 173), concerning the legal assessment of the facts relating to the Franco-Italian agreements and/or concerted practices, the Commission complained that Lafarge and Buzzi in particular had participated in agreements and/or concerted practices the object of which was 'sharing the markets between such producers, excluding any uncertainty as to their mutual conduct and depriving consumers of the economic possibility of choosing their sources of supply'. Although the Commission accused Lafarge and Buzzi of having, through their agreement and/or concerted practice to share the markets, deprived consumers of the economic choice as to their sources of supply, it did not, however, object to the parties having colluded to restrict their autonomy of behaviour with regard to their sources of supply.

1834 The Court therefore upholds Buzzi's argument that the SO is not in conformity with the contested decision as regards the accusation that it participated in a concerted practice with Lafarge concerning such a restriction.

1835 It follows that, so far as concerns that accusation, Article 3(1)(a) of the contested decision must be annulled as against Buzzi, and, consequently, also as against Lafarge, which cannot be accused of having participated in alleged concerted action relating to the sharing of source of supply in the Franco-Italian border region, since that accusation may no longer be maintained against the only other party to the alleged concerted action.

C — The existence of an anti-competitive concerted practice between Lafarge and Buzzi with regard to the sharing of the south of France market

1836 In view of the conclusion arrived at in the preceding paragraph, all that need be ascertained is whether the Commission was legally justified in considering that Lafarge and Buzzi were guilty, when they met on 26 November 1988, of a concerted practice contrary to Article 85(1) of the Treaty in so far as the meeting concerned 'the sharing of the market in the south of France' (Article 3(1)(a) of the contested decision).

1837 Lafarge observes that the Commission relies on a single document, which is not corroborated by any other evidence or indication, in order to prove the accusation it makes in Article 3(1)(a) of the contested decision. Buzzi is of the view that the Commission disregarded the doctrine laid down in the case-law on the burden of proof by basing its allegations solely on the internal Lafarge memorandum concerning the 26 November 1988 meeting.

1838 It should however be pointed out that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 85(1) of the Treaty has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question. In this connection, in order to assess the evidential value of a document, regard should be had first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (Opinion of Mr Vesterdorf acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited in paragraph 1053 above, p. II-956).

1839 In the present case, the record of the meeting held on 26 November 1988 between Lafarge and Buzzi was drawn up shortly afterwards by Mr Saint-Hillier, Lafarge's representative at the meeting, since it was distributed within the Lafarge company on 1 December 1988. The applicants put forward no argument which would make it possible to consider that the information contained in that document does not reflect the content of the discussions held on that occasion.

1840 Without prejudging the question — considered below at paragraphs 1843 to 1876 — as to whether the excerpt from the minutes in question, set out at recital 20, paragraph 3, of the contested decision, in itself proves the existence of the infringement as found, it must thus be concluded at this stage that there is no doubt as to the evidential value of that document and that the Commission was right to rely on it. The fact — as pointed out by Buzzi at the hearing — that the minutes were distributed within Lafarge by Mr Liduena, and not by Mr Saint-Hillier, its author, is of no significance in that respect.

1841 Buzzi further criticises the Commission for substantiating its claim that there was concerted action with Lafarge by means of evidence based on contacts which it had had with other French producers, claiming that the various bilateral relations which it maintained with the latter producers were unique.

1842 However, perusal of recital 20, paragraphs 3 and 7, and of recital 48, paragraphs 3 and 7, of the contested decision clearly show that the Commission based the various aspects of the infringement of which Lafarge and Buzzi are accused (existence of a concerted action, anti-competitive purpose and duration thereof) solely on the excerpt, reproduced in recital 20, paragraph 3, of the contested decision, of the record of the meeting held on 26 November 1988. Buzzi's argument must therefore be rejected.

1843 Next, Lafarge and Buzzi put forward eight arguments, essentially denying the existence of an anti-competitive concerted practice involving the sharing of the market of the south of France.

1844 First, Buzzi claims that the Commission committed a manifest error of assessment in stating, at recital 20, paragraph 2, of the contested decision that 'in the period in question, the prices charged by Italian producers were roughly 20% lower than prices charged by French producers'. In actual fact, from 1983 to 1988, the prices charged by Italian producers were always, apart from those for 1988, higher than those charged by French producers, as shown by a comparison between its own Cement 425 prices and those charged by Vicat for CPJ 45 cement (Annex 17 to the application).

1845 The Court points out that the figures produced by the Italian cement industry at the hearing of 2 March 1993 show that the French prices were, on average, always 20% higher than the Italian prices during the period 1981 to 1991 (contested decision, recital 9, paragraph 6, and the tables in Annexes 9-3 and 9-4).

1846 Furthermore, the analysis put forward by Buzzi in fact challenges the Commission's argument for the period prior to that under consideration in respect of the infringement at issue.

1847 In any event, it does not make it possible to disregard the statements, cited above, which it made to Lafarge during the meeting of 26 November 1988:

'— No desire to enter Côte d'Azur to upset the market ...

— A war is pointless.

— Agreements must be concluded to avoid conflict.'

1848 Secondly, Buzzi maintains that the Commission, by merely stating that Buzzi had informed Lafarge of the conduct which it planned to adopt on the market in question, without stating that Lafarge did likewise vis-à-vis Buzzi, has not shown that there was an element of reciprocity, which is necessary in order to prove that there was a concerted practice within the meaning of Article 85(1) of the Treaty. Lafarge claims for its part that the fact that one party lets another party know of its personal point of view cannot reasonably lead to the conclusion that there is a concerted practice.

1849 In that connection, the Court points out that the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, points 170 to 175). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it. Perusal of the covering letter with which Mr Liduena of Lafarge distributed within his company the minutes of the meeting of 26 November 1988 reveals that the meeting was held at the behest of Lafarge. Moreover, there is nothing in those minutes drawn up by Lafarge which shows that its representative expressed any reservations or objections whatsoever when Buzzi informed it of its position regarding the market in the south of France. In those circumstances, the applicants cannot seek to reduce Lafarge's attitude during the meeting in question to the purely passive role of a recipient of the information which Buzzi unilaterally decided to pass on to it, without any request by Lafarge.

1850 It may be inferred therefrom that the contacts between Lafarge and Buzzi were motivated by the element of reciprocity essential to a finding of concerted practice. Accordingly, the applicants' arguments must be rejected.

1851 Thirdly, Buzzi denies the existence of an anti-competitive concerted practice claiming, first, that the views which it expressed to Lafarge during the meeting in question only concerned present and past circumstances, rather than anticipating future actions, and, secondly, that it had not given any undertaking to Lafarge as to its future conduct on the market in the Côte d'Azur.

1852 The Court points out in this regard that any direct or indirect contact between economic operators of such a nature as to disclose to a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, constitutes a concerted practice prohibited by

Article 85(1) of the Treaty (see most recently the judgments of the Court of Justice in *Commission* v *Anic*, cited in paragraph 270 above, paragraph 117, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 160). In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market (Opinion of Advocate General Darmon in *Woodpulp II*, cited at paragraph 697 above, point 172). It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market (Case T-4/89 *BASF* v *Commission* [1991] ECR II-1523, paragraph 242; and *Hercules Chemicals* v *Commission*, cited at paragraph 140 above, paragraph 260). However, in the present case, Buzzi, after acknowledging, at its meeting with Lafarge on 26 November 1988, that the market belonged to Lafarge, told it that it had no desire to enter Côte d'Azur to upset a market in which it had had only two or three customers in the last 20 years, that war was pointless, and that it was necessary to make arrangements to avoid conflicts. By doing so, it gave Lafarge an assurance, with an anti-competitive intent, as to the — in this case peaceful — attitude which the latter could count on as regards the market in the south of France.

1853 Fourthly, Lafarge and Buzzi criticise the Commission for not having analysed their meeting of 26 November 1988 in its economic context. They complain first of all that it misjudged the geography (the natural obstacle of the Alps) and road conditions (poor quality of the road and motorway infrastructure) of the Franco-Italian border area. Buzzi observes in particular that the Commission states at recital 11, paragraph 5, of the contested decision that 'natural obstacles such as mountains do not form any impediment to cement supplies ... [since] the Italian producers are able to carry out supplies across the Alps in Switzerland', whereas the deliveries in question were restricted to the canton of Tessin which, for a transporter coming from Italy, is situated before the Alps. The applicants, in particular Buzzi (see annexes 18 to 29 to its application), also stress a whole series of factors which explain, in their view, why the market in the Franco-Italian border area was not in fact amenable, at least during the period under consideration in the contested decision, to cross-border transportation of cement and, therefore, that they were not at that time actual or potential competitors in the south of France market: geographical location of their respective production sites; Italian price levels; transport and customs conditions and costs; strike-related difficulties; delivery and transport time restrictions in force in the building sector; specific conditions placed on the use of cement in the context of tenders in the French public sector as well as numerous private projects; natural preference of French consumers for local producers etc. The applicants claim that, during the meeting of 26 November 1988, Buzzi merely drew attention to those objective economic limits to export activities on the Franco-Italian border market.

1854 However, the record of the 26 November 1988 meeting does not contain any reference to the various factors put forward by the applicants seeking to explain the real reasons and significance of the remarks made by Buzzi to Lafarge. On the contrary, statements such as 'a war is pointless' or 'agreements must be concluded to avoid conflict' undermine the analysis defended by the applicants. They make it clear that the difficulties and obstacles of all kinds put forward by them did not prevent a certain level of interpenetration of French and Italian border markets. According to the record of the meeting, Buzzi had furthermore stated that it had had two or three customers in the last 20 years in the Côte d'Azur market. During the administrative procedure, it stated that 'despite a number of obstacles which it had [had] to overcome (transport costs, customs, difference in the quality of Italian and French cement), and although

it could have sold its products on closer and more profitable markets, it [had] been exporting worthwhile quantities ("interessanti quantità") of cement to the south of France' and, 'at prices lower than those charged by French producers' (paragraph 4.3 of Buzzi's reply to the SO; contested decision, recital 20, paragraph 7). Lafarge and Buzzi were thus competitors, at least potentially, on the south of France market.

1855 The Commission was therefore right to see in the meeting of 26 November 1988 on the south of France market 'a statement of intent to share the Côte d'Azur' (contested decision, recital 20, paragraph 3), that is, in short, a concerted practice between Lafarge and Buzzi intended to 'to restrict their autonomy of behaviour and, in particular, Buzzi's autonomy of behaviour and, ultimately, to share the market in the south of France' (contested decision, recital 48, paragraph 3).

1856 In those circumstances, the explanations proffered by the applicants, based on all kinds of limitations affecting cross-border trade between the south of France and the north of Italy, are all the more such as to underline the seriousness of the infringement of which they are accused, inasmuch as, by their concerted action, they sought to eliminate or, at least, restrict the little actual competition which might exist on the market.

1857 Fifthly, Lafarge and Buzzi claim that the — legitimate — purpose of their meeting of 26 November 1988 was discussion of a joint industrial project in the region in question, a project that never came to fruition.

1858 Although it is perfectly conceivable that, during their meeting of 26 November 1988, Lafarge and Buzzi discussed a joint industrial project, the fact remains that, on that occasion, Buzzi told Lafarge that the south of France market belonged to Lafarge, that it had no desire to enter Côte d'Azur to upset the market, that war was pointless, and that agreements should be concluded to avoid conflict. The applicants' argument cannot therefore hide the reality of the unlawful collusion at the meeting of 26 November 1988 regarding the sharing of the market in the south of France.

1859 Sixthly, Buzzi claims that, although the effect of its statements could have been to guarantee to its French competitors a sharing of the south of France market, it would have been illogical for those selfsame competitors to have then spent considerable sums in order to acquire a number of its customers in that region.

1860 The Court points out in that respect that during the meeting of 26 November 1988 Buzzi indicated to Lafarge that it had had two or three customers in the last 20 years in Côte d'Azur and that that did not elicit any obvious reaction or objection on the part of the latter. The

concerted action in relation to the south of France market did not therefore rule out Buzzi's keeping the 'two or three' isolated accounts which it had long maintained with a number of customers in that region, since those few commercial links did not appear to be such as to upset the Côte d'Azur market. The fact that the French producers should have subsequently decided to acquire part of Buzzi's customer base in that market is therefore not inconsistent with the existence of an unlawful concerted action between Lafarge and Buzzi at the end of 1988, as shown by the excerpt from the record of the meeting mentioned by the Commission in recital 20, paragraph 3, of the contested decision

1861 Seventhly, Buzzi states that, despite its alleged undertaking not to become involved in the south of France market, its sales on that market have improved almost consistently, with the exception of those in 1988 (Annex 16 to its application). Supported on that point by Lafarge, it adds that the fall in its sales in France in 1988 can only be explained by the takeover, by certain French producers, of two of its main customers in that region, and not, as maintained by the Commission at recital 20, paragraph 7, of the contested decision, by the existence of a concerted action with the French producers, and in particular with Lafarge.

1862 The Court points out that the information provided by Buzzi to illustrate the consistent improvement in its sales until 1987 on the south of France market is irrelevant as a challenge to the infringement as found, since it is accused of having participated in an unlawful concerted practice with Lafarge only since 26 November 1988.

1863 As to the fall in Buzzi's sales in France in 1988, although it is conceivable that it may be linked, at least in part, to the loss of two important customers in the region of the south of France, those explanations do not make it possible to disregard the statements of intention made by Buzzi to Lafarge on 26 November 1988.

1864 Eighthly, Lafarge and Buzzi allege that the Commission has not proved that the alleged concerted action influenced their subsequent conduct, by leading them to aligning their respective policies on the market in question, or, at least, that the concerted action had such potential. Buzzi adds that, in any event, such influence was inconceivable, regard being had to the nature of the Franco-Italian border market.

1865 However, although, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two, it must be held, subject to proof to the contrary, which the parties concerned must adduce, that the concerted action in question influenced the parties' conduct on the market (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 118 and 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraphs 161 and 162).

1866 Lafarge states specifically that, after the meeting of 26 November 1988, Buzzi continued to supply its customers in the south of France.

1867 However, the Court points out that, during that meeting, Buzzi told Lafarge that it had had two or three customers in the last 20 years on the Côte d'Azur market. Lafarge expressed no objection, in that respect, obviously considering that that situation was not such as to upset that market. In such a context, the evidence invoked by Lafarge does not prove that the collusion between Buzzi and it on 26 November 1988 did not influence their conduct on the market.

1868 It follows from all the foregoing that the Commission was justified in concluding in Article 3(1)(a) of the contested decision that there was an anti-competitive concerted practice between Lafarge and Buzzi involving 'the sharing of the market of the south of France'. Such a concerted practice is manifestly contrary to Article 85(1)(c) of the Treaty, which expressly prohibits all agreements and concerted practices 'which share markets'.

D — Duration of the infringement

1869 The Commission takes the view that the concerted practice found in Article 3(1)(a) of the contested decision lasted from 26 November to 31 December 1988.

1870 First of all, Buzzi claims that the Commission found that the infringement began in May 1983.

1871 In actual fact, as has been pointed out above (paragraph 1869), the contested decision cites 26 November 1988 as the starting point for the concerted practice. Buzzi's argument is thus unfounded.

1872 Secondly, Buzzi states that, until 26 November 1988 there had been a 'state of war' on the south of France market and that there was no 'agreement ... to avoid conflicts', in view of the record of the meeting held on that date.

1873 However, the fact that Lafarge and Buzzi agreed during that meeting that war was pointless does not necessarily mean that the parties were at war until then on the south of France market. Such a statement could just as well indicate their intention not to engage in warfare. In any event, there was held to be a concerted practice between Lafarge and Buzzi only as from 26 November 1988. The Commission has therefore not claimed that concerted action between the two parties, based on agreements intended to avoid 'war' or 'conflicts', existed already before that date.

1874 Thirdly, Buzzi states that the Commission, without giving reasons, set 31 December 1988 as the date on which the concerted practice at issue was brought to an end, even though it acknowledged (contested decision, recital 48, paragraph 7) that it did not have any specific information in that regard.

1875 At recital 48, paragraph 7, of the contested decision the Commission explains that '[i]n the absence of any other precise indications of when the infringement ended, [it] considers that it lasted at least until the end of 1988, since the last concerted action with Lafarge dates from 26 November 1988 and involved Buzzi's revealing to Lafarge its future conduct on the market'.

1876 On the basis of that factor, and in the absence of evidence to the contrary adduced by the undertakings concerned, the Commission was right to consider that the unlawful concerted action between Lafarge and Buzzi lasted 'at least until the end of 1988'.

Concerted practice between Ciments Français and Buzzi found in Article 3(1)(b) of the contested decision

A — Introduction

1877 As a basis for its conclusion that the infringement of which it accuses Ciments Français and Buzzi in Article 3(1)(b) of the contested decision existed (see paragraph 1821 above), the Commission relies on a fax of 17 March 1988 whereby Ciments Français sent Buzzi a list of its prices applicable from 2 March 1987 together with the following covering note: 'In reply to your telex of today, herewith our ex-works prices for sacked and bulk cement. Price increase timetable has not been decided as yet. An average increase of 1 to 1.5% in the current year is envisaged' (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987). The Commission takes the view that the 'reason why Ciments Français communicated its price list and forecast price increases ... was so that Buzzi could align its cement prices in France on Ciments Français ... prices' (contested decision, recital 20, paragraph 6). It concludes that 'the transmission by Ciments Français to Buzzi on 17 March 1988, at Buzzi's request, of the price list of the Beaucaire factory and of the forecast average increase for the year constitutes a

concerted practice, covered by Article 85(1)' (contested decision, recital 48, paragraph 4), given that 'any communication to a competitor of the conduct which it is planned to adopt on the market, such as to enable an influence to be exerted on the competitive conduct of such competitor, constitutes an infringement of Article 85(1)' (contested decision, recital 48, paragraph 5, last indent).

B — Whether there was an anti-competitive concerted practice between Ciments Français and Buzzi

1878 Ciments Français complains that the Commission committed an error of fact in its description, in recital 20, paragraph 1, of the contested decision, of the location of plant on either side of the Franco-Italian border belonging to the four undertakings mentioned in Article 3(1) of the contested decision, inasmuch as it placed its Ranville plant at Bouches-du-Rhône, whereas Ranville is in Normandy.

1879 However, that error — which the Commission acknowledges (defence in Case T-39/95, p. 30) — has no consequences. As pointed out above (see paragraph 1877), the Commission, in its legal assessment in recital 48, paragraph 4, of the contested decision, merely objects to the disclosure made by Ciments Français to Buzzi of its Beaucaire price list and the provision of the forecast average increase for the year.

1880 Buzzi, for its part, complains that the Commission infringed the requirements laid down in the case-law with regard to the burden of proof by basing its finding of an infringement on a single fax of 17 March 1988 by which Ciments Français had transmitted its price list to it.

1881 It has already been stated in that respect (see paragraph 1838 above) that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 85(1) of the Treaty has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question. Since Buzzi has not adduced any evidence to refute the evidential value of the document cited at recital 20, paragraph 4, of the contested decision, it must be concluded here that the Commission was right to base itself on that document in order to prove the existence of the unlawful concerted action of which it accuses Ciments Français and Buzzi. That does not, however, prejudge the question — examined below in paragraphs 1883 to 1921 — whether the document in question proves, by itself, that the said infringement existed.

1882 Next, Ciments Français and Buzzi set out in substance nine arguments challenging the existence of the anti-competitive concerted practice alleged against them.

1883 First of all, as has already been stated above (paragraph 1844), Buzzi disputes the Commission's statement that 'in the period in question, the prices charged by Italian producers were roughly 20% lower than prices charged by French producers' (paragraph 20(2) of the contested decision). It maintains that the prices charged by Italian producers were always, apart from those for 1988, higher than those charged by French producers during that period.

1884 The Court points out that the information provided by the Italian cement industry during the hearing of 2 March 1993 shows that French prices were, on average, always 20% higher than Italian prices during the period 1981 to 1991 (contested decision, recital 9, paragraph 6, and the tables in annexes 9-3 and 9-4).

1885 In any event, Buzzi's criticisms, which amount to a challenge of the Commission's analysis in respect of the period prior to that under consideration in respect of the infringement at issue, cannot obscure the fact that on 17 March 1988 Ciments Français sent it, at Buzzi's request, its price list and forecast average increase for the year (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987).

1886 Secondly, Buzzi maintains that the Commission, by merely stating that there was a unilateral flow of information coming out of Ciments Français, has not proved that there was the element of reciprocity essential to a finding of a concerted practice.

1887 That argument must be rejected. As has been pointed out above (paragraph 1849), the condition of reciprocity, which is necessary for a finding of concerted practice, is met where it appears that one competitor discloses information relating to its conduct on the market at the request of another competitor. The very wording of the fax referred to in recital 20, paragraph 4, of the contested decision makes it clear that the price list was transmitted by Ciments Français to Buzzi 'in reply to [the] telex of today' (document 33.126/11983), that is, as the Commission rightly observes (contested decision, recital 48, paragraph 4), 'at Buzzi's request'. The element of reciprocity is thus established in the present case.

1888 Thirdly, Ciments Français submits that, for various reasons to do, in particular, with the high cost of transport over the border between Italy and France, and the absence of overlap between their respective natural markets, Buzzi and itself are not actual or potential competitors. It criticises the Commission in this regard for having taken a distance considerably less than the actual distance by road or motorway as the distance separating the nearest Buzzi factory from its own (contested decision, recital 48, paragraph 5). It enclosed with its application (annexes 4

and 5) surveys carried out under the supervision of a bailiff's official, stating the actual duration and distance of a journey made under its orders by a cement lorry departing from a factory near that of Buzzi in Italy to Nîmes, at the heart of the market for Ciments Français' Beaucaire factory in southwest France. According to Ciments Français, the influence of those two factors makes that type of delivery impracticable. Ciments Français concludes that the exchange of information between Buzzi and itself did not have as its object or effect the restriction of competition within the meaning of Article 85(1) of the Treaty, since the prime condition for such concerted practice, namely the existence of competition between the parties concerned, was absent.

1889 For its part, Buzzi again criticises the Commission for not having carried out an economic analysis of the Franco-Italian border market, emphasising the various reasons which explain, in its view, that that market was not amenable to the cross-border transportation of cement (see paragraph 1853 above).

1890 That argument cannot be accepted. As the Commission rightly pointed out, 'the ... fact is that Buzzi exports to France' (contested decision, recital 48, paragraph 5). Buzzi stated during the administrative procedure that, 'despite a number of obstacles which it had to overcome (transport costs, customs, difference in the quality of Italian and French cement), and although it could have sold its products on closer and more profitable markets, it has been exporting worthwhile quantities ("interessanti quantità") of cement to the south of France since the end of the 1960s' (point 4.3 of Buzzi's reply to the SO; contested decision, recital 20, paragraph 7).

1891 Since there is no doubt that Buzzi exported to the south of France market, the Commission was entitled to consider that Ciments Français, which owns a production plant on that market, at Beaucaire (contested decision, recital 20, paragraph 1), and Buzzi were 'actual or, at the very least, potential competitors' (contested decision, recital 48, paragraph 5).

1892 Fourthly, Ciments Français and Buzzi deny that the transmission of price lists, such as those in the fax of 17 March 1988, could have served an anti-competitive purpose. They put forward a series of arguments centred on the nature of the information communicated by that fax. Ciments Français maintains that that information had already been made public, first, through the specialist press and the economic press in general and, secondly, as a result of an obligation imposed by French Order 86/1243 of 1 December 1986 concerning freedom of pricing and competition. Buzzi claims that the document transmitted to it by Ciments Français concerned official prices set by the French State and easily available to any interested party and that the increase forecasts could be calculated on the basis of an analysis of the economic indicators taken into account by the public authorities when dealing with applications for increases. Transmission of that information by Ciments Français was a matter of simple commercial courtesy. The applicants state that the prices which had been forwarded had been in force for more than a year (from the beginning of March 1987) and that they were about to be changed, so that they were of purely historical value, making it possible at most to shed light on Ciments Français' past conduct but not to predict its future conduct. The price rise forecast for the year

was given as a purely approximate range and in any event subsequently proved incorrect (2.5% instead of the 1 to 1.5% initially announced by Ciments Français). Furthermore, the information mentioned neither the type of cement nor the region concerned by the envisaged price increase. Buzzi further states that the information sent to it merely gave indications as to prices but no other information, such as Ciments Français' share of the market or the level of sales in the region in question.

1893 Such an argument must be rejected. The obligation of transparency required, in particular in relation to prices, of French producers by Order 86/1243 of 1 December 1986, cited above, applies only to 'purchaser(s) of the product' (Article 33 of that Order), which was not Buzzi's position in this case. Moreover, it is clear from the fax of 17 March 1988 that the information sent by Ciments Français to Buzzi related not to the official price list, but to '(its) ex-works prices for sacked and bulk cement', including those of the factory located in the Beaucaire region, Ciments Français' natural market in the south of France (contested decision, recital 20, paragraph 4; documents 33.126/11983, 11985 and 11987). Although the prices in question had already been in force for more than a year and liable to be amended at any time, the fact remains that these were prices which were (still) in force at that time. Far from being of merely historical or statistical interest, the information which Ciments Français sent to Buzzi was thus of 'current value' (contested decision, recital 48, paragraph 5). It is true that Buzzi could have obtained those prices from Ciments Français' customers. Nevertheless, it requested them of Ciments Français, which sent them to it that same day.

1894 As regards the indication as to the price rise envisaged for the year, Buzzi cannot reasonably defend the view that that information could be easily calculated on the basis of a simple analysis of the economic indicators taken into account by the State, since State control of cement prices had been abolished in France since 1986 (contested decision, recital 16, paragraph 12). In actual fact, that information was commercially confidential and thus particularly sensitive.

1895 The applicants thus took part, through that transmission of information, in a concerted practice prohibited by Article 85(1) of the Treaty within the meaning of the case-law cited in paragraph 1852 above.

1896 By sending to Buzzi, at Buzzi's request, its sales prices in force and the forecast increase for the year, Ciments Français revealed both its current and future commercial conduct, eliminating or, at the very least, substantially reducing in advance any uncertainty as to its pricing policy, in particular on the south of France market.

1897 The fact that the information thus sent only concerned prices and not any other commercial information does not mitigate the infringement constituted by the sending of the information.

1898 Even though the price increase announced by Ciments Français eventually proved inaccurate, communication of that forecast, as the Commission rightly points out, enabled Buzzi 'to plan its pricing policy with a great degree of certainty even after the price changes forecast' (contested decision, recital 48, paragraph 5).

1899 Fifthly, Ciments Français complains that the Commission engaged in an artificial terminological manipulation of the fax of 17 March 1988 by taking the statement that 'an average increase of 1 to 1.5% in the current year is envisaged' (contested decision, recital 20, paragraph 4; document 33.126/11983) as proof of disclosure, by Ciments Français, of a 'forecast ... increase' of its prices (contested decision, recital 48, paragraph 4). According to the applicant, the Commission thus gave the impression that the price rise had already been firmly and definitively decided.

1900 That argument must be rejected. Recourse to the term 'forecast' in place of the term 'envisage' cannot be considered to reveal an intention on the part of the Commission to misrepresent the wording of the fax of 17 March 1988. Moreover, nowhere in the contested decision does the Commission present Ciment Français' forecast average price increase for the year as being the result of a firm and definitive decision.

1901 Sixthly, Buzzi claims that the disclosure by Ciments Français of its price list could not have served the anti-competitive purpose claimed for it by the Commission, namely 'so that Buzzi could align its cement prices in France on Ciments Français ... prices' (contested decision, recital 20, paragraph 6). The prices actually charged by the French cement producer on the south of France market did not in fact correspond to those appearing in that price list. Buzzi refers, in that respect, to the French price list for 1983 to 1988, set out in annexes 18 to 23 of its application.

1902 That argument must be rejected.

1903 Examination of the information contained in the fax sent by Ciments Français on 17 March 1988 and the indications of the French price for 1987 provided by Buzzi in annex 22 to its application leads to the conclusion that the French price specified by Buzzi for that year was of FRF 365 per tonne, that is to say exactly the same price which Ciments Français had communicated to it on 17 March 1988 in respect of its Beaucaire factory.

1904 When invited to explain itself on that point by a written question put by the Court of First Instance of 27 May 1998, Buzzi replied on 25 June 1998 that the information which it had enclosed in annexes 18 to 23 of its application was intended, in actual fact, to show that the prices which it had itself charged on the south of France market between 1983 and 1988 were largely below those of the French producers and, in particular, of Ciments Français. That argument will be examined in paragraphs 1909 to 1913.

1905 Be that as it may, even if the prices communicated by Ciments Français to Buzzi did not correspond to the prices actually charged by the French producer on the market — a price which depends on a number of additional parameters which vary case by case — the price specifications set out in the fax in question were such as to enable Buzzi to 'align its cement prices in France on Ciments Français ... prices' (contested decision, recital 20, paragraph 6) by raising those export prices to a level likely to dissuade actual or potential Ciments Français customers from importing its products into the south of France and/or by passing on to its own customers in that region the changes in 'local' prices, in this case those of Ciments Français, in order not to upset the natural market of that producer. Knowledge of the price list applied by a competitor at a given time, as well as the price increase envisaged by it for the year, enables an operator — particularly where, as in the present case, that information includes a precise indication of the VAT rate in force (see documents 33.126/11984 to 11987) — to adjust its own prices accordingly, without it being necessary to have available the exact actual prices — which vary according to the customer — charged by that competitor on the market.

1906 Seventhly, Buzzi considers that, if, as the Commission claims, 'the lower prices [were] justified by the fact that the Portland cements sold by Buzzi in France (grades 325 and 425) have lower resistance grades than the corresponding cements manufactured and sold by the French producers (grades 350 and 450)' (contested decision, recital 20, paragraph 7), Buzzi cannot be criticised for having acted on the basis of the price list which had been sent by Ciments Français on 17 March 1988, since that list concerned products of a type different from those which it marketed.

1907 The Court points out that, in its application (p. 20), Buzzi contests precisely the explanation put forward by the Commission at recital 20, paragraph 7, of the contested decision (see the preceding paragraph), stating that the products which it sold in France were identical in quality to French cement and that, in the eyes of customers, they were thus entirely interchangeable and competitive as between them.

1908 In any event, whatever the degree of comparability, in terms of quality and resistance, between products manufactured by Buzzi and French cement, it is nevertheless the case that on 17 March 1988 Buzzi asked Ciments Français for its price list, which the latter hurried to transmit to it that same day, informing it also of the forecast price increase for the year. In the absence of any persuasive alternative explanation to justify that transmission of information, and regard being had to what has been set out at paragraph 1905 above, the Commission was right to consider that the 'reason why Ciments Français communicated its price list and forecast

price increases ... was so that Buzzi could align its cement prices in France on Ciments Français ... prices' (contested decision, recital 20, paragraph 6). It was therefore entitled to conclude that the bilateral contact, which had the object of bringing about competitive conditions that did not correspond to the normal market conditions, was unlawful (see, to that effect, the case-law cited in paragraph 1852 above).

1909 Eighthly, Buzzi maintains that, both before and after communication of the price list by Ciments Français, it constantly charged prices in that region which were significantly lower than those of the French producers, in particular of Ciments Français. It refers in that respect to annexes 18 to 23 to its application, in which it compares French and Italian prices during the period 1983 to 1988. In reply to a written question put by the Court of First Instance on 27 May 1998, it also provided, on 25 June 1998, copies of the invoices relating to sales in the south of France, to which it referred in its application (p. 41, paragraph 11) in order to support its arguments on that point. Those invoices confirm that, in fact, Buzzi's prices for certain customers in the south of France between February 1987 and December 1988 were constantly lower (FRF 290 to 300 per tonne) than those specified by Ciments Français for its Beaucaire factory (FRF 365 per tonne) in its fax of 17 March 1988 (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987). As indicated above (paragraph 1907), Buzzi dismisses the explanation put forward by the Commission in recital 20, paragraph 7, of the contested decision to justify its lower prices for sales in France than those of French producers.

1910 It should be pointed out in that regard that although, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two, it must be held that, subject to proof to the contrary, which the parties concerned must adduce, undertakings participating in the concerted action and which remain active on the market take into account the information exchanged with their competitors in determining their conduct on that market (*Commission* v *Anic*, cited in paragraph 270 above, paragraphs 118 and 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraphs 161 and 162).

1911 It is appropriate to bear in mind that Buzzi has never denied having had, during the period under consideration in the contested decision, a number of customers in the south of France, more specifically in the Côte d'Azur market. It did not, however, intend to wage 'war' there against the French producers (see the record of the meeting of 26 November 1988 between Lafarge and Buzzi; contested decision, recital 20, paragraph 3; document 33.126/6857 bis). It was thus perfectly able to follow an independent commercial policy with regard to those customers, which, according to the information it provided at the hearing, was essentially the fruit of personal contacts of the Buzzi brothers, while taking into account the information on prices communicated by Ciments Français in its fax of 17 March 1988, in order to respond to possible requests for exports coming from actual or potential customers of the French producer in the south of France region.

1912 It should be pointed out moreover that the Commission does not claim at all in the contested decision that the communication by Ciments Français of its price list to Buzzi led Buzzi to apply prices identical to those of the French producer. At the very most, it claims that the 'reason why Ciments Français communicated its price list and forecast price increases ... was so that Buzzi could align its cement prices in France on Ciments Français ... prices' (contested decision, recital 20, paragraph 6). The fact that Buzzi's prices in the south of France were in actual fact lower than those which had been communicated to it by Ciments Français does not make it inconceivable that the Italian undertaking, despite everything, allowed the information which had been provided to it on 17 March 1988 to influence its export prices.

1913 In conclusion, Buzzi's submissions set out in paragraph 1909 above do not prove that the information which it had obtained, at its request, from Ciments Français had no impact on its conduct on the market.

1914 Ninthly, Buzzi refers to the takeover by the French producers of a number of its French customers.

1915 However, such a circumstance does not hide the unlawful concerted action between Ciments Français and it, when Ciments Français sent to Buzzi, at Buzzi's request, its price list and details of the increase envisaged for 1988.

1916 It follows from all the foregoing that the Commission was justified in concluding that there was a concerted practice as stated in Article 3(1)(b) of the contested decision.

C — Duration of the infringement

1917 The Commission considers that the concerted practice which it finds in Article 3(1)(b) of the contested decision lasted from 17 March to 31 December 1988.

1918 First, Ciments Français claims that it did not have an opportunity to express its views during the administrative procedure regarding the date on which the infringement in question ceased, as that date was not mentioned in the SO.

1919 In this connection, the Court points out that, at point 61(b) of the SO, dedicated to the legal assessment of the facts relating to the Franco-Italian agreement or concerted practice, the Commission considered that 'the exchanges of price lists between the French producers Lafarge, Ciments Français and Vicat and the Italian producer Buzzi [constituted] concerted practices restricting competition within the meaning of Article 85(1) [of the Treaty] from at least 1983 to 1988' (SO, p. 173). Ciments Français must have realised, on reading that passage of the SO, that the Commission intended to complain that it had allegedly participated in a concerted practice with Buzzi until at least the end of 1988. Its argument alleging lack of consistency between the SO and the contested decision must therefore be rejected.

1920 Second, Ciments Français observes that the exchange of information of which it is accused consisted of no more than the sending of a single fax to Buzzi on 17 March 1988 (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987). Like Buzzi, it challenges the Commission's right to base itself, at recital 48, paragraph 7, of the contested decision, on the concerted action between Lafarge and Buzzi in order to extend until 31 December 1988 the duration of the infringement of which it is accused, where it has not been proved that the various contacts between Buzzi and the French producers had arisen from a single infringement. Buzzi also complains that the Commission determined the duration of its unlawful concerted action with Ciments Français without providing a specific reason. It stresses that the price list which had been sent to it on 17 March 1988 by Ciments Français was no longer in force on 1 September 1988, that is to say, four months before the date fixed in the contested decision for the end of the infringement.

1921 It must however be observed that, by informing Buzzi on 17 March 1988, at the latter's request, of its prices in force, and of the forecast price increase 'for the current year', Ciments Français offered it a reasonable degree of certainty as to its commercial conduct, in terms of prices, for the whole of 1988. The unlawful concerted action was thus likely to be of benefit to the participants until the end of 1988. The Commission was therefore entitled to find that the infringement had lasted from 17 March to 31 December 1988.

Concerted practice between Vicat and Buzzi found in Article 3(1)(c) of the contested decision

A — Introduction

1922 In concluding that the infringement of which it accuses Vicat and Buzzi in Article 3(1)(c) of the contested decision (see paragraph 1822 above) existed, the Commission relies on various telexes concerning exchanges of price lists between the two undertakings during the period from 11 to 16 May 1983 (contested decision, recital 20, paragraph 5; documents 33.126/11974, 11973 and 11975 to 11977). It also relies on a telex of 23 April 1986 sent by Buzzi to Vicat. In that telex, Buzzi stated as follows to Vicat: 'We have received requests to supply cement not only from Nice but also Toulon. We replied in the negative to all such requests and intend to

continue so doing. We have learnt that your prices rose recently. Please inform us: ex-works prices for bulk and sacked goods, the percentage increase, and if other price increases are planned for this year. Our prices from March 1986 are: .... The percentage increase was around 4.5%. We anticipate/hope for another increase in September of 3%' (contested decision, recital 20, paragraph 5; document 33.126/6144). The Commission bases itself finally on a document relating to Vicat's list of prices applicable from 1 July 1986, allegedly sent by that company to Buzzi, at the top of which appears the following handwritten note in Italian: '+ 6.3% for bulk compared with March 1986; + 18.79 for sacked' (contested decision, recital 20, paragraph 5; document 33.126/11971).

1923 The Commission considers that the reason why 'Vicat sent its price list was so that Buzzi could align its cement prices in France on ... Vicat prices' and that 'the fact that Buzzi informed Vicat both of its refusal to fill cement orders from the south of France and that it intended to continue doing so [constituted] sharing the south of France market' (contested decision, recital 20, paragraph 6). At recital 48, paragraph 6, of the contested decision, the Commission finds in the following terms that there was a concerted practice between Vicat and Buzzi, contrary to Article 85(1) of the Treaty: '... on the one hand, Buzzi reassured Vicat of its desire not to disrupt the market in the south of France, and, on the other, through the exchanges of price lists and the notification of price increases, Vicat and Buzzi endeavoured to establish a reasonable degree of certainty that any exports which continued to take place would be carried out on the basis of a pricing policy comparable to that of Vicat. By these means, they eliminated a large part of the normal risk inherent in any autonomous change in market behaviour' (contested decision, recital 48, paragraph 6, last subparagraph).

B — Existence of an anti-competitive concerted practice between Vicat and Buzzi

1924 Buzzi states that, according to the Commission, its statements to Vicat, according to which it intended to reply in the negative to all requests for cement coming from Nice and Toulon, constituted 'sharing the south of France market' (contested decision, recital 20, paragraph 6) or reflected its 'desire not to disrupt the market in the south of France' (contested decision, recital 48, paragraph 6). Buzzi states, however, that neither it nor Vicat were censured on that ground in Article 3(1)(c) of the contested decision. It also states that the Commission did not find it was unlawful to send to Vicat on 23 April 1986 a forecast of price increases (contested decision, recital 20, paragraph 5; document 33.126/6144), even though it found the transmission of the same type of information to it on 17 March 1998 by Ciments Français to be unlawful (contested decision, recitals 20, paragraph 4, and 48, paragraphs 4 and 5, and Article 3(1)(b); documents 33.126/11982 to 11987).

1925 It is true that in Article 3(1)(c) of the contested decision the Commission does not expressly charge either Vicat or Buzzi with having participated in a concerted practice consisting in sharing the south of France market, unlike as alleged in Article 3(1)(a) of the contested decision

against Lafarge and Buzzi, or with having exchanged information relating to forecast price increases, unlike the complaint it makes in Article 3(1)(b) of the contested decision against Ciments Français and Buzzi.

1926 In its legal assessment of the facts set out in recital 20, paragraph 5, of the contested decision, which leads it to conclude in Article 3(1)(c) that there was a concerted practice between Vicat and Buzzi 'involving the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France', the Commission gives its reasons for finding such an infringement in the following terms: 'The exchange of price lists which took place on 11-16 May 1983 and April and July 1986, and Buzzi's communication to Vicat on 23 April 1986 of its intention not to accept orders from Nice and Toulon constitute a concerted practice, covered by Article 85(1). Even if the price lists can be obtained through customers, the procedure is more complicated and more time-consuming. Furthermore, the exchanges related not only to the price lists, but also, on one occasion, to the forecasts of price increases. Through this concerted practice, on the one hand Buzzi reassured Vicat of its desire not to disrupt the market in the south of France, and, on the other, through the exchanges of price lists and the notification of price increases, Vicat and Buzzi endeavoured to establish a reasonable degree of certainty that any exports which continued to take place would be carried out on the basis of a pricing policy comparable to that of Vicat. By these means, they eliminated a large part of the normal risk inherent in any autonomous change in market behaviour' (contested decision, recital 48, paragraph 6).

1927 That analysis shows that, in finding that there was a concerted practice between Vicat and Buzzi, the Commission sought to object to the exchanges of prices and forecast price increases between those two undertakings, inasmuch as the purpose of those exchanges was to restrict their autonomy of behaviour, in particular that of Buzzi, by enabling the latter to apply with regard to the south of France market an export pricing policy comparable to the pricing policy followed by Vicat in order not to disrupt that market, in accordance with the intentions expressed by Buzzi in its telex to Vicat of 23 April 1986. Consequently, even if Article 3(1)(c) of the contested decision does not expressly allege that Vicat and Buzzi participated in a concerted practice to share the south of France market, it is nevertheless the case that, according to the Commission, the information exchanges objected to were designed to avoid disturbing the market in question.

1928 Next, Vicat and Buzzi put forward essentially 10 arguments denying the existence of the anti-competitive concerted practice of which they are accused.

1929 Firstly, Buzzi claims, as has been stated above (see paragraphs 1844 and 1883), that the Commission committed a manifest error of assessment in stating, at recital 20, paragraph 2, of the contested decision, that 'in the period in question, the prices charged by Italian producers were roughly 20% lower than prices charged by French producers'. It submits that the prices charged by Italian producers were always, apart from those for 1988, higher than those charged

by French producers, as shown by a comparison between its own Cement 425 prices and those charged by Vicat for CPJ 45 cement (Annex 17 to its application).

1930 It should be recalled once more that the figures produced by the Italian cement industry at the hearing of 2 March 1993 show, for their part, that the French prices were, on average, always 20% higher than the Italian prices during the period 1981 to 1991 (contested decision, recital 9, paragraph 6, and the tables in Annexes 9-3 and 9-4). In any event, on 23 April 1986 Buzzi told Vicat that it had received requests to supply cement not only from Nice but also Toulon — which serves to illustrate the attractiveness of the Italian prices and thus to bolster the Commission's argument — but that it had replied in the negative to all of them and intended to continue so doing (contested decision, recital 20, paragraph 5; document 33.126/6144).

1931 Secondly, Buzzi submits that there is nothing to prove that the document containing Vicat's price list effective as from 1 July 1986 (contested decision, recital 20, paragraph 5; document 33.126/11971) was sent to it by Vicat.

1932 It must be accepted that although the document in question was found on Buzzi's premises, with handwritten notes in Italian at the top of the page, there is no proof that it was sent by Vicat to Buzzi. Buzzi could have obtained it from one of Vicat's customers, to which no objection can be made. In those circumstances, the Commission has not shown that the abovementioned document was part of exchanges between Vicat and Buzzi. It follows that it cannot be taken into account as evidence of the concerted practice at issue.

1933 Thirdly, Vicat complains that the Commission arrived at the conclusion that its contacts with Buzzi were unlawful on the ground that they were the result of the Cembureau agreement to ensure non-transhipment to domestic markets, mentioned in Article 1 of the contested decision.

1934 That argument must be rejected. It is clear from recital 48, paragraph 6, of the contested decision that in the Commission's legal assessment of relations between Vicat and Buzzi, the Commission relied solely on the evidence referred to in the abovementioned recital 20, paragraph 5, in order to conclude that they were unlawful and made no reference whatsoever to the Cembureau agreement.

1935 Fourthly, both applicants deny that the communications complained of had an anti-competitive purpose, raising a number of arguments based on the nature of the information exchanged. Vicat submits that, because of the price-control regime which existed in France until 1986, the prices which it transmitted to Buzzi gave no indication as to its commercial policy (rebates, conditions for payment ...). It relies, furthermore, in support of its argument, on the judgments in *Fiatagri and New Holland Ford* v *Commission*, cited in paragraph 1680 above, paragraph

91, and *Deere* v *Commission*, cited at paragraph 420 above, paragraph 81. Buzzi claims, for its part, that all the prices exchanged were available to the public. The applicants add that, contrary to what the case-law requires before it can be concluded that there has been an unlawful concerted practice, the information which they exchanged did not lead to their revealing or influencing their commercial conduct on the market in question.

1936 The Court finds that the price lists exchanged between Vicat and Buzzi, referred to in recital 20, paragraph 5, of the contested decision, mostly concerned prices in force and therefore up to date. Although it was possible for the parties to obtain those price lists through customers, the fact remains that 'the procedure is more complicated and more time-consuming' (contested decision, recital 48, paragraph 6), and the parties preferred to go directly to each other in order to obtain them. Moreover, Vicat sent Buzzi on 11 May 1983 a change to forthcoming prices by notifying it of the ex-works prices list for the factory at La Grave de Peille with effect from 1 June 1983 (contested decision, recital 20, paragraph 5; document 33.126/11973). On 23 April 1986 Buzzi even notified Vicat of an anticipated/hoped for 3% increase in September and in turn, asked Vicat to indicate ex-works prices for bulk and sacked goods and the percentage increase, of which it had learnt, and to tell it 'if other price increases are planned for this year' (contested decision, recital 20, paragraph 5; document 33.126/6144). Contacts between Vicat and Buzzi thus concerned sensitive and at times even confidential commercial information.

1937 Furthermore, in May 1983 and April 1986, Vicat and Buzzi sent each other their respective ex-works prices for bulk and sacked cement and, on one occasion, a forecast price increase. On 23 April 1986, Buzzi further informed Vicat that it had refused requests to supply cement from Nice and Toulon and that it intended to continue so doing. By doing so, the two applicants revealed their current and future conduct on the market, thus eliminating or, at the very least, substantially reducing the uncertainty as to their respective policies on the said market. In the light of the case-law cited at paragraph 1852 above, the Commission was therefore right to consider that, by that exchange of information, they had 'eliminated a large part of the normal risk inherent in any autonomous change in market behaviour' (contested decision, recital 48, paragraph 6).

1938 Although, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two, it must be held that subject to proof to the contrary, which the parties concerned must adduce, undertakings participating in the concerted action which remain active on the market take into account the information exchanged with their competitors in determining their conduct on that market (*Commission* v *Anic*, cited in paragraph 270 above, paragraphs 118 and 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraphs 161 and 162). It will be necessary to examine (paragraphs 1952 to 1956 below) whether in the present case the evidence adduced by the parties concerned amounts to such contrary evidence.

1939 Lastly, Vicat cannot rely on the judgments in *Fiatagri and New Holland Ford* v *Commission*, cited at paragraph 1680 above, and *Deere* v *Commission*, cited at paragraph 420 above. First, the exchange of information referred to in those cases did not involve prices. Secondly, it is clear from the judgment in *Fiatagri and New Holland Ford* v *Commission* (paragraph 91) that, for transparency between traders to be considered lawful under Article 85(1) of the Treaty, it must be likely to lead, on a market that is truly competitive owing to the atomised nature of supply, to the intensification of competition between suppliers, a condition evidently not fulfilled by the exchange of price lists between Vicat and Buzzi, if only because of the relative concentration of supply which characterises the market in question.

1940 Fifthly, Buzzi claims that the Commission contradicts itself when it affirms, first, that the exchanges of price lists and notification on price increases enabled it to develop a commercial policy comparable to that of Vicat on the south of France market, and secondly, that those products did not belong to the same class of resistance as those of the French producers.

1941 It should be borne in mind that Buzzi contests specifically, in its application, the explanation put forward by the Commission at recital 20, paragraph 7, of the contested decision for its prices being lower than those of the French producers, by emphasising that its products were of equivalent quality to those of French cement (see paragraph 1907 above).

1942 In any event, whatever the degree of comparability, in terms of quality and resistance, between the products marketed by Buzzi and the French cement producers, it has been established that Buzzi asked Vicat on various occasions to send it its price list for its factory at La Grave de Peille, together with some indication of any price increases envisaged. In the absence of an alternative persuasive explanation by Buzzi as to the reason for such price list notification, the Commission was justified in considering that 'through the exchanges of price lists and the notification of price increases, Vicat and Buzzi [had] endeavoured to establish a reasonable degree of certainty that any exports which continued to take place would be carried out on the basis of a pricing policy comparable to that of Vicat' (contested decision, recital 48, paragraph 6).

1943 Sixthly, Vicat puts forward several alternative justifications for the relations it maintained with Buzzi during the period under consideration. The exchanges of price lists complained of allegedly enabled Buzzi to offer prices lower than its own, which led the Italian company to increase its sales. Vicat thus prevented Buzzi from attempting to encroach on its own client base in the south of France.

1944 That explanation cannot be accepted. An undertaking which seeks to avoid having its customers poached by a competitor would more likely seek to ensure or restore its

competitiveness rather than communicate its prices to its competitor in the hope that that information would lead it to losing interest in its own customer base. In actual fact, the explanations put forward by Vicat disclose its anti-competitive intention when it exchanged information, namely to protect its natural market in the south of France.

1945 Vicat further states that, since at the time there was a system of price control in Italy, it considered it lawful that Buzzi should ask it for its price list in order to seek to have the Italian public authorities accept an increase in its prices.

1946 It must however be found that the various documents relating to the exchanges of price lists between Vicat and Buzzi (contested decision, recital 20, paragraph 5; documents 33.126/11974, 11973, 11975 to 11977 and 6144) do not contain the slightest evidence to confirm that affirmation. Moreover, the justification put forward by Vicat does not explain why Vicat itself requested Buzzi's ex-works prices for its Robilante factory on several occasions, (contested decision, recital 20, paragraph 5; documents 33.126/11975 to 11977 and 6144).

1947 Seventhly, Vicat submits that the statement of intention which Buzzi sent to it in the telex of 23 April 1986 (contested decision, recital 20, paragraph 5; document 33.126/6144) was at most, at least in so far as concerned orders from Toulon, technically impossible, given the distance between that region and the Robilante factory. For its part, Buzzi criticises the Commission once again for its failure to analyse the market in question. It informed Vicat of its intention not to accept the orders it received from Nice and from Toulon because of the numerous objective obstacles to export activity in the Franco-Italian border region (see paragraph 1853 above).

1948 It must however be pointed out that the telex of 23 April 1986 does not contain any evidence of such a nature as to support to the explanations which the applicants now put forward. Moreover, the applicants cannot argue that Buzzi's refusal to accept orders from the south of France may be explained by the difficulties and inconveniences relating to Franco-Italian cross-border trade, when Buzzi itself stated, during the administrative procedure, that those various obstacles had not dissuaded it from exporting 'worthwhile quantities' of cement to the south of France, moreover 'at prices lower than those charged by French producers' (paragraph 4.3 of Buzzi's reply to the SO; contested decision, recital 20, paragraph 7).

1949 Eighthly, Vicat argues that Buzzi's statement to the effect that it would refuse and intended to continue to refuse requests coming from Nice for it to supply cement is inconsistent with the truth, inasmuch as Buzzi has always sold its product in Nice. Furthermore, the report of the meeting of 26 November 1988 between Lafarge and Buzzi (contested decision, recital 20, paragraph 3; document 33.126/6857 bis) itself denies the existence of an agreement over

domestic markets, in this case the south of France market, between the Italian undertaking and the French producers, in particular Vicat, in that it records Buzzi's statement that it had had two or three customers in the last 20 years in the south of France.

1950 In that regard, the parties agree that, as is shown by the passage from the record of the meeting of the 26 November 1988 between Lafarge and Buzzi and highlighted by Vicat, Buzzi maintained on the Côte d'Azur market several business contacts based on the personal links established by the Buzzi brothers. None the less, in its telex of 23 April 1986 to Vicat, Buzzi actually told the latter that it had given a negative reply to requests for the supply of cement which it had received not only from Nice but also from Toulon and that it intended to continue so doing. The indication given by Vicat means therefore at most that the French producers, among them Vicat, saw no objection to Buzzi keeping its two or three customers of 20 years standing on the Côte d'Azur market (record of the meeting of 26 November 1988 between Lafarge and Buzzi), provided that the Italian undertaking abstained from increasing its exports on that market, in order not to disrupt the natural market of the French producers and in particular of Vicat.

1951 In conclusion, the Commission was right to see in Buzzi's statement of intention of 23 April 1996 the expression of its desire 'not to disrupt the market in the south of France' (contested decision, recital 48, paragraph 6). It was also entitled to find (ibidem) that through their exchanges of price information Vicat and Buzzi endeavoured to establish a reasonable degree of certainty that any exports which continued to take place would be carried out on the basis of a pricing policy comparable to that of Vicat. The Commission was therefore entitled to conclude that those bilateral contacts, which sought to bring about competitive conditions that did not correspond to the normal market conditions, were unlawful (see, to that effect, the case-law cited in paragraph 1852 above).

1952 Ninthly, Buzzi argues that the unlawful concerted practice of which the Commission accuses it and Vicat is contradicted by the constant increase of its sales in France between 1983 and 1986 (annex 16 to its application). It adds that the Commission cannot rely, at recital 20, paragraph 7, of the contested decision, on the fall in sales in France from 1987 in order to show that the abovementioned concerted action did in fact influence the behaviour of the parties concerned on the south of France market, since that drop followed the takeover by the French producers of a number of its customers in the Côte d'Azur.

1953 It states that, during the whole of the period from 1983 to 1988, its prices on the French market were significantly lower than those of the French producers, in particular those of Vicat (annexes 18 to 23 to its application). It refutes (see paragraphs 1907 and 1941) the explanation put forward in that respect by the Commission at recital 20, paragraph 7, of the contested decision. For its part, Vicat compares Buzzi's sale prices with its own on the south of France market for the period in issue. It appears from that comparison that at the end of 1985 Buzzi's prices in France were approximately FRF 100 per tonne lower than those of Vicat.

1954 As has been stated above (see paragraph 1911), Buzzi has never denied having had, during the period under consideration in the contested decision, a number of customers in the south of France, more specifically in the Côte d'Azur market. It did not intend however waging 'war' against the French producers (see the record of the meeting of 26 November 1988 between Lafarge and Buzzi; contested decision, recital 20, paragraph 3; document 33.126/6857 bis). It was thus perfectly able to follow an independent commercial policy, both in terms of prices and of volume of sales, with regard to those customers, which was the fruit of personal contacts of the Buzzi brothers, while restricting vis-à-vis all other customers its autonomy of behaviour on the basis of information provided to it by Vicat in order not to disrupt the south of France market and in particular Vicat's natural market in that region.

1955 Next, the Commission does not claim, in the contested decision, that the exchanges of price lists between Vicat and Buzzi led the latter to apply prices identical to those of the French producer in the south of France market. It maintains only that 'through the exchanges of price lists and the notification of price increases, Vicat and Buzzi endeavoured to establish a reasonable degree of certainty that any exports which continued to take place would be carried out on the basis of a pricing policy comparable to that of Vicat' (contested decision, recital 48, paragraph 6). The fact that Buzzi in fact applied in the south of France prices lower than those communicated to it by Vicat does not rule out the possibility that Buzzi, despite everything, followed a 'pricing policy comparable to that of Vicat' by reflecting in its export prices the change in 'local' prices on that market, in this case, Vicat's prices.

1956 The various arguments put forward by the applicants either to illustrate the commercial conduct of Buzzi during the period under consideration or to refute the explanations proffered to that end by the Commission at recital 20, paragraph 7, of the contested decision do not therefore show that the bilateral contacts between Vicat and Buzzi described in recital 20, paragraph 5, of the contested decision had no impact on their conduct on the market. They do not therefore show that the infringement in question did not in fact take place.

1957 Tenthly, Vicat maintains, it its reply, that the Commission could not, without contradicting itself, criticise it for having taken part in a concerted practice with Buzzi involving both an exchange of information on prices intended to ensure that their prices were aligned with each other and, at the same time, a systematic refusal by Buzzi to deliver to the south of France.

1958 The Court points out that the Commission does not claim, in the contested decision, that Vicat and Buzzi colluded on the systematic refusal by Buzzi to deliver in the south of France or, in other words, on total non-delivery of cement by Buzzi on that market. All it alleged against Vicat and Buzzi was that they participated in a concerted practice which involved 'the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France' (Article 3(1)(c) of the contested decision), after it had found that 'through the exchanges of price lists and the notification of price increases, Vicat and Buzzi endeavoured to establish a reasonable degree of certainty that any exports which continued to take place' — without prejudice to the desire, expressed by Buzzi to Vicat, not to disrupt the

market in the south of France by accepting any order which it might receive not only from Nice but also from Toulon — 'would be carried out on the basis of a pricing policy comparable to that of Vicat' (contested decision, recital 48, paragraph 6). It follows that Vicat's argument alleging that the Commission contradicts itself on this point must be rejected.

1959 It follows from all the foregoing that the Commission was justified in concluding that there was concerted practice as stated in Article 3(1)(c) of the contested decision.

C — The duration of the infringement

1960 The Commission considers the concerted practice between Vicat and Buzzi lasted from 11 May 1983 to 31 December 1988.

1961 First, Buzzi complains that the Commission extended the starting point of the concerted practice engaged in with Vicat by finding that that practice existed from May 1983 rather than, as in the SO, from April 1986.

1962 In the SO, the Commission actually took the following view: 'The agreements and/or concerted practices between the French producers Lafarge and Vicat and the Italian producer Buzzi... on Buzzi's exports to France constitute restrictions of competition within the meaning of Article 85(1) since at least 1986 [in that] such agreements and/or practices have the object of sharing the markets between such producers' (Chapter 10, first paragraph of point 61(b), of the SO, p. 173). However, it added: 'The exchanges of price lists between the French producers Lafarge, Ciments Français and Vicat and the Italian producer Buzzi constitute concerted practices restricting competition within the meaning of Article 85 [(1) of the Treaty] from at least 1983 to 1988. Such exchanges were carried out because, as may be seen in point 10 [of the SO], there is a reasonable degree of certainty that a firm wishing to export will charge prices for its supplies that are comparable to those charged by the producers established in the importing country. This removes the possibility of unforeseen or unforeseeable reactions on the part of competitors and, hence, a large part of the normal risks inherent in any autonomous change of behaviour on the market' (SO, Chapter 10, second paragraph of point 61(b), p. 173). On reading that passage of the SO, Buzzi must have realised that the Commission intended to complain that it had participated with Vicat, at least since 1983, in a concerted practice which involved 'the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France' (Article 3(1)(c) of the contested decision).

1963 Secondly, Vicat and Buzzi submit that the Commission, by merely producing evidence of exchanges of price lists in May 1983, April 1986 and July 1986, has failed to fulfil the obligation required by the case-law (see in particular *Dunlop Slazenger* v *Commission*, cited above at paragraph 270, paragraph 79) to adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between 11 May 1983 and 31 December 1988. Vicat stresses in particular that the Commission has not shown that Buzzi and itself continued to exchange their price lists after 1986.

1964 The applicants go on to state that the exchanges of prices lists are time-barred by virtue of Article 1(1)(b) of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), because the Commission's investigations began in April 1989, that is to say more than five years after the events. Buzzi adds that the 1983 exchanges at issue are also time-barred by virtue of Article 2(3) of that regulation, because the Commission, in adopting its decision on 30 November 1994, was penalising the conduct more than 10 years after it occurred. The applicants conclude that proceedings can be brought in respect of the infringement alleged against them at most for the period between April and July 1986.

1965 The Court points out that, although the telexes relied on by the Commission at recital 20, paragraph 5, of the contested decision attest only to exchanges of price lists in May 1983 and April 1986, the directness of the language used by Vicat and Buzzi and the spontaneity with which they sent each other their respective price lists, without explaining or asking the other party to explain the reasons behind such request for price-related information, show that those exchanges were normal practice.

1966 It should further be observed that, on 23 April 1986, Buzzi informed Vicat of the fact that it had given a negative reply to requests for the supply of cement which it had received not only from Nice but also from Toulon. By so doing, Buzzi reassured Vicat as to its previous conduct on the market in the south of France.

1967 The continuity of the infringement alleged against Vicat and Buzzi is therefore certain for the period between 11 May 1983 and 23 April 1986 inclusive. Having regard to Articles 1 and 2 of Regulation No 2988/74, the Court must reject the argument that the offending conduct involving exchanges of price lists in May 1983 is time-barred.

1968 On the other hand, there is no proof of exchanges of price lists between Vicat and Buzzi after 23 April 1986. In finding that the infringement alleged in Article 3(1)(c) of the contested decision lasted until 31 December 1988, the Commission relies on 'the last concerted action with Lafarge ... from 26 November 1988 which involved Buzzi's revealing to Lafarge its future

conduct on the market' (contested decision, recital 48, paragraph 7, third subparagraph). It concludes: 'December 1988 must be deemed to be the end of the infringement as regards the three French producers too. Even though it was provided individually to the three French producers, Buzzi's information ultimately benefited all three' (contested decision, recital 48, paragraph 7, fourth subparagraph).

1969 However, the fact that, at the meeting of 26 November 1988 with Lafarge, Buzzi told Lafarge that it had no desire to upset the Côte d'Azur market, and that war was pointless, does not demonstrate that 'exchanges of information on prices', which is the specific subject of the infringement found in Article 3(1)(c) of the contested decision, took place between Vicat and Buzzi until 31 December 1988.

1970 It follows that Article 3(1)(c) of the contested decision must be annulled in so far as it finds that Vicat and Buzzi participated, after 23 April 1986, in a concerted practice involving exchanges of information on prices in order to restrict their autonomy of conduct so far as concerns deliveries of cement in the south of France.

Access to the file

1971 None of the applicants mentioned in Article 3(1) of the contested decision has claimed that it did not have access during the administrative procedure to the incriminating evidence mentioned in recital 20 of the contested decision.

1972 So far as it contains exculpatory evidence, Vicat, Ciments Français and Buzzi made a number of observations on the basis of those documents which they had been able to consult following the measures of 2 October 1996 and 18 and 19 June 1997. They sought to show that, by giving them only restricted access to the SO and to its investigation file during the administrative procedure, the Commission had breached the rights of the defence when finding the infringements of which they are accused in Article 3(1)(a), (b) and/or (c) respectively of the contested decision. As stated above (see paragraph 1823), Lafarge did not submit any observations to show that the finding of the infringement of which it is accused in Article 3(1)(a) of the contested decision was made in breach of its rights of defence.

1973 Vicat states that, if it had been aware of a number of documents during the administrative procedure, it would have been able to use them in order to support its defence against the complaint in Article 3(1)(c) of the contested decision alleging that it had participated in an anti-competitive concerted practice with Buzzi.

1974 In its observations of 10 February 1997, it argues, first, that the documents consulted confirm the presence of economic and historic obstacles to the existence of a Franco-Italian concerted practice. Documents 33.126/12485 to 12492, 12493 to 12509, 12463 to 12484, 12452 to 12462, 2921 to 2928, 2929 to 2931, 3158 to 3160, 3163 to 3166, 3150 to 3154, 3017, 3018, 3019 to 3032, 3053 to 3059, 3099 to 3108, 3110 to 3126, 12083 to 12096, 12081, 12082, 12136 to 12138, 3365, 12139, 12140, 12142 and 12143 show that from the early 1980s the Italian market was closed off by a series of agreements entered into by the three principal cement producers; these were agreements in relation to which Buzzi had always been hostile. All those documents would thus have enabled Vicat to prove that Buzzi was unlikely to participate in restrictions and that a concerted practice with Buzzi would have been totally ineffective, in view of its indiscipline and the small part which it played on the Italian market.

1975 Vicat relies moreover on documents 33.126/11990 and 11991, which relate to the price increase for Italian cement authorised in September 1989 by the Interministerial Price Committee (Comitato interministeriale dei prezzi — CIP) due to be announced in the Italian press by AITEC. Those documents would show, in Vicat's view, that the pricing information which Buzzi had sent to it occasionally was not confidential at all and that its commercial value was limited.

1976 Secondly, Vicat claims that there is an astonishing disparity between the practices, termed unlawful, between Italian and French cement producers and the much more elaborate practices revealed by the documents in the Spanish file. The information exchanged with Buzzi in the telex referred to by the contested decision was anodyne compared to that which, on reading the file on Spain and Portugal, were exchanged between the Portuguese and Spanish markets. In that respect, Vicat refers in particular to documents 33.322/1410 to 1412 and 1406 to 1408. It expresses astonishment therefore that its occasional exchanges of information with Buzzi should have been the subject of investigations similar to those carried out into more frequent and, above all, more sensitive exchanges of information, inasmuch as the latter involved, in particular, names of customers and volumes of exports.

1977 It should however be noted that, contrary to those affirmations, the comments which Vicat could have made on the basis of the documents it lists are not such as to prove the existence of an infringement of its rights of defence in the course of the administrative procedure.

1978 First of all, the documents relied upon in order to illustrate the 'cartelisation' of the Italian market since the early 1980s and the allegedly rebellious attitude of Buzzi in that respect (see the documents referred to in paragraph 1974 above) would not have shed a different light on the documents on which the Commission relied in the SO (Chapter 2, point 10, and Chapter 10, point 61(b)) and in the contested decision (recital 20, paragraphs 5 to 7, and recital 48, paragraphs 6 and 7) in order to conclude in Article 3(1)(c) of the contested decision that there had been a concerted practice between Vicat and Buzzi.

1979 Nor are documents 33.126/11990 and 11991 likely to reveal the existence of a breach of Vicat's rights of defence during the administrative procedure. Any comments which Vicat might have been able to make on the basis of those documents would not have prevented the Commission from finding, objectively and irrefutably, in the light of the telexes referred to in point 10 of the SO and at recital 20, paragraph 5, of the contested decision (documents 33.126/11974, 11973, 11975 to 11977 and 6144), that the exchanges between Vicat and Buzzi during the period under consideration involved their own ex-works prices applicable at their factories at La Grave de Peille (Vicat) and Robilante (Buzzi), as well as, 'on one occasion, ... forecasts of [those] price increases' (contested decision, recital 48, paragraph 6), information whose sensitive or even confidential nature is undeniable, rather than price lists and price increases approved by the State authorities. Those documents would therefore not have shown that the contacts between Vicat and Buzzi set out in Article 3(1)(c) of the contested decision were not unlawful.

1980 Finally, the quantity, nature and content of the documents used by the Commission in order to prove one particular infringement cannot, as such, affect the evidential value of — fewer — documents relied upon in support of a finding of another infringement. Accordingly, documents 33.322/1406 to 1408 and 1410 to 1412, relating to the Hispano-Portuguese agreement mentioned in Article 3(2) of the contested decision, cannot undermine the evidential value of the documents relied upon by the Commission, in the SO and in the contested decision, in concluding that there was a concerted practice between Vicat and Buzzi as stated in Article 3(1)(c) of the contested decision.

1981 In its observations of 8 January 1998, Vicat refers, first, to the extracts from an internal Ciments Français memorandum of 20 June 1988 (documents 33.126/4366, 4372 and 4387) which reflected the French company's desire to enter into cooperation agreements with Buzzi, something which would have been inconceivable if, as the Commission maintains in its contested decision, Buzzi was involved with Vicat, a competitor of Ciments Français. Those extracts thus allegedly disprove the existence of an agreement between Vicat and Buzzi. The same is true for Lafarge's minutes of a meeting of 20 December 1988 (documents 33.126/7357 to 7362) dealing, in particular, with the French company's prospects in Italy, and which involved a possible alliance between Lafarge and, specifically, Buzzi.

1982 The Court points out that the documents thus relied on by Vicat, which do indeed refer to possible alliances with Buzzi, reflect expansionist strategies envisaged by Ciments Français and Lafarge in Italy. Those documents do not however shed a different light on the documents on

which the Commission relied, in the SO and the contested decision, in concluding that there was concerted practice between Vicat and Buzzi as stated in Article 3(1)(c) of the contested decision. The fact that two French cement producers could have pondered strategic alliances in 1988 with Buzzi does not preclude or contradict the pursuit from 1983 to 1986 of unlawful collusion between Vicat and Buzzi.

1983 Secondly, Vicat states that documents 33.126/4395 to 4399 and 4406 to 4414, apparently of 9 March 1989, relating to the cooperation agreements between Ciments Français and Unicem, could have been of use in its defence during the administrative procedure, since they would have enabled it to establish *a contrario* that the Commission's file did not contain any proof of an agreement or a draft agreement of that type between Buzzi and itself.

1984 However, it is not possible to argue *a contrario* from the existence of proof of an agreement between two parties that there is no proof of concerted action between two other parties. Moreover, in the present case, the Commission did in fact refer, in the SO and the contested decision, to documents proving that there was unlawful concerted action between Vicat and Buzzi involving 'the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France' (Article 3(1)(c) of the contested decision). Any comments which Vicat might have been able to make could not therefore prevent a finding of such concerted action.

1985 Thirdly, Vicat invokes documents 33.126/4421 and 4422, which contain a brief description of the Italian cement industry in 1986, in order to emphasise the lack of impact on the common market of the alleged concerted practice, given the very modest position held by Buzzi on the Italian market (3% share of the market).

1986 However, that reasoning does not support the conclusion that Vicat's rights of defence were infringed during the administrative procedure. In prohibiting agreements which have as their object or effect the restriction of competition and which are likely to affect trade between Member States, Article 85(1) of the Treaty does not require that the agreement in question should have actually affected trade between Member States, which, moreover, is difficult to prove to a sufficient legal standard in most cases, but requires that it be established that the agreement be capable of having that effect (*Miller* v *Commission*, cited in paragraph 1727 above, paragraph 15, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 19). An agreement may thus affect trade between Member States where it is possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that the agreement or practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see to that effect Case 99/79 *Lancôme* v *ETOS* [1980] ECR 2511, paragraph 23, and *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 170). In the present case, it is apparent from the documents examined in paragraphs 1922 to 1970 above that the concerted practice between Vicat and Buzzi was likely to affect normal business in the cement sector in the Franco-Italian border region, both in regard to quantities and to prices. Any observations which Vicat might have

been able to make during the administrative procedure in order to illustrate the modest position held by Buzzi on the Italian market could not therefore have altered the outcome of the administrative procedure.

1987 Fourth, Vicat puts forward an internal Lafarge document, undated but probably from 1987, entitled 'Implications of the risks of overland importation over the French borders' (documents 33.126/4869 to 4873). That document, relating specifically to Italian exports to the Nice-Côte d'Azur area, allegedly confirms the existence of considerable difficulties encountered by Buzzi when exporting cement to France. In other words, that document demonstrates that the low level of trade in cement between France and Italy may be explained solely by purely objective considerations to do with the various obstacles to exportation prevailing in the Franco-Italian border area, rather than, as the Commission claims, by a local concerted practice between Buzzi and the French producers, in particular Vicat. The document in question thus states, with regard to the 'Italy/Nice-Côte d'Azur' market: 'The advantage in cost terms of the nearest Italian factory (Buzzi) is not favourable ... despite a variable cost of FRF 90 per tonne instead of FRF 100 per tonne charged by French factories; as regards transport costs, the favoured approach is that of the widening of the pass at Tende (a project under serious consideration) with direct deliveries; a commercially justified warehouse at Ventimiglia would only increase delivery costs. The position of French plants on the border with Italy places them, in some circumstances, in a good position to carry out reprisals. Finally, the Italian factory does not have for the time being the requisite overcapacity — investment in grinding plant is required. The whole of the above would indicate that there is no significant threat of overland imports.'

1988 The Court finds that that document shows that, although, according to Lafarge, there was no 'significant threat of overland imports', in particular from Italy, and specifically from Buzzi, the 'risk' which such imports involved was none the less latent.

1989 Furthermore, any comments which Vicat might have made on that document in the course of the administrative procedure in an attempt to show that the low level of cross-border trade in cement between France and Italy was due to the various obstacles and inconveniences linked to export between those two markets would not have made it possible to disregard Buzzi's statements during that administrative procedure, set forth as follows in the contested decision (recital 20, paragraph 7) '... despite a number of obstacles which it had to overcome (transport costs, customs, difference in the quality of Italian and French cement), and although it could have sold its products on closer and more profitable markets, it has been exporting worthwhile quantities ("interessanti quantità") of cement to the south of France since the end of the 1960s [... at] prices ... lower than the prices communicated to it by the French producers'.

1990 Finally, Vicat's comments would not have prevented the Commission from deciding that Buzzi, by informing Vicat on 23 April 1986 of its decision not to give a favourable reply to requests for supply of cement which it received from the south of France and of its intention to continue so

doing (contested decision, recital 20, paragraph 5; document 33.126/6144), had 'reassured Vicat of its desire not to disrupt the market in the south of France' (contested decision, recital 48, paragraph 6).

1991 It appears from the foregoing considerations that, so far as concerns the infringement mentioned in Article 3(1)(c) of the contested decision, none of the arguments put forward by Vicat in its observations of 10 February 1997 and 8 January 1998 is such as to show that its rights of defence were infringed in the course of the administrative procedure.

B — Case T-39/95 *Ciments Français* v *Commission*

1992 Ciments Français states that, if it had been aware of a number of documents during the administrative procedure, it would have been able to make full use of them in order to support its defence against the complaint in Article 3(1)(b) of the contested decision that it had participated in an anti-competitive concerted practice with Buzzi.

1993 In its observations of 10 February 1997, it argues that the chapters in the SO dealing with Italy and the documents relating thereto (in particular documents 33.126/2945 to 2948, 2949 to 2951 and 19871 to 19873) would have enabled it to state that Buzzi had not participated in the action undertaken by the Italian producers against the Greek exporters, which had nothing to do with Cembureau. According to Ciments Français, in the absence of any such relationship between Buzzi and Cembureau, the transmission of a public price list to Buzzi by Ciments Français on 17 March 1988 (documents 33.126/11982 to 11987; contested decision, recital 20, paragraph 4) should not have been considered to be proof of an unlawful concerted action and, still less so, of an application of the Cembureau agreement. Finally, those passages from the SO relating to the Italian market make no reference to any document suggesting there were links or contacts between the French and Italian producers nor, a fortiori, between Ciments Français and Buzzi.

1994 The Court finds, however, that no breach of the rights of the defence was committed in the course of the administrative procedure with regard to the documents referred to by Ciments Français. The Commission has never claimed that Buzzi had links with Cembureau. On the contrary, in recital 48, paragraph 2, of the contested decision it emphasises the lack of any structural link between Buzzi and Cembureau. Comments by Ciments Français intended to deny the existence of such a link could therefore not have altered the outcome of the administrative procedure.

1995 In any event, any comments which Ciments Français might have been able to make in order to demonstrate the lack of any link between Buzzi and Cembureau and the absence of participation by Buzzi in the action against Greek exports undertaken by the producers

belonging to its market and, finally, the total absence of any reference in the Italian chapters of the SO to documents concerning contacts between the Italian and French producers, in particular between Ciments Français and Buzzi, would not have made it possible to disregard or to shed a different light on the contents of the fax of 17 March 1988 whereby Ciments Français communicated to Buzzi, at the latter's request, its price list and the increases which it envisaged for the year (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987) and on which the Commission relied in the SO (Chapter 2, point 10, and Chapter 10, point 61(b)) and in the contested decision (recital 20, paragraphs 4, 6 and 7 and recital 48, paragraphs 4, 5 and 7) in concluding that the concerted practice existed.

1996 In its observations of 21 November 1997, Ciments Français makes reference, as Vicat has done, to the study carried out by Lafarge entitled 'Implications of the risks of overland importation over the French borders' (documents 33.126/4869 to 4910) in which it highlights the same excerpts as those relied upon by Vicat (see paragraph 1987 above). It considers that if it had been able to have access to that study during the administrative procedure, it would have enabled it to confirm the merits of the argument put forward in reply to the SO, to the effect that there had been no possibility that Ciments Français and Buzzi were in competition. In those circumstances, the sending of a price list could not have been considered to be proof of an anti-competitive agreement. What that document in fact shows is that Buzzi, which owns the nearest factory to the French border, was not in an actual or potential competitive relationship with Vicat and Lafarge on the market of the south-east of France. That conclusion applies all the more in the case of Ciments Français, whose nearest factory to the Italian border is even farther away than those of Vicat and Lafarge. Ciments Français takes the view that that exculpatory document would have altered the outcome of the administrative procedure if the Commission had seen fit to take it into account during the abovementioned procedure.

1997 As has been pointed out at paragraph 1988 above, the Lafarge document shows that, although the French undertaking did not perceive, at that time, any 'significant threat of overland imports', in particular from Italy and specifically from Buzzi, the 'risk' linked with such imports was none the less latent. Furthermore, for the reason set out at paragraph 1989 above, any comments which Ciments Français might have made on that document in the course of the administrative procedure would not have prevented the Commission from finding that Buzzi exported to France (contested decision, recital 48, paragraph 5, second subparagraph). Finally, any comments which Ciments Français might have made would not have enabled the Commission to alter the conclusions it made in the second and fourth subparagraphs of recital 48, paragraph 5, of the contested decision: '... Ciments Français and Buzzi are actual or, at the very least, potential competitors and ... any communication to a competitor of the conduct which it is planned to adopt on the market, such as to enable an influence to be exerted on the competitive conduct of such competitor, constitutes an infringement of Article 85(1).'

1998 It is clear from the foregoing considerations that, so far as concerns the infringement mentioned in Article 3(1)(b) of the contested decision, none of the arguments put forward by Ciments Français in its observations of 10 February and of 21 November 1997 are such as to show that its rights of defence were infringed in the course of the administrative procedure.

1999 Buzzi, referring to various documents, states that, if it had been aware of them during the administrative procedure, it would have been able to use them to support its defence against the complaint in Article 3(1)(b) of the contested decision alleging that it had participated in three anti-competitive concerted practices with the French producers Lafarge, Ciments Français and Vicat.

2000 Buzzi makes the general point that none of the documents in the Commission's file to which it obtained access following the measures of organisation of procedure ordered by the Court of First Instance supports the conclusion that it was involved in an unlawful concerted practice with the principal French producers.

2001 However, the fact that unlawful conduct on its part was not shown by any of the documents which Buzzi was able to consult during the procedure before the Court does not, of itself, shed a different light on the documents which were accessible during the administrative procedure on which the Commission relied in the SO (Chapter 2, point 10, and Chapter 10, points 61(b)) and in the contested decision (recitals 20 and 48) in order to conclude that there had been a concerted practice between Buzzi and the French producers Lafarge, Ciments Français and Vicat.

2002 Buzzi next refers to a first series of documents which, in its view, could have been useful during the administrative procedure in clarifying the market conditions and proving the total absence of any competitive relationship between the French producers and itself.

2003 First of all, it refers, in its document of 9 January 1997, to an internal Lafarge memorandum of 21 April 1989 (documents 33.126/4709 and 4710), from which, it claims, that it is clear that it was not perceived by the French undertaking as a competitor on the market in the south-east of France. In its observations of 28 November 1997 it relies on another internal Lafarge memorandum of 28 February 1988 concerning 'Investigations by the Commission in Brussels' (documents 33.126/16838 to 16840). That memorandum makes clear that Buzzi's factory in Robilante was not deemed a likely source of competition in the south-east of France on which Lafarge, Ciments Français and Vicat faced each other. Buzzi further refers in its observations of 28 November 1997 to an internal Vicat memorandum of 18 July 1988 (documents 33.126/6245 to 6247), which Buzzi claims confirms that it was not perceived by Vicat as a competitor on the south of France market.

2004 It should first of all be pointed out that the three internal memoranda in question make no reference to Buzzi. They concern exclusively competition between the three French producers Lafarge, Ciments Français and Vicat on the south of France market. The fact that those

documents make no mention of Buzzi does not in itself mean that the Italian undertaking was not perceived by the French producers as an actual or potential competitor on that market.

2005 Next, it is appropriate to recall once again that during the administrative procedure Buzzi itself stated that, 'despite a number of obstacles which it had to overcome (transport costs, customs, difference in the quality of Italian and French cement), and although it could have sold its products on closer and more profitable markets, it had been exporting worthwhile quantities ("interessanti quantità") of cement to the south of France since the end of the 1960s' in order to show that it 'acted completely independently, in accordance with the actions of an entrepreneur seeking new markets' (point 4.3 of the response to the SO; contested decision, recital 20, paragraph 7) and thereby to deny the complaints made against it in the SO with regard to having participated in unlawful concerted actions with the French producers.

2006 It follows that any comments which Buzzi might have made in the course of the administrative procedure to show, in the light of the three internal memoranda which it relies upon, that it was not perceived as a competitor by the French producers with which the Commission accuses it of having engaged in unlawful concerted actions would not have prevented the Commission from finding that Buzzi exported to France (contested decision, recital 48, paragraph 5) and thus that the French producers and Buzzi were actual or, at the very least, potential competitors on the south of France market (contested decision, recital 48, paragraph 5). Finally, they would not have made it possible to disregard the documents on which the Commission relied, in the SO and in the contested decision, in concluding that the three concerted practices of which Buzzi is accused did exist.

2007 Secondly, Buzzi refers in its document of 28 November 1997 to a study on the market in the south-east of France, carried out by the commercial department of Lafarge on 10 December 1987 (documents 33.126/14549 to 14604). It claims that that document shows that the market study was carried out by Lafarge using only the undertaking's internal database. Buzzi considers that if the other French producers operating in the south-east of France, as well as itself, had provided Lafarge with enough data to enable it to know and assess the market in question, Lafarge would not have needed to resort to that internal study. It further claims that it also makes it clear that, since 1984, Lafarge had abandoned an important project, specifically on the basis of its knowledge of the market in question. Buzzi finds it remarkable that the abandonment of that project was not compensated by new initiatives, such as an exchange of information with the competition. On the contrary, Lafarge's knowledge of the market became significantly worse after 1984. Those various aspects thus contradict the Commission's argument that Buzzi had entered into an agreement with the three French producers Lafarge, Ciments Français and Vicat to share the market of the south of France on the basis of reciprocal exchanges of information.

2008 The Court points out first of all that the contested decision does not allege the existence of a single agreement or concerted practice between, on the one hand, the French producers Lafarge, Ciments Français and Vicat and, on the other, the Italian producer Buzzi. The Commission accuses Buzzi of three different concerted practices, corresponding to a like number of bilateral

relationships constituting an infringement, in which the Italian producer engaged with each of the three French undertakings. Since the internal study put forward by Buzzi comes from Lafarge, and Buzzi claims that the study reveals the difficulties encountered at the time by that undertaking in collecting information on the south of France market, the only matter which need be considered is whether access to the document in question by Buzzi during the administrative procedure would have been useful in its defence against the complaint in Article 3(1)(a) of the contested decision that it had participated in a concerted practice with Lafarge involving the sharing of the market in southern France.

2009 Lafarge's internal study concerns exclusively the volume of sales and the share of that company's market in France. However, the Commission, in finding that Lafarge and Buzzi committed the infringement mentioned in Article 3(1)(a) of the contested decision, never claimed either in the SO or in the contested decision that their concerted action related to exchanges of information on their respective sales volumes and market shares in southern France.

2010 It follows that any comments which Buzzi might have made on that internal study by Lafarge in the course of the administrative procedure in order to illustrate the difficulties of that company in obtaining information on the south of France market and to seek in that way to refute the existence of an unlawful concerted action between Lafarge and itself, would not have made it possible to disregard the record of the meeting of 26 November 1988 between Lafarge and Buzzi, on which the Commission relied in the SO (Chapter 2, point 10, and Chapter 10, point 61(b)) and in the contested decision (recital 20, paragraphs 3 and 7 and recital 48, paragraphs 3 and 7), in concluding that the concerted practice found against those two undertakings in Article 3(1)(a) of the contested decision did exist.

2011 Thirdly, Buzzi draws attention in its document of 9 January 1997 to the fact that, in the statistics drawn up by SFIC (documents 33.126/14809 to 14824) the flow of imports of cement from Benelux, Germany and Switzerland had always been specifically analysed, whereas the flows from the other countries, including Italy, were mentioned under the residual heading 'Others'. Those documents, in Buzzi's view, thus showed that the flow from Italy was very small. It is further alleged that it is clear from those documents, in the light of an SFIC internal memorandum drawn up for its Bureau of 5 January 1988 (documents 33.126/14806 and 14807), that the Italian imports into France were not considered to be 'normal flows of imports coming from ... European neighbours', undertaken in markets governed by economic principles. Only imports from the Benelux, Germany and Switzerland were regarded as such and were, for that reason, subject to strict control. Buzzi adds that it is precisely the cement producers of countries subject to close surveillance by SFIC which had 'structural links' likely to enable them to exchange information (SO, Chapter 16, point 82, p. 211). It also compares other SFIC statistics (documents 33.126/14956 to 14976) with the abovementioned statistics (documents 33.126/14809 to 14824), pointing out that that comparison confirms that Italian importations into France were of a completely different type to those coming from Germany, the Benelux and Switzerland. It further observes that, according to an SFIC document of 10 November 1987 (document 33.126/14894) and a FIC memorandum of 9 March 1989 (documents 33.126/14898 and 14899), the members of Cembureau were in the habit of keeping

in contact with the purpose of controlling imports. However, the Commission's file does not show that that habit was shared by Buzzi.

2012 The abovementioned documents as a whole show that imports from Italy were occasional and residual and were perceived as such a small threat by the French producers, that they were treated in the same way as episodic importations from countries like Japan. It follows from all the foregoing that there could not have been an agreement on the Côte d'Azur market between the French producers and Buzzi, since the basic condition of such an agreement, namely that the parties concerned should, if only potentially, be operational on the same market, was not fulfilled.

2013 It should be observed, first of all, so far as concerns the SFIC statistics (documents 33.126/14809 to 14824), that documents 33.126/14809, 14812, 14813, 14815, 14817, 14820, 14822 and 14824 were accessible to Buzzi during the administrative procedure (see paragraph 250 above). Buzzi was therefore in a position to make use of them in order to support its reply to the SO. In those circumstances, it cannot now rely upon them in order to prove that its rights of defence were infringed during the administrative procedure.

2014 The internal SFIC memorandum drawn up for its Bureau on 5 January 1988 (documents 33.126/14806 and 14807) refers to 'the existence of normal flows of importations from ... European neighbours [and to] the appearance of abnormal flows of cement coming from East Germany'. There is nothing in that internal memorandum, read in conjunction with the SFIC statistics (documents 33.126/14809 to 14824), to support the conclusion that the flows from Italy were deemed abnormal. Only the flows originating in East Germany were described thus.

2015 In any event, any comments which Buzzi might have made in the course of the administrative procedure on the basis of the various documents on which it relies and, in particular, in the light of the comparison between various SFIC statistics (documents 33.126/14956 to 14976 and 14809 to 14824), in order to prove that Italian imports into France were not of the same kind as the flows from Germany, the Benelux and Switzerland, would not have made it possible to disregard the statements it made during the administrative procedure to the effect that it had exported 'worthwhile quantities' to the south of France market (contested decision, recital 20, paragraph 7) and, thus, have cast doubt on the finding that Buzzi and the French producers were, on that market, actual or, at the very least, potential competitors (contested decision, recital 48, paragraph 5). In short, such comments would not therefore have made it possible to disregard the content of documents on which the Commission relied in the SO and in the contested decision in concluding that the three concerted practices of which Buzzi is accused existed.

2016 Finally, as regards the SFIC document of 10 November 1987 (document 33.126/14894) and the FIC memorandum of 9 March 1989 (document 33.126/14898 and 14899), the Court points out that Buzzi had access to document 33.126/14898 during the administrative procedure (see paragraph 250 above). On that document FIC states, for the attention of SFIC: 'Please find enclosed the update to end of February of our exports to France. As soon as we have official figures for 1988 we shall try to draw up a comparison with the figures which you very recently sent us.' Buzzi was thus in a position to develop an argument during the administrative procedure on the basis of that document in order to show that, although the Cembureau membership were in the habit of exchanging information intended to enable the control of importations, there was no document in the Commission file to prove that it, not being either a direct or indirect member of Cembureau, engaged in such practices. Buzzi cannot therefore invoke that document in order to prove that its rights of defence were infringed during the administrative procedure. In any event, the argument which Buzzi could have submitted on the basis of the SFIC and FIC documents cited above would not have been of such a nature as to invalidate the documents on which the Commission relied in the SO and in the contested decision in concluding that the three concerted practices of which Buzzi is accused existed.

2017 It follows from all the foregoing that the fact that Buzzi did not have access, during the course of the administrative procedure, to documents 33.126/14806, 14807, 14810, 14811, 14814, 14816, 14818, 14819, 14821, 14823, 14956 to 14976, 14894 and 14899 was not detrimental to its defence during that procedure.

2018 Fourthly, Buzzi adduces in its document of 28 November 1997 several documents which purportedly show the significant impact of transport conditions and costs on the cement market. It refers to a Lafarge document entitled 'Commercial Policy' (document 33.126/4982), which states that there 'does not exist a uniform domestic cement market but rather specific regional markets' on account of, in particular, the 'the impact of transport costs'. The preponderant effect of transport costs on the assessment of profitability of exports is moreover confirmed by an SNFCC document of 2 December 1986 (document 33.126/6048 to 6050).

2019 It should be recalled in that respect that in the course of the administrative procedure Buzzi emphasised the impact of transport costs on exports to the south of France (point 4.3 of Buzzi's reply to the SO), while adding, however, that 'despite a number of obstacles which it had to overcome (transport costs ...), and although it could have sold its products on closer and more profitable markets, it [had] been exporting worthwhile quantities ("interessanti quantità") of cement to the south of France since the end of the 1960s' (contested decision, recital 20, paragraph 7). Any additional comments which Buzzi might have made during the administrative procedure on the basis of the abovementioned documents in order to emphasise the influence of transport conditions and costs on export policy would not have altered the outcome of the administrative procedure in that respect.

2020 Furthermore, the Lafarge document entitled 'Commercial Policy' (document 33.126/4982) was accessible to Buzzi during the administrative procedure (see paragraph 250 above). It was even in the Box (see paragraph 95 above). Buzzi was therefore in a position to use it in support of its reply to the SO. It cannot now rely upon it in order to prove that its rights of defence were infringed during the administrative procedure.

2021 The SFIC document of 2 December 1986 (documents 33.126/6048 to 6050) does not show at all that the transport costs were deemed to be prohibitive for exports. The fact that that document analyses the risks of importation of cement into France becoming more serious tends rather to prove the opposite.

2022 In its observations of 28 November 1997, Buzzi refers again, as do Vicat and Ciments Français, to the undated internal Lafarge memorandum entitled 'Implications of the risks of overland importation over the French borders' (documents 33.126/4869 to 4909), in which it highlights the same excerpts as those relied upon by Vicat (see paragraphs 1987 and 1996 above). It argues that it is clear from that document that its imports into France were not perceived as a threat by Lafarge, owing, in particular, to the prohibitive nature of the transport costs involved in trade in cement between Italy and France. It concludes that, since it was not perceived as a threat, Lafarge had no interest in entering into an agreement with it to restrict its autonomy of behaviour on the south of France market.

2023 Nevertheless, as has been pointed out on several occasions, Buzzi itself acknowledged during the administrative procedure that the transport costs, just as the other obstacles and difficulties involved in trade in cement between Italy and France, were not prohibitive to the extent of dissuading it from all export activity in the southern region of France (contested decision, recital 20, paragraph 7). Any comments which Buzzi might have been able to make in the course of the administrative procedure in respect of the internal Lafarge memorandum (documents 33.126/4869 to 4909) in order to prove that its imports were not perceived by the latter as a threat would not therefore have prevented the Commission from finding objectively that Buzzi exported to the south of France at the time of the conduct complained of in the contested decision, and, thus, that it was an actual or, at the very least, potential competitor of the French producers in that region. In short, such comments would not therefore have made it possible to disregard the content of the record of the meeting of 26 November 1988 between Lafarge and Buzzi, on which the Commission relied in the SO and in the contested decision in order to find in Article 3(1)(a) of the contested decision that there was unlawful concerted action between the two undertakings involving the sharing of the market in southern France.

2024 Buzzi next refers to a second series of documents which it claims shows the existence of a practice between the French producers in which it did not participate. In its document of 9 January 1997, it refers to internal Vicat memoranda of 18 and 30 September and of 2 and 22 October 1987 (documents 33.126/5824 to 5830), as well as to a letter of 28 February 1983 sent by Vicat to Ciments Français (documents 33.126/5844 to 5845). Examination of those

various documents reveals that certain of the information sent by Buzzi to Vicat or to Ciments Français could not have been circulated between those two French undertakings or communicated in turn by those two to Lafarge. Buzzi thus sees those documents as additional proof that it was never bound by a single agreement or concerted practice to the three French producers mentioned in Article 3(1) of the contested decision.

2025 The Court points out first of all that, in the contested decision, the Commission complains not of a single Franco-Italian agreement or practice, but of three different concerted practices. Thus any comments which Buzzi might have been able to make in the course of the administrative procedure in order to deny the existence of a single Franco-Italian practice could not have altered the outcome of the administrative procedure in that respect.

2026 As to any comments which Buzzi might have been able to make on the basis of the various Vicat documents referred to above (see paragraph 2024 above) in order to prove its total lack of involvement in the agreement which existed at the time between the French producers, they would not have enabled it to exclude the content of the various documents on which the Commission relied in the SO and in the contested decision in order to establish the reality of the three unlawful concerted practices found in Article 3(1)(a), (b) and (c) of the contested decision.

2027 Finally, Buzzi puts forward a third series of documents, relating to the prices it charged to its French customers during the period taken into account in the contested decision.

2028 In its document of 9 January 1997, it first of all states that the prices it charged French customers in 1986 for 425 cement ranged between FRF 240 and 290 per tonne, whereas it appears from a letter from SFIC to Cembureau of 27 November 1986 (document 33.126/14938) that the price in France for CPJ 45 cement, a product in competition with its own, was FRF 357 per tonne. Moreover, other documents discovered at the SNFCC (documents 33.126/15040 to 15051) allegedly confirm that the prices applied by the French producers in respect of different types of cement at different times between 1987 and 1989 were vastly greater than those which it charged its French customers during the same period.

2029 In its document of 28 November 1997, Buzzi explains that it appears from a memorandum found on Vicat's premises (documents 33.126/6166 to 6175) that the price in France in 1987 was FRF 370 per tonne and that cement imported from East Germany at a price of FR 320 per tonne was considered to be dumped. That point is purportedly confirmed by an internal Lafarge document entitled 'Commercial Policy' (see paragraph 2018 above). Buzzi concludes that, if the price of FRF 320 per tonne charged by the East German producers was considered as a dumping price, the same was necessarily true of those even lower prices (an average FRF 263.5 per tonne) which it charged its French customers also during 1987. That conduct is totally incompatible with the existence of an agreement involving the sharing of markets, an agreement which, by its nature, should necessarily have been turned to maximising profits as a result of the absence of

any competition on the market. Buzzi makes the further comment that, according to a Vicat document entitled 'Average sales prices 1987 and 1988' (document 33.126/5476), the price charged by the French undertaking in January 1987 was FRF 427 per tonne.

2030 On the basis of the various documents mentioned in the two preceding paragraphs and a document entitled 'France Price Development For Cement' (document 33.126/15174), Buzzi submits a table showing that there was a constant increase in average prices in France applied by the French producers during the period 1983 to 1987, but that, at the same time, its own prices for sales in France advanced in peaks and troughs, with very small upward adjustments, followed by significant drops. It concludes that the trend of its prices during that period is typical of the behaviour of a marginal producer which, on a given market, tries to make small gains (on the market) by resorting to large price reductions, while carefully attempting, in so far as possible, to pass on any increases onto the market.

2031 It must nevertheless be pointed out that during the administrative procedure Buzzi stated, in reliance on a number of documents (see point 4.4(a) and annexes 12 to 14 of Buzzi's reply to the SO), that 'the prices it charged were lower than the prices communicated to it by the French producers' in order to show that it 'had embarked on the difficult task of exporting ... completely independently, in accordance with the actions of an entrepreneur seeking new markets' (contested decision, recital 20, paragraph 7). However, the Commission expressed a view on that line of reasoning in the last subparagraph of recital 20, paragraph 7, of the contested decision by replying that in its view 'the lower prices were justified by the fact that the Portland cements sold by Buzzi in France (grades 325 and 425) have lower resistance grades than the corresponding cements manufactured and sold by the French producers (grades 350 and 450)'. Any additional comments which Buzzi might have made during the administrative procedure on the basis of the documents referred to in paragraphs 2028 to 2030 above to show that its prices on the south of France market were significantly lower than those of the French producers were therefore not likely to have altered the outcome of the administrative procedure in that respect.

2032 It must further be pointed out that the document entitled 'France Price Development for Cement' (document 33.126/15174) was accessible to Buzzi during the administrative procedure (see paragraph 250 above), as was the Lafarge document entitled 'Commercial Policy' (document 33.126/4982). Buzzi was thus in a position to make use of those documents in order to support its reply to the SO. It cannot now rely upon it in order to prove that its rights of defence were infringed during the administrative procedure.

2033 It follows from the foregoing analysis that, so far as concerns the infringements mentioned in Article 3(1)(a), (b) and (c) of the contested decision, none of the documents put forward by

Buzzi in its observations of 9 January and 28 November 1997 are such as to show that its rights of defence were infringed in the course of the administrative procedure.

Conclusions

2034 It is apparent from the foregoing considerations (see paragraphs 1819 to 2033) that Article 3(1) of the contested decision must be annulled:

— in so far as it finds in subparagraph (a) that from 26 November to 31 December 1988, Lafarge and Buzzi infringed Article 85(1) of the Treaty by participating in a concerted practice involving the restriction of their autonomy of conduct with regard to production sources,

— in so far as it finds in subparagraph (c) that Vicat and Buzzi infringed Article 85(1) of the EC Treaty after 23 April 1986 by participating in a concerted practice involving the exchange of price information with a view to the restriction of their autonomy of conduct as regards cement supplies in southern France.

2035 The remainder of the pleas examined must be rejected.

VI — *Pleas alleging infringements of Article 85(1) of the Treaty, the principle of equal treatment and rights of the defence in that the Commission found that there was a Hispano-Portuguese agreement which infringed Article 85(1)of the Treaty and that various applicants participated in it (contested decision, Article 3(2))*

Introduction

2036 Oficemen (T-59/95), Cimpor (T-61/95) and SECIL (T-62/95) deny the existence of the infringement found in Article 3(2) of the contested decision, their participation in it and the duration of the unlawful conduct of which they are accused. Cimpor and SECIL complain,

moreover, that the principle of equal treatment was infringed inasmuch as the Commission found that they participated in that infringement, whereas no such finding was made in respect of the Spanish undertakings.

2037 Oficemen, Cimpor and SECIL also plead infringement of their rights of defence inasmuch as they were not given full access to incriminating and exculpating documents in the Commission's file during the administrative procedure.

2038 In this connection the Court points out that, because of irregularities committed during the administrative procedure, certain items of incriminating evidence relied upon by the Commission in the contested decision may not be used against the applicants concerned.

2039 Those documents should therefore be disregarded when assessing the evidence of the infringement and participation in it of those parties.

2040 The following must therefore be disregarded:

— the three last sentences of document 33.322/2901 used in the contested decision, recital 21, paragraph 2, second subparagraph, and recital 49, paragraph 2 (see paragraphs 369 to 372 above) as inadmissible evidence against the three applicants;

— documents 33.322/512, 513, 549, 550, 566 and 567, telexes sent by or addressed to Cimpor in 1988 and 1989, used in the contested decision, recital 21, paragraph 8 (see paragraph 373 above), as inadmissible evidence against Oficemen; and

— document 33.322/1399 concerning the meeting of 27 July 1988, used in the contested decision, recital 21, paragraph 6 (see paragraph 374 above) as inadmissible evidence against Cimpor.

Infringement referred to in Article 3(2) of the contested decision

A — The Commission's analysis

2041 Article 3(2) of the contested decision states that Oficemen, Cimpor and SECIL infringed the provisions of Article 85(1) of the Treaty 'from 1 January 1986 to 24 April 1989 by participating in an agreement on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets'.

2042 Evidence of that infringement is given in particular in recitals 21 and 49 of the contested decision.

2043 The Commission explains, first of all (recital 21, paragraph 1), that 'the Portuguese producers Cimpor and SECIL and the Spanish producers' association Oficemen held several meetings between 1985 and 1989 to discuss cement exports, mainly from Portugal to Spain, resulting from the difference in prices between the two countries ...'.

2044 It refers next (recital 21, paragraph 2) to documents relating to two meetings held in July and December 1985, during which the principle of excluding any movement of cement between Spain and Portugal was agreed.

2045 It also refers to the following record drawn up by Cimpor of the meeting held on 22 July 1985 (contested decision, recital 21, paragraph 2, first subparagraph; documents 33.322/155 to 157):

'1. The parties present, who may be regarded as the representatives of Spanish and Portuguese cement producers, expressed their clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country.

2. However, they acknowledge that this unambiguous position of agreement does not prevent third parties (distributors, retailers, consumers, carriers, etc.) from undermining the intentions of the two parties, without the latter being able to exercise effective control. In the event of such situations arising, the two parties should hold open exchanges of information in order to find a solution to the problem.'

2046 It also refers to an extract from document 33.322/2901 (see paragraph 2040 above), which is a record of a visit to SECIL on 28 and 29 May 1986 by two employees of Hispacement (hereinafter 'the Hispacement document'). The part used against the applicants concerned (see paragraphs 369 to 372 above) states:

'... the Chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts in December last year (that is to say December 1985), at which time it was decided to agree on a reciprocal ban on exports between the two countries'.

2047 The Commission states, moreover (recital 21, paragraphs 3 to 7) that a number of meetings were held between Oficemen, Cimpor and SECIL between 20 January 1986 and 24 April 1989, during which the state of exports between Portugal and Spain was examined.

2048 Finally, basing itself on other documents (recital 21, paragraph 8), it refers to the fact that Cimpor refused to fill orders for cement coming from Spain.

2049 The Commission concludes from the whole of its analysis (recital 21, paragraph 9) that:

'... the aim of the Portuguese and Spanish producers, represented by their associations, was to control cement exports between their two countries and hence to share the markets'.

2050 It then refutes the explanations put forward by the applicants during the administrative procedure (recital 21, paragraphs 10 and 11).

2051 In the legal assessment of the conduct at issue (recital 49, paragraph 1), the Commission concludes:

'The restrictions agreed at the meetings held from 22 July 1985 to 24 April 1989 between Oficemen, Cimpor and SECIL constitute an agreement within the meaning of Article 85(1). Through that agreement, [Oficemen, Cimpor and SECIL] opted, deliberately and in the knowledge that they were committing infringements of the laws of their countries and of the

Community competition rules ..., for a form of cooperation designed to restrict, or actually to prevent, trade in cement between the two countries and, in this way, to ensure non-encroachment on their respective traditional sales markets, consolidating the partitioning of the Spanish and Portuguese markets.

The agreement constitutes an infringement as from 1 January 1986, the date on which Spain and Portugal joined the Community, until 24 April 1989 at least.'

2052 It adds (recital 49, paragraphs 2 to 5) that the agreement was actually implemented and that the arguments submitted by the applicants concerned did not legitimise their conduct in any way.

B — Agreement between Oficemen, Cimpor and SECIL on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets

2053 For the purposes of the present analysis, a distinction should be drawn between the agreement referred to in Article 3(2) of the contested decision (1) and the implementation of that agreement (2). The Court will then examine the arguments put forward by the applicants concerned as to special circumstances claimed to be unreconcilable with its existence (3). Finally, SECIL's special position will be examined (4).

1. Conclusion of the agreement

2054 In the contested decision, evidence that there was an agreement on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets is based on the two documents mentioned above (see paragraphs 2045 and 2046), namely the record drawn up by Cimpor of the meeting held on 22 July 1985 and the Hispacement document.

2055 Oficemen, Cimpor and SECIL submit that those documents do not constitute proof of the existence of an agreement between them.

2056 According to SECIL and Cimpor, the record of the meeting of 22 July 1985 does not reflect the point of view of its author. It does not prove the existence of any agreement, but rather that

there was support for a principle. The reference to 'the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain' relates to a statement of intention which should be appraised in the light of Community and national competition rules.

2057 The three applicants also challenge the evidential value of the passage from the Hispacement document used against them. There does not in fact any evidence that the meeting of December 1985, which that passage mentions, actually took place.

2058 It is common ground that Oficemen, Cimpor and SECIL participated in the meeting of 22 July 1985. That fact is moreover confirmed by the record of that meeting drawn up by Cimpor.

2059 That last-mentioned document proves the existence of a concurrence of wills between the parties present at the meeting, and thus between the applicants referred to in Article 3(2) of the contested decision, involving 'clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country'.

2060 The part of the Hispacement document which is admissible evidence against the applicants concerned (see paragraphs 369 to 372 above) confirms the fact that an agreement was struck between them some months previously. It states that: 'the Chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts in December last year [that is to say December 1985], at which time it was decided to agree on a reciprocal ban on exports between the two countries'

2061 The argument put forward by Cimpor and SECIL to the effect that the record of the meeting attests to support for a principle rather than accession to an agreement must be rejected. An agreement within the meaning of Article 85(1) of the Treaty does not necessarily have to be in writing (Case 28/77 *Tepea* v *Commission* [1978] ECR 1391, paragraph 41). For there to be an agreement within the meaning of that provision, it is sufficient for the participants in the meeting in question to have the common intention of conducting themselves in the market in a particular way (see the case-law, cited in paragraph 1010 above). In the present case, the record of the meeting of 22 July 1985 clearly shows the existence of a concurrence of wills and, therefore, of an agreement within the meaning of Article 85(1) of the Treaty, relating to the two aspects of the infringement referred to in Article 3(2) of the contested decision, namely the monitoring of cement movements between Spain and Portugal and non-transhipment to their respective home markets.

2062 The other arguments challenging the evidential value of the same document and of the Hispacement document must also be rejected. The evidence must be assessed, not in isolation,

but as a whole (Case 48/69 *ICI* v *Commission*, cited in paragraph 636 above, paragraph 68; Case T-141/94 *Thyssen* v *Commission* [1999] ECR II-347, paragraph 175). The documents in question emanated from Cimpor and Hispacement, companies which are perfectly acquainted with the cement market and its traders. Since they thus emanate from two different reliable sources, they confirm the existence of the agreement at issue.

2063 Moreover, the holding of a number of meetings between Oficemen, Cimpor and SECIL between 20 January 1986 and 24 April 1989, during which the state of exports between Portugal and Spain was examined (contested decision, recital 21, paragraphs 3 to 7), also confirms that the applicants concerned sought to limit and control trade in cement between Portugal and Spain. Accordingly, it confirms the existence of an agreement (see paragraphs 2070 to 2082 below).

2064 Cimpor and SECIL further submit that it is clear from the Hispacement document that what Hispacement sought to discover was whether it could purchase clinker from SECIL under better conditions than those offered by the Spanish competitors, rather than to obtain assurances that no cement exports would be made to Spain.

2065 That argument must also be rejected. Even if Hispacement had sought to import Portuguese clinker, the fact remains that the Hispacement document proves that 'the Chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts [in December 1985], at which time it was decided to agree on a reciprocal ban on exports between the two countries'. It is apparent from the record of the meeting of 22 July 1985 that the agreement between the industries of the two countries concerned cement and did not include clinker and that movements instigated or controlled by the cement industry of either country were permitted.

2066 On the basis of the document and of the extract it analysed, the Commission was therefore able to find, rightly, that there was an agreement on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets. However, it must be examined at a later stage whether it was right in finding that the participation of the parties concerned in that agreement constituted an infringement of Article 85(1) of the Treaty with effect from 1 January 1986 and that the infringement lasted until 24 April 1989.

2. Implementation of the agreement

2067 In recital 49, paragraph 2, first subparagraph, of the contested decision, the Commission states:

'The agreement [between Oficemen, Cimpor and SECIL] was actually implemented. The representative of SECIL stated to Hispacement ... that his firm was determined to abide by the agreement with the Spanish and that Cimpor had resisted any temptation to export even though it had received orders from customers in Spain; the parties to the agreement exchanged all the information necessary to monitor and halt exports by third parties ...; Cimpor refused to sell in Spain on the pretext that "we have no availabilities for export", although it is proven that, during those same periods, it met specific requests for cement from other countries ...'

2068 However, as Oficemen, Cimpor and SECIL point out, various documents relied on by the Commission in recitals 21 and 49 of the contested decision as evidence that the agreement between them was implemented, are not admissible against all the three applicants (three last sentences of the Hispacement document), Oficemen (documents 33.322/512, 513, 549, 550, 566 and 567, cited in the contested decision, recital 21, paragraph 8), or Cimpor (document 33.322/1399, cited in the contested decision, recital 21, paragraph 6) on account of irregularities committed by the Commission during the administrative procedure (see paragraphs 369 to 374 and 2038 to 2040 above).

2069 The Court must therefore examine whether the other documents relied upon by the Commission prove that the agreement was actually implemented.

2.1. Meetings held between Oficemen, Cimpor and SECIL

2070 It is apparent from various documents used as evidence against the applicants concerned that they met on several occasions in order to follow closely the development of exports between Portugal and Spain, seeking to monitor movements of cement between the two countries, in accordance with the principles agreed at the meeting of 22 July 1985.

2071 In that connection, the record of that last meeting states:

'[The parties present] acknowledge that [the] unambiguous position of agreement [on the principle that there should be no cement movements] does not prevent third parties (distributors, retailers, consumers, carriers, etc.) from undermining the intentions of the two parties, without the latter being able to exercise effective control. In the event of such situations arising, the two parties should hold open exchanges of information in order to find a solution to the problem.'

2072 It would appear from the minutes of the Oficemen board meeting of 13 February 1986 (contested decision, recital 21, paragraph 3; documents 33.322/1311 and 1314) that a meeting between Oficemen, Cimpor and SECIL was held on 20 January 1986. Its purpose was to 'exchange information on the development of cement exports between the two countries'. During that meeting, the parties present also agreed to 'inform each other about any exports known to them'.

2073 According to documents 33.322/163 to 166 and 1406 to 1408 (contested decision, recital 21, paragraph 4) which record the meeting, another meeting took place on 23 January 1987 between Cimpor and SECIL and representatives of the Spanish producers, including Mr Andía, of Oficemen. In light of those documents, importation into Spain of cement from Portugal was perceived as a problem, so that the participants in the meeting suggested, on the one hand, a medium-term solution consisting of an increase in the price of Portuguese cement, and, on the other, a short-term solution, consisting in discouraging Portuguese operators engaging in cross-frontier exports.

2074 Further meetings took place on 5 and 6 March 1987 between Cimpor, SECIL and representatives of the Spanish producers, including Mr Andía of Oficemen. SECIL does not expressly acknowledge that he attended those meetings. However, his participation as well as that of Oficemen and Cimpor are clear from documents 33.322/169 to 172 (contested decision, recital 21, paragraph 5). At those meetings, the Portuguese producers provided their Spanish colleagues with a list of the Spanish operators who had asked them for cement quotations (document 33.322/172). The position of Portuguese cement exports to Spain for each point of entry (Valencia, Alcántara, Badajoz, Tuy) was also examined in respect of each month of 1986 and for January and February 1987 (document 33.322/170). The minutes of the meeting of 6 March 1987 (contested decision, recital 21, paragraph 5; documents 33.322/1410 to 1412) indicate that the participants had noted 'a relatively rapid increase of imports [from Portugal to Spain] since mid-October [of the previous year]'. It adds that, on that occasion, 'the Spanish representatives insisted in the view that Portuguese cement prices should be amended'.

2075 Oficemen, Cimpor and SECIL do not deny that, at the abovementioned meetings, the movements noted in exports of cement from Portugal to Spain were followed closely. They claim, however, that the purpose of the meetings was legitimate. They sought, in actual fact, to limit the likelihood of cement P-300 exports from Portugal to Spain, on the ground that use of that product, which was prohibited in Spain, could render Spanish cement producers liable. It is alleged that the record of the meeting of 6 March 1987 shows that the purpose of the meetings in question was to check that Spanish standards were observed with the aim of preventing civil or criminal proceedings being brought against Spanish producers. Oficemen for its part pressed the Portuguese producers to negotiate a change to the system of maximum prices with their government.

2076 The Court finds that, although in the contested decision (recital 22, paragraph 11) the Commission expressed doubts as to the scope of Spanish Royal Decree No 1964/1975 of 23 May 1975, it was no longer disputed during proceedings before the Court that that royal decree, in force from 1975 to 1988, generally prohibited the use in Spain of Portland cement of a resistance below 350 kg per cm^2 (cement P-350). Moreover, the Commission does not challenge the explanations put forward by the applicants concerned, according to which two grades of cement were authorised at the time in Portugal, namely grade 30 (P-300) and grade 40 (P-400). SECIL alleges that until 1989 it only produced grade 30 cement. Cimpor claims that it did not begin to produce grade 40 cement until 1985 and in small quantities which were always absorbed by domestic demand. Nor is it disputed that in 1988 Decree No 1964/1975 was repealed and replaced by Royal Decree No 1313/1988 of 28 October 1988, expressly prohibiting the importation into Spain of cement which did not comply with the type approved by the Spanish authorities, and of cement which did meet type-approval but lacked a certificate of conformity of production.

2077 However, the argument of the applicants concerned cannot be accepted.

2078 It should be pointed out that, according to the record drawn up by Cimpor of the meeting held on 22 July 1985, those who took part in that meeting 'expressed their clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country'. Likewise, it is apparent from the admissible part of the Hispacement document that the purpose of the agreement was to prevent 'exports between the two countries'. The agreement did not provide that the exported cement should conform to the standards applicable in the country of importation.

2079 It is also apparent from the record of the meeting of 22 July 1985 that, in so far as the agreement in question bound the cement producers, but not third parties (for example, distributors and retailers), the parties to the agreement agreed that, in the event that the actions of third parties should undermine that agreement, they should 'hold open exchanges of information in order to find a solution to the problem'.

2080 Admittedly, the record of the meeting of 6 March 1987 does expressly mention Oficemen's concern over the problems posed by the use in Spain of grade 30 cement coming from Portugal. However, that document shows that the solution sought to the problem of exports coming from Portugal consisted in increasing Portuguese prices. Moreover, several other documents confirm that that solution was invariably suggested, as Oficemen pointed out during proceedings before the Court (see the records of the meetings of 23 January 1987 (contested decision, recital 21, paragraph 4; documents 33.322/163 to 166 and 1406 to 1408) and from 6 March 1987 (contested decision, recital 21, paragraph 5; documents 33.322/1410 to 1412)). The applicants cannot therefore claim that any increase in the prices of Portuguese cement was likely to resolve the problem arising, in some circumstances, from the failure of Portuguese cement to comply with Spanish standards.

2081 It follows that the purpose of the various meetings held by the Portuguese and Spanish producers was to limit exports between Portugal and Spain, rather than to make Portuguese exports conform to Spanish standards.

2082 Even if the purpose of the meetings had been to monitor observance of Spanish standards, the applicants have not explained why they did not inform the competent authorities of the problem posed by the danger of the possible use of Portuguese cement which did not conform to Spanish standards. It is in principle the task of public authorities and not of private undertakings and associations to ensure that statutory requirements are complied with (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 118, and *SCK and FNK* v *Commission*, cited at paragraph 485 above, paragraph 194). Moreover, it must be observed that the agreement between Oficemen, Cimpor and SECIL prohibited also 'cement movements from Spain to Portugal' (record drawn up by Cimpor of the meeting held on 22 July 1985; contested decision, recital 21, paragraph 2; documents 33.322/155 to 157) and that the applicants concerned exchanged 'information on the development of cement exports between the two countries' (minutes of the Oficemen board meeting of 13 February 1986; contested decision, recital 21, paragraph 3; documents 33.322/1311 and 1314) and not only on exports from Portugal to Spain. However, the argument based on the divergence between Portuguese and Spanish standards does not at all justify the monitoring of exports from Spain to Portugal. Since Spanish cement being, at the time, at least of grade 35, it was of higher quality than the grade 30 produced in Portugal.

2.2. Cimpor's refusal to sell

2083 It is apparent from several documents submitted as evidence against the applicants concerned, specifically documents 33.322/485, 486, 493 to 495, 530 to 532, 537 and 538, cited in recital 21, paragraph 8, first subparagraph, of the contested decision that, in 1988 and 1989, Cimpor refused all requests for cement from Spain with the standard response 'we have no availabilities for export'.

2084 Oficemen and Cimpor claim that there were objective reasons for such refusals to sell. It therefore had nothing to do with the implementation of an anti-competitive agreement by Cimpor. The applicants explain that Cimpor's capability to export at the time was limited. That company was thus very sensitive to fluctuations in domestic demand and to the technical vicissitudes of production. It was allegedly in such understandable circumstances that, during a particular period, certain orders were accepted and certain others refused. Furthermore, in view of its limited capability to export, Cimpor was not able to establish a strategy for developing export markets. For those reasons, maintaining links with markets in which demand exceeded supply, in particular with African countries with Portuguese as the official language, was still considered a priority, but without neglecting possibilities which might occasionally arise in other markets, such as those of the Cembureau countries, including Spain, and to fill orders sent to it in so far as it was able from a technical and logistical point of view. However, the quantities of grade 40 cement produced by Cimpor were wholly taken up by the Portuguese market. Grade 30 cement was prohibited in Spain. Orders refused related explicitly or implicitly to cement of a type not manufactured by Cimpor and which it did not have available for export.

2085 The telexes relied upon by the Commission in the contested decision (contested decision, recital 21, paragraph 8; documents 33.322/485, 486, 493 to 495, 530 to 532, 537 and 538) must be viewed in their context in order to understand Cimpor's refusal to sell. It is already unequivocally clear from the record of the meeting held on 22 July 1985 drawn up by Cimpor that it participated in the agreement on the monitoring of cement movements between Spain and Portugal and on non-transhipment to their respective home markets referred to in Article 3(2) of the contested decision. That document refers to 'clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country'. The participation of Cimpor in the agreement is also apparent from the admissible extract of the Hispacement document used against the three applicants (document 33.322/2901) (see paragraph 2060 above). That fact is further confirmed by the fact that various meetings were held between the Spanish and Portuguese producers in 1986 and 1987, in which the development of exports between the two countries was analysed and solutions suggested (contested decision, recital 21, paragraphs 3 to 5).

2086 In that context, Cimpor's refusal to deliver cement in Spain in 1988 and 1989 is in itself a sign of Cimpor's continued participation in the agreement. However, it is appropriate to examine whether the arguments put forward by Oficemen and Cimpor undermine the value of that evidence.

2087 The justification put forward by Cimpor in the abovementioned telexes relating to its refusal to sell in Spain, namely the lack of availability for export, cannot be accepted. Indeed, it is not disputed that, at the time when Cimpor refused to sell cement in Spain, it had agreed to fill specific orders for cement to: Africa, Guinea, Senegal, Libya, Madagascar, Puerto Rico, United States of America, and Antilles (contested decision, recital 21, paragraph 8; documents 33.322/490 to 492, 496 to 511, 514 to 517, 523 to 526, 533 to 536, 539 to 541, 543 to 548, 551 to 556 and 571 to 574).

2088 Cimpor's argument based on the divergence between standards in Spain and Portugal must also be rejected. The Spanish Royal Decree No 1964/1975 prohibited the use, but not the importation, into Spain of Portland cement of a resistance below 350 kg per cm^2 — prohibition of importation of such a product was added only by Spanish Royal Decree No 1313/1988 (see paragraph 2076 above). In those circumstances, there was nothing to prevent Cimpor from selling in Spain grade 30 cement, which it in fact produced, until the entry into force of Royal Decree No 1313/88. *A fortiori*, there was nothing to prevent Cimpor from selling in Spain grade 40 cement, the importation and use of which were not prohibited, as Cimpor had begun, as it admits in its submissions, to produce that type of cement in 1985 'in small quantities'. It must in addition be pointed out that Cimpor has not justified any of the disputed refusals to sell by claiming that its products did not conform to the Spanish standards in force. It constantly used the standard response 'we have no availabilities for export'. Yet, at the same time, it accepted orders for Guinea, Senegal, Libya, Madagascar, Puerto Rico, United States of America and Antilles. Moreover, in reply to 'Spanish orders', it stated that it had no cement available even where the orders did not indicate the type of cement required (see document 33.322/538, cited in recital 21, paragraph 8, first subparagraph, of the contested decision). On the other hand, when, in August 1988, it received from 'Jcc Imp Exp' an order for grade 35 cement for delivery in Senegal, that is to say outside the Community, it offered it grade 30 cement (documents 33.322/551 and 553, cited in recital 21, paragraph 8, third subparagraph, of the contested decision).

2089 In view of the automatic nature of the refusals to sell and of the standard response used to that effect which was, moreover, not true, the Commission was right to conclude (contested decision, recital 49, paragraph 2) that such refusals to sell constituted implementation of the agreement entered into by the Portuguese producers and Oficemen. That finding is borne out by the telex from Tracoisa, a Spanish trader, to Cimpor of 13 March 1989 (contested decision, recital 21, paragraph 8; document 33.322/575): '... If exports to Spain cannot (be) even considered due to the bilateral agreement between Spanish and Portuguese producers, okay but please let us know your possibilities for other markets'. Even if, as Oficemen claims, that telex represents merely the speculative view of one undertaking which could not have any direct knowledge of the alleged Hispano-Portuguese agreement, the fact remains that that factor is evidence which entirely agrees with other evidence proving, when taken together, that the agreement entered into by the Portuguese and Spanish producers was implemented.

2090 Cimpor further argues that all the documents relied upon by the Commission allegedly post-date the adoption of Spanish Royal Decree No 1313/1988. It could therefore not have been at all legally or technically possible for it to fill the 'Spanish orders'.

2091 However, the relevant date is not that of the adoption of Spanish Royal Decree No 1313/1988, that is to say 28 October 1988, but rather that of its entry into force, 4 January 1989. Among the documents relied upon by the Commission in recital 21, paragraph 8, of the contested decision, there are several refusals to sell relating to Spanish orders prior to the date on which the royal decree entered into force (Cimpor telexes of 24 August 1988 (document 33.322/549), of 11 November 1988 (document 33.322/532) and of 20 December 1988 (document 33.322/537 and 538). In any event, it must be pointed out that, so far as concerns orders

after the date on which the royal decree entered into force, Cimpor's refusal to sell does not make any reference to legal difficulties (see paragraph 2088 above).

2.3. Conclusions

2092 It follows from all the foregoing that, solely on the basis of the documents that were admissible evidence against the applicants concerned, the Commission was properly able to find in recital 49, paragraph 2, subparagraph 2, of the contested decision that the agreement referred to in Article 3(2) was actually implemented.

3. Specific circumstances ruling out the existence of an agreement

2093 Firstly, Oficemen claims that the existence of any Hispano-Portuguese agreement is ruled out by the report on the cement industry in Spain, published on 31 July 1991 by the Tribunal de Defensa de la Competencia (Annex O to its application). That report states that there was no sign of the existence of agreements or concerted practices between Spanish producers and foreign producers.

2094 However, the fact that the Tribunal de Defensa de la Competencia did not find any such evidence does not shed a different light on the documentary evidence analysed in paragraphs 2054 to 2092 above. The study which led the national court to its conclusion of July 1991 did not in fact deal with that direct documentary evidence.

2095 Secondly, Oficemen claims that the increase in cement exports from Portugal to Spain disproves the existence of the agreement referred to in Article 3(2) of the contested decision. Those exports rose from 2 439 to 75 427 tonnes between 1986 and 1988, that is to say an increase of 2 993%, whereas Portuguese exports to other countries decreased from 52.6 million tonnes in 1986 to 39.6 million tonnes in 1988, that is a reduction of 33%. The fact that Portuguese exports to Spain amounted to no more than 2 715 tonnes in 1989 and only 83 tonnes in 1990 was allegedly due to the adoption of Royal Decree No 1313/1988.

2096 It should however be borne in mind that the Commission, in concluding that there had been an infringement, based itself on documentary evidence of direct collusion between the applicants concerned rather than on an analysis of the market. Any increase in exports from Portugal to

Spain is not such as to shed a different light on the direct documentary evidence examined in paragraphs 2054 to 2092 above, which unequivocally shows not only that an agreement existed but also that it was implemented. In any event, as the Commission rightly points out (contested decision, recital 49, paragraph 4), exports to Spain could have taken place under other conditions in the absence of a restrictive agreement (see, to that effect, *Consten and Grundig* v *Commission*, cited at paragraph 837 above, paragraph 495). The argument must therefore be rejected.

2097 Thirdly, Cimpor and SECIL rely on the following passage from the record of the meeting of 6 March 1987 (contested decision, recital 21, paragraph 5; documents 33.322/1410 to 1412): 'The Portuguese ... are minded not to do anything about it, so that we shall have to insist at other meetings.' That passage purportedly shows that there was no agreement between Spanish and Portuguese producers.

2098 That argument must be rejected. When examined in the light of all the information contained in the record in question, the passage relied upon shows that Oficemen harboured grave doubts as to the action which the Portuguese producers had to take vis-à-vis the Portuguese authorities, and in particular vis-à-vis the Directorate General for Competition and Prices, in order to bring about an increase in the price of cement in Portugal. Such action is perfectly consistent with an agreement on the regulation of trade in cement between Spain and Portugal and on non-transhipment to their respective home markets.

2099 Fourthly, Oficemen, Cimpor and SECIL set out a series of arguments explaining that the reduced volume of exports of Portuguese cement to Spain between 1 January 1986 and 24 April 1989 was due to the existence of technical and structural barriers rather than to any alleged agreement between the Spanish and Portuguese producers. Having regard to the applicable technical standards in Spain, the price levels in Spain, the system of maximum prices in Portugal and the high utilisation rate of production capacity, export of cement from Portugal to Spain was not a realistic option.

2100 Thus, SECIL claims to have produced only grade 30 cement, the marketing and, subsequently, the importation of which into Spain were prohibited (see paragraph 2076 above). Cimpor also produced almost exclusively grade 30 cement. It did not begin to produce grade 40 cement until 1985, in small quantities, which were always absorbed by domestic demand. Since the Portuguese plants worked at the limit of their production capacity during the period under consideration (in the order of 90%), the use of the existing lines with a view to manufacturing and stocking P-350 cement or cement of greater resistance intended for export would not have been possible without causing serious depletion in the supply of the Portuguese market.

2101 Moreover, it claims that prices charged in Spain and in Portugal were similar. Cimpor and SECIL refer in that connection to the passages of the Hispacement document (documents 33.322/2898 to 2903) which were not disclosed during inspection of the investigation file during the administrative procedure (see paragraphs 369 to 372 above). The Spanish market was thus allegedly of no interest, even in the rare event of Cimpor or SECIL having spare capacity. Once the costs of transport were taken into account, the final price for their product in Spain was not competitive. Furthermore, there was a risk that the Spanish producers might take reprisals, a risk which no rational businessman could ignore, having regard to the volume of the Spanish industry's surplus. It was therefore natural, when seeking an outlet for the small surpluses which they occasionally had, that the applicants should have preferred those markets in which demand structurally exceeded supply, such as the African markets, rather than the Spanish market, which was structurally in surplus. The applicants state in that connection that no Portuguese cement production plant was situated near the Spanish border.

2102 According to the applicants, the increase of imports into Spain of cement from Portugal between 1986 and 1988 was the result of the fact that Royal Decree No 1964/1975 prohibited the use of cement P-300 in work carried out within Spain, but not its importation. Taking advantage of the fact that the customs authorities did not check at the border whether the imported cement complied with the technical requirements of the Spanish royal decree, a number of unscrupulous intermediaries and undertakings imported and used Portuguese cement of the P-300 type in Spain until 1988.

2103 Another factor which helped to dissuade Portuguese producers from selling their cement in Spain was the system of maximum prices applicable in Portugal. According to Oficemen, Cimpor and SECIL, the prices imposed did not give a true view of the costs of production, so that the level of prices in force in Portugal was artificially low. Moreover, the maximum authorised sale price had been the same since 1986 irrespective of whether the cement was delivered to the purchaser from factories situated on the Portuguese coast or from stores in the interior. Accordingly, the 'ex warehouse' sale price did not reflect the cost borne by the cement producer to transport the product between the factory and the warehouse. Purchase of Portuguese cement at Portuguese warehouses situated close to the border at artificially low prices thus became attractive from 1986 for Spanish intermediaries and consumers, which triggered exports to Spain. However, because of the Portuguese pricing system the effect of which was that long-distance sales achieved by producers (including all sales for export to Spain) were subsidised by sales close to factories, Portuguese producers had no interest in promoting their sales for export to Spain at the cost of more profitable sales on the Portuguese coast.

2104 The Court points out that in order to prove the existence of the infringement the Commission relied on documentary evidence of direct collusion between the applicants concerned and of implementation of the agreement, rather than on the reduced volume of cement exports from Portugal to Spain (see paragraphs 2054 to 2092 above).

2105 The arguments which the applicants base on the existence of technical and structural barriers in order to justify the low level of trade between Portugal and Spain are not of such a nature as to shed a different light on that direct documentary evidence. Thus, the applicants do not explain why, faced with alleged difficulties over the export of cement from Portugal to Spain, they undertook not to tranship to their respective home markets. Rather, their line of argument is such as to emphasise the seriousness of the infringement committed, since, by concluding and implementing the agreement referred to in Article 3(2) of the contested decision, they attempted to eliminate the little actual remaining competition on the market.

2106 For the sake of completeness, the Court makes the following observations: the argument based on the divergence between Portuguese and Spanish standards does not justify the monitoring of exports from Spain to Portugal. Since Spanish cement was, at the time, at least of grade 35, it was of a better quality than the grade 30 produced in Portugal (see paragraph 2082 above). The system of maximum prices applicable in Portugal could not have discouraged 'ex warehouse' sales by Cimpor and SECIL to Spanish customers prepared to pay the transport costs. The argument based on the allegedly prohibitive costs of transport or distance is inconsistent with the large number of Spanish orders placed with Portuguese producers (contested decision, recital 21, paragraph 8; documents 33.322/485, 486, 493 to 495, 530 to 532, 537 and 538). Finally, the Court points out the contradiction between the various arguments put forward by the applicants concerned, who allege, on the one hand, that the price levels in Spain and Portugal were nearly identical and, on the other, that, because of the artificially low prices in Portugal, Portuguese cement was attractive to Spanish and Portuguese intermediaries and consumers.

4. SECIL's special position

2107 SECIL maintains that it took no initiative in seeking to conclude an agreement with the Spanish producers. It claimed that such an agreement would have been of no interest to it, given that its production capacity was fully utilised to meet domestic demand and it feared Spanish reprisals. It points out that its commercial behaviour did not give rise to Spanish concerns and that Cimpor's refusal to sell are not evidence that it participated in an agreement on non-transhipment to home markets.

2108 The Court finds that the fact that SECIL did not participate in the drawing up of any of the documents referred to in recital 21 of the contested decision and that most of the documents were not discovered in its files does not mean that they may not be used against it as evidence of the infringement with which it is charged (*Empresa Nacional Siderúrgica* v *Commission*, cited at paragraph 1053 above, paragraph 312).

2109 It is apparent from Cimpor's record of the meeting held on 22 July 1985 that SECIL undertook to apply the agreement entered into by the participants at that meeting (see paragraphs 2058 and 2059). Moreover, the admissible part of the Hispacement document, which confirms the existence of that agreement (see paragraph 2060 above), reports the visit by two Hispacement employees precisely to SECIL. Moreover, there is specific documentary evidence of the implementation of the agreement in the context of meetings in which SECIL took part (see paragraphs 2070 to 2082 above). SECIL's alleged lack of interest in exporting to Spain is thus not of such a nature as to shed a different light on that specific documentary evidence.

2110 Finally, the Commission did not put forward Cimpor's refusals to sell to Spanish clients in 1988 and 1989 as evidence of SECIL's participation in the conclusion of the agreement. As pointed out above, that evidence is constituted by Cimpor's record of the meeting held on 22 July 1985 and the Hispacement document. In order to illustrate the implementation of the agreement, the Commission referred to Cimpor's refusal to fill orders for exports of cement from Portugal to Spain in 1988 and 1989. Evidence that the agreement was implemented by SECIL is not, however, based on Cimpor's refusal to sell but on participation in various meetings held by the Portuguese and Spanish producers with a view to limiting exports of cement between Portugal and Spain (see paragraphs 2070 to 2082 above).

5. Conclusion

2111 It follows from all the foregoing that none of the circumstances relied on by the applicants give grounds for overruling the finding that the disputed agreement was concluded and implemented (see paragraphs 2066 and 2092 above).

C — Unlawful nature of the applicants' conduct

2112 Since Cimpor and SECIL admit to having been, during the period covered by the contested decision, the only Portuguese cement producers, and since Oficemen was the trade association to which the Spanish cement producers belonged, the agreement concluded by those parties manifestly restricted competition between Portuguese and Spanish producers and was such as to have a material effect on trade between the two Member States concerned. Such an anti-competitive agreement is one of the kinds of conduct expressly prohibited by Article 85(1)(c) of the Treaty.

2113 Even though the first item of documentary evidence relates to a meeting held on 22 July 1985, the Commission was justified in concluding that 'the agreement [constituted] an infringement as

from 1 January 1986, the date on which Spain and Portugal joined the Community' (contested decision, recital 49, paragraph 1, second subparagraph). From 1 January 1986, the agreement, which continued to be implemented (see paragraphs 2070 to 2082 above) by parties established from that date within the Community, clearly fell within the scope of Article 85(1) of the Treaty.

2114 Oficemen submits that the Commission has not adduced evidence that the agreement or concerted practice was maintained after the accession of Spain and Portugal to the Community. It observes that the documents relating to meetings after 1 January 1986 make no reference at all to a Hispano-Portuguese agreement. At those meetings the Spanish representatives merely expressed their disquiet at the growing imports of grade 30 cement from Portugal and asked the Portuguese producers to negotiate, with their Government, a change of those aspects of the maximum price system which stimulated such exportation. Cimpor also complains that the Commission based its finding of infringement on evidence dating from before 1986. SECIL, for its part, observes that Cimpor's record of the meeting of 22 July 1985 only mentions an intention to enter into an agreement (see paragraph 2056 above). Without breaching the principle of the presumption of innocence, the Commission is not entitled to assume that, as from 1 January 1986, SECIL began to infringe Article 85 of the Treaty by putting that intention into practice.

2115 Those arguments must be rejected. Although Cimpor's record of the meeting of 22 July 1985 predates the accession of Spain and Portugal to the Community, and in the contested decision that record plays a leading part in proving the existence of the infringement found, the Court finds that point 6 of that document shows that the parties to the agreement considered that their intention not to compete with each other could raise problems from the point of view of Community and domestic competition law in the two countries in question. Such a concern thus disclosed the intention of Oficemen, Cimpor and SECIL to implement the agreement after 1 January 1986. It is apparent, moreover, from the first sentence of the extract from the Hispacement document, concerning its two employees' trip to Lisbon in May 1986, that the same parties met in December 1985 and that 'it was decided to agree on a reciprocal ban on exports between the two countries'. When that document was drawn up, namely at the end of May 1986, the Hispano-Portuguese agreement was also described not as an agreement which had expired but as an existing agreement. Finally, it has already been observed that the agreement referred to in Article 3(2) of the contested decision was implemented in the framework of the various meetings held by Oficemen, Cimpor and SECIL after 1 January 1986 (see paragraphs 2070 to 2082 above).

2116 The Court must still examine the applicants' arguments that their conduct did not fall within the scope of Article 85(1) of the Treaty.

2117 First, Oficemen, Cimpor and SECIL assert that Cimpor's record of the meeting held on 22 July 1985 shows the participants' intention to comply with competition law. Such an intention rules out the possibility that the applicants could have entered into an anti-competitive agreement contrary to the provisions of Article 85(1) of the Treaty.

2118 The Court finds that point 6 of the record of that meeting reveals that the parties considered that their intention not to compete with each other could raise problems from the point of view of Community and domestic competition law in the two countries in question. However, that awareness, far from exonerating the applicants concerned of any liability, reveals, as the Commission rightly points out (contested decision, recital 49, paragraph 1), the conscious and deliberate nature of the infringement.

2119 Secondly, SECIL and Cimpor state that the cement industry in Portugal was nationalised in 1975. One of the results of nationalisation was the priority given to servicing the Portuguese market. The balance between domestic demand and national production thus arose out of a deliberate policy pursued by the Portuguese State, so that the conduct of the two undertakings falls outside the scope of Article 85(1) of the Treaty.

2120 That argument must be rejected. Neither Cimpor nor SECIL have proved that through the conduct of the Portuguese authorities they were denied the degree of autonomy required of them by Article 85(1) of the Treaty (see, to that effect, Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 33 and 34, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 61 and 65). Thus, there is nothing in the file to show that the Portuguese State prohibited cement exports or exerted pressure on Cimpor and SECIL to restrict their exports to Spain. They thus enjoyed a sufficient degree of autonomy in the choice of commercial policy, in particular export policy. Moreover, the circumstances to which Cimpor and SECIL refer do not explain why the Portuguese producers thought it necessary to give an undertaking to Spanish producers that they would not export to Spain.

2121 Thirdly, Oficemen, Cimpor and SECIL submit that, in view of the divergence between Portuguese and Spanish standards, their conduct could not have had an anti-competitive effect. They are of the view that, even if an agreement had been concluded between the Portuguese producers and Oficemen, it would have been rendered purposeless as soon as the Spanish Royal Decree No 1313/88 entered into force (see paragraph 2076 above).

2122 That argument must also be rejected. Even though use of cement of a resistance below 350 kg per cm^2 was prohibited in Spain, the various refusals to sell attest to the existence of real demand in Spain for cement from Portugal (see paragraphs 2083 to 2091 above). Moreover, none of the refusals to sell to Spanish customers was based on the ground that the Portuguese producers did not produce cement of a quality equal to or greater than that of Spanish cement of resistance 350. Moreover, it was not for the Portuguese and Spanish producers to stem such demand. It was conceivable that potential Spanish importers of cement from Portugal intended to re-export that cement to other States in which the use of grade 30 cement was not prohibited. Finally, the agreement in question also prohibited exports from Spain to Portugal; the applicants have not even claimed that there were technical and structural barriers to it. In those

circumstances, it was in any event likely to have an appreciable effect on trade between Spain and Portugal.

2123 Even after the entry into force of Spanish Royal Decree No 1313/1988 on 4 January 1989, the disputed agreement was not rendered purposeless, since the Portuguese producers continued to have an interest in seeing their national market protected and it was in the Spanish producers' interest that the Portuguese producers should not hasten to apply to the Spanish authorities for approval of their cement types which complied with the requirements laid down by them. Thus, SECIL admitted to making its first application for approval on 3 February 1992 (application, point 2.2.6).

D — Duration of the infringement

2124 Oficemen, Cimpor and SECIL submit that, should the Court find that the Commission has proved the existence of the infringement, it could not be considered to have lasted until 24 April 1989.

2125 The Court has already found that the Commission was right to fix the beginning of the infringement as 1 January 1986 (see paragraph 2113 above).

2126 None of the documents in the file show that the agreement was entered into for a limited period. The record of the meeting held on 22 July 1985 reveals that the agreement provided for the organisation of meetings between the parties when 'third parties (distributors, retailers, consumers, carriers, etc.) [could undermine] the intentions of the two parties'. It was also provided that, at such meetings, the Spanish and Portuguese producers 'should hold open exchanges of information in order to find a solution to the problem'.

2127 In those circumstances, the Commission was right to consider that, in the absence of any sign to the contrary, the Hispano-Portuguese agreement lasted throughout the period in respect of which it has documents confirming the holding of meetings between the Spanish and Portuguese producers at which information on exports between the two countries was examined.

2128 It is unequivocally clear from the records of the meetings held between the Portuguese and Spanish producers on 20 January 1986, 23 January and 5 and 6 March 1987 that, at those meetings, the problem of Portuguese imports was discussed and that solutions were proposed,

namely an increase in the price of Portuguese cement and a policy intended to discourage Portuguese operators engaging in cross-frontier exports (see paragraphs 2070 to 2082 above).

2129 It is also apparent from the documents mentioned in the contested decision that, even leaving aside document 33.322/1399 (see paragraphs 374 and 2040 above), other meetings between the Spanish and Portuguese producers also took place, in particular on 25 June 1987, 10 November 1897, 5 February 1988, 21 April 1988, 10 May 1988, 27 July 1988, 28 October 1988, 12 January 1989 and 24 April 1989, as shown in Cimpor's documents 'Programa de Acção Conjunta' and various memoranda and telexes (contested decision, recital 21, paragraph 6). However, the Commission does not have any minutes of those meetings.

2130 The applicants concerned conclude therefrom that the Commission has not adduced any evidence proving that the meetings in question pursued an objective contrary to Article 85 of the Treaty.

2131 The Court finds however that, under the 'Programa de Acção Conjunta' run by Cimpor, a number of meetings were called with the Spanish producers and that SECIL acknowledges having participated in some of those meetings. If, contrary to what is suggested by the Commission in the contested decision (recital 21, paragraph 7), it cannot be concluded from documents 33.322/162, 177, 181 and 252, tables drawn up by Oficemen setting out the imports into Spain of cement coming from Portugal, that those tables were prepared on the basis of information collected from Portuguese producers and that they were discussed at meetings organised as part of the 'Programa de Acção Conjunta', the very fact that such meetings were held in that context between Spanish and Portuguese producers nevertheless constitutes objective and relevant evidence showing that the agreement lasted from June 1987 until 24 April 1989, when the last meeting of which the Commission was aware took place. Other objective and relevant evidence confirms the pursuit of that agreement during the same period. First, it is apparent from the documents found by the Commission that, at the time, Cimpor refused any order for cement coming from Spain, while at the same time accepting orders relating to deliveries outside the Community (see paragraphs 2083 to 2091 above). Secondly, the telex from Tracoisa of 13 March 1989 mentions the 'bilateral agreement between Spanish and Portuguese producers' (see paragraph 2089 above).

2132 Since those various items of objective and consistent evidence demonstrate that the agreement continued until 24 April 1989, the Commission was right to conclude that the infringement was committed from 1 January 1986 to 24 April 1989.

Breach of the principle of equal treatment

2133 Cimpor and SECIL maintain that, by not finding that all the Spanish undertakings which are members of Oficemen or, at least, those which attended the meetings referred to in recital 21 of the contested decision, participated in the infringement, the Commission infringed the principle of equal treatment. It is incorrect to allege that the Hispano-Portuguese agreement was concluded between Cimpor and SECIL, on the one hand, and Oficemen, on the other. It is apparent from the documents gathered by the Commission that various Spanish producers, namely Portland Mallorca, Cementos del Mar, Cementos del Atlántico, Portland Valderrivas, Cementos Portland Hispania, Asland, Hornos Ibéricos, Hispacement, Cementos Cosmos, Tudela Veguin and Cementos Alba, took part in the meetings between Spanish and Portuguese producers. Cimpor and SECIL rely in that regard on Cimpor's record of the meeting held on 22 July 1985 (documents 33.322/155 to 157), an internal document of SECIL's concerning the same meeting (document 33.322/167), Cimpor's memoranda on the meeting of 23 January 1987 (documents 33.322/163 to 166), Oficemen's internal memoranda on that same meeting (documents 33.322/1406 to 1408) and the memoranda relating to the meetings of 5 March 1987 (document 33.322/171), of 6 March 1987 (documents 33.322/1410 to 1412), of 5 February 1988 (document 33.322/161) and of 12 January 1989 (document 33.322/997).

2134 The Commission replies that the representatives of the Spanish producers who took part in the meetings referred to in recital 21 of the contested decision were on Oficemen's board of directors and attended the meetings in question in that capacity.

2135 Even if the explanation put forward by the Commission were, at least in so far as concerns the meetings of 23 January 1987 (attended by Mr Viñolas of Asland), of 5 March 1987 (attended by Mr Quemeda of Portland Valderrivas, Mr Asunción of Asland and Mr Fresno of Cementos Portland Hispania), of 5 February 1988 (attended by Mr Suana of Hornos Ibéricos) and of 21 April 1988 (attended by Mr Magan of Hornos Ibéricos), the Court points out that the fact that traders who were in a position similar to that of Cimpor and SECIL were not found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by Cimpor and SECIL, provided that that infringement was properly established (*Woodpulp II*, cited in paragraph 106 above, paragraph 146). The foregoing grounds have shown that, in the contested decision, the Commission was right to conclude that Cimpor and SECIL participated in the infringement from 1 January 1986 to 24 April 1989. In those circumstances, Cimpor's and SECIL's complaint must be rejected.

Infringement of the rights of the defence when access to the file was granted

A — Incriminating documents

2136 So far as concerns incriminating documents not made available to the applicants during the administrative procedure, it must be emphasised again that, even if the extracts from documents reporting the trip of two of Hispacement's employees to Lisbon in May 1986 (document 33.322/2901) are disregarded (see paragraphs 369 to 374 and 2038 to 2040 above), the Commission adduced, in the contested decision, evidence of the existence of the alleged infringement and of the participation in it of Oficemen, Cimpor and SECIL.

B — Exculpatory documents

2137 In their application, Cimpor and SECIL submit that the parts of the Hispacement document (documents 33.322/2898 to 2903) which were not disclosed during inspection of the investigation file during the administrative procedure (see paragraphs 369 to 372 above) contains exculpatory evidence.

2138 However, Cimpor and SECIL cannot claim for the first time in their application that the passages initially omitted from the document in question contained exculpatory evidence, since they received the full text of the document in the course of the administrative procedure, a year and a half before the adoption of the contested decision, namely on 3 May 1993. If Cimpor and SECIL considered that that document contained information which exculpated them, they could have drawn the Commission's attention to that point before the contested decision was adopted. In any event, none of the information contained in the passages which had at first been omitted is of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49) to establish the infringement (see paragraphs 2101 and 2104 to 2106 above).

2139 Oficemen, Cimpor and SECIL also make a number of observations based on documents which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 on the matter of access to the file. According to them, those documents would have been useful in the course of the administrative procedure in their defence against the complaint laid against them. Hornos Ibéricos and Blue Circle also rely on a number of documents relating to the same complaint (Hornos Ibéricos: documents 33.322/124 to 133, 170, 905, 966 to 973, 1019, 1020, 1027, 1080 to 1089, 1319 to 1322, 1395, 1396 et 1409 and Chapter 9 'Portugal' at the SO; Blue Circle: documents 33.322/2898 to 2903). However, the observations which they were able

to make on the basis of those documents could not have altered the outcome of that procedure for those applicants, since they are not referred to in Article 3(2) of the contested decision (see paragraph 256 above).

1. Case T-59/95 *Oficemen* v *Commission*

2140 In its observations of 10 February 1997 Oficemen submits that a number of documents included in the file on Portugal attest to the fact that it was impossible for the Portuguese producers to export cement to the Spanish market, since Portuguese domestic demand was practically identical to their total production and they were bound by longstanding undertakings with regard to the markets of the former Portuguese colonies. Thus, Cimpor's report of activities for 1987 (document 33.322/905) and SECIL's for 1988 (document 33.322/1072) reveal that during the period from 1983 to 1987 Portuguese production was taken up in satisfying domestic demand. A letter of 17 November 1987 from Cimpor to SECIL (document 33.322/1021), which mentions the intention of the latter to import cement, is put forward as evidence that the Portuguese producers did not have the capacity to export. Likewise, the data in the fax sent by Cimpor to SECIL on 7 March 1987 (documents 33.322/1025 and 1026) concerning exports to Spain, attest to their sporadic nature and confirm the difficulties encountered by the Portuguese producers in supplying the neighbouring market. Finally, ATIC's data on imports and exports to and from Portugal in 1989 (document 33.322/197) are put forward as evidence that the Portuguese industry exported only to those countries with which it had traditional links (former Portuguese colonies such as Guinea-Bissau and São Tomé). That information is alleged to prove that the slight potential that there was for export was principally channelled towards trade with those markets, thus rendering exports to Spain impossible.

2141 The Court finds however that the alternative explanations which Oficemen put forward in order to justify the low level of trade in cement between Spain and Portugal during the period under consideration, based on the various documents on which it relies, were not of such a nature as to shed a different light on the body of specific documentary evidence on which the Commission relied in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49), which unequivocally shows not only that an agreement existed but also that it was implemented (see paragraphs 2054 to 2092 above).

2. Cases T-61/95 *Cimpor* v *Commission*, and T-62/95 *SECIL* v *Commission*

2142 In their written pleadings of 7 and 10 February 1997, Cimpor and SECIL put forward, first, a series of arguments alleging that they did not receive the chapters of the SO relating to Spain (Chapters 8 and 18) during the administrative procedure. They mention in particular point 55 of the SO (p. 155), which they claim substantiates their argument that the Spanish technical rules explain the reduction of cement exports to Spain. Moreover, according to SECIL, it is clear

from the same point (p. 151) that it did not have any interest in subscribing to an agreement which offered the certain prospect to Spanish producers that it would not export its cement to Spain.

2143 The Court points out that, in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49), the Commission relied on specific documentary evidence, not on the market conduct of the undertakings in question, in order to establish the existence of the infringement and the participation of Cimpor and SECIL in it. Consequently, even if Cimpor and SECIL had had available to them the extracts from the chapters of the SO on Spain during the administrative procedure in order to support their two arguments, those extracts would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied (see paragraphs 2054 to 2092 above).

2144 Secondly, Cimpor and SECIL submit, in their statements of 7 and 10 February 1997, that points 55 and 87 of the SO (pp. 153, 155 to 157 and 220) show that, if the absence of exports was indeed the result of an agreement, responsibility for that infringement should be attributed not only to Oficemen, but also to the Spanish cement producers. They further claim that, if they had had access to the SO pages in question, the manifestly discriminatory nature of the contested decision could have been avoided. In support of that argument they mention numerous other documents in the investigation file. Thus, they submit that it is clear from Oficemen's Articles of Association (documents 33.322/1216 to 1219) that, in the event of an agreement being entered into, this would be possible only between the Portuguese and Spanish producers, but not between the Portuguese producers and Oficemen. That is also clear, furthermore, from the minutes of Oficemen's board meetings of 13 February 1986 (documents 33.322/1311 to 1318), of 18 September 1986 (documents 33.322/1319 to 1323), of 12 March 1987 (documents 33.322/1329 to 1333) and of 10 March 1988 (documents 33.322/1334 to 1340), from various telexes and notes from Cimpor, SECIL and Oficemen (documents 33.322/1035 to 1038), and replies from Asland (documents 33.322/1801, 1802 and 1805) and Hispacement (document 33.322/2597) to a question put by the Commission during the administrative procedure.

2145 The Court finds that, if Cimpor and SECIL had been able, during the administrative procedure, to point out that several passages of the SO showed that Spanish undertakings participated in the Hispano-Portuguese agreement the Commission could at most only have found that the latter had participated either in addition to or instead of Oficemen in the infringement complained of. On the other hand, such an observation would not have been of such a nature as to exonerate Cimpor and SECIL in any way, since it would not have shed a different light on the specific documentary evidence establishing Cimpor and SECIL's participation in that agreement (see paragraphs 2054 to 2092 above).

2146 Thirdly, Cimpor and SECIL submit, in their written pleadings of 21 January 1998, that, during the period covered by the contested decision, their natural market, namely the Portuguese market, was undergoing a period of expansion. In such circumstances, it was allegedly impossible for them to develop an export policy. They cite, in that regard, a report of the board

of directors of Ciments d'Obourg of 29 September 1988 (document 33.322/215). They also rely on various minutes of the Comité de Programación, a committee set up by several Spanish undertakings (documents 33.322/2816, 2820, 2829, 2830, 2833 and 2837). Those documents confirm that the Portuguese undertakings were unable to exploit the Spanish market in the long term. They show that, where surplus production was significant, as was the case in Spain, definition of an export policy would have made sense only towards countries which had regular deficits and subject to the existence of permanent capacity to deliver cement and clinker. For that reason, undertakings such as Asland, Molins, Sanson, Uniland, Portcemen and Hispacement were obliged to act together in order to palliate the difficulties entailed by the fluctuations in exportable surpluses. In support of the same argument, SECIL relies moreover on a document entitled 'Peter Schuhmacher', of 22 May 1980 (document 33.126/6007). It refers, further, to the report on the trip by Mr Torrela, of Hispacement, to Lisbon, on 3 to 5 June 1987 (document 33.322/2954), from which it is clear that neither in 1986 nor in 1987 was there any actual export capacity and that it had even imported clinker. The memorandum shows moreover that Hispacement was aware that SECIL's export capacities were purely theoretical.

2147 The Court must once again point out that in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49) the Commission relied on specific documentary evidence in order to establish the existence of the infringement and the participation of Cimpor and SECIL in it. In particular, the record drawn up by Cimpor of the meeting held on 22 July 1985 between representatives of cement producers from Spain and Portugal shows that the parties present 'expressed their clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country'. The fact that various documents confirm that the Portuguese undertakings had no interest in or any possibility of exploiting the Spanish market in the long term is not of such a nature as to shed a different light on the documentary evidence used by the Commission. Moreover, the argument put forward by Cimpor and SECIL makes no mention of the interest which Portuguese producers had in Spanish producers' not exporting their overproduction to Portugal.

2148 Fourthly, Cimpor and SECIL consider that the content of a number of documents is inconsistent with the existence of an Hispano-Portuguese agreement or their participation in it. They explain that their participation in various meetings with Spanish producers must be understood as a prudent response on their part to the concerns expressed by the Spanish producers. They submit in their written pleadings of 21 January 1998 that several documents point out the large export capacity of the Spanish undertakings. Those documents are two plans setting out Cim-Bel's strategy (documents 33.126/8382 and 8406) and internal Lafarge memoranda of 20 and 25 April 1988 (documents 33.126/4631 and 4621 to 4624). Cimpor also relies on a CCB document entitled 'Basic information 1987' (see paragraph 1169 above) (documents 33.126/1634 and 1636). It was natural for the Portuguese undertakings to view with some apprehension the concerns of the Spanish producers, whose surpluses were equal to or greater than the Portuguese market, and which were complaining of unfair competition conditions. Cimpor and SECIL claim that, if they had had access to those documents during the administrative procedure, they would have been better able to explain the context in which the meetings with the Spanish producers took place.

2149 That argument must be rejected. The background against which those meetings between Spanish and Portuguese producers took place was necessarily known to the latter, which included Cimpor and SECIL. There was therefore nothing to prevent them from putting forward that argument even during the administrative procedure. Moreover, it must be stated that the aforesaid documents, which attest to the existence of Spanish exports to the German, Belgian, Netherlands and French markets, contain nothing which constitutes either a direct or indirect link with the meetings which took place between the Spanish and Portuguese producers and which are referred to in recital 21 of the contested decision. Cimpor and SECIL have thus not succeeded in demonstrating that access, during the administrative procedure, to the documents to which they refer, would have enabled them to make comments of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49).

2150 Cimpor and SECIL submit, in their written pleadings of 7 February 1997, that certain Oficemen documents (documents 33.322/1225 and 1372 to 1374) show that there were some imports of cement and clinker from Spain to Portugal between 1986 and 1989. They observe next that, in the report for 1988 drawn up by the Directorate-General for Mines and Construction (documents 33.322/1245 to 1289), the pages on cement imports and exports are missing. In their written pleadings of 21 January 1998, they state that the Informe General al Consejo de Administración (General Report to the Board of Directors) of Hispacement of March 1987 (document 33.322/2941), proves that trade in cement between Portugal and Spain continued to grow between 1986 and 1989, when the new Spanish technical rules blocked the access of Portuguese cement to the Spanish market. The document confirms that meetings were held by Spanish producers, in particular between Hispacement and Expocemsa, on coordinating the export of bagged cement and clinker to Portugal.

2151 The Court finds that the pages of the report drawn up by the Directorate-General for Mines and Construction on the import and export of cement were accessible to the applicants following the measure of 18 and 19 June 1997. The pages in question are pages 57 to 67, which are included in the file as documents 33.322/1273 to 1278. However, in their written pleadings of 21 January 1998, Cimpor and SECIL did not claim that the fact of not having had access to those documents during the administrative procedure was detrimental to their defence.

2152 As to the argument that there was an increase in cement exports between the two countries concerned, it is clear from Cimpor's record of the meeting held on 22 July 1985 that the agreement between the Portuguese and Spanish producers did not ban all cement movements between the two countries but only movements that were not instigated or controlled by the cement industry of either country (see paragraph 2045 above). Moreover, the argument in question has already been raised by the interested parties during the administrative procedure. It was however rejected in the contested decision. The Commission was of the opinion that 'the increase in exports [was] not sufficient to refute the documentary evidence' (contested decision, recital 21, paragraph 11, last subparagraph). It also took the view (contested decision, recital 49, paragraph 4) that: 'The argument put forward by the parties that the agreement did not prevent cement movements between the two parties ... carries no weight. As the Court ruled in 1966, the fact that an agreement does not in any way prevent or indeed promotes an increase in the volume of trade between Member States does not mean that there may not be a restriction

of competition or that the agreement cannot affect trade between Member States, since such trade could have developed under other conditions if there had been no restrictive agreement.' In so far as the Oficemen documents (documents 33.322/1225 and 1372 to 1374) and the Hispacement report of March 1987 (document 33.322/2941) substantiate an argument which was already put forward during the administrative procedure, and in the absence of any explanation by the applicants of how those documents could add to that argument, it must be held that Cimpor and SECIL have not been able to establish that lack of access to the said documents during the administrative procedure infringed their rights of defence.

2153 Cimpor also refers, in its memorandum of 7 February 1997, to an extract from Valenciana's annual report for 1988 (document 33.322/1818), which mentions under-use, in the order of 30%, of the production capacity available in Spain. It maintains that it could have used that document in support of its argument that it made no sense for it, as an undertaking without any significant export capacity, to favour exportation to markets in which the potential offer greatly exceeded demand as a result of plant capacity.

2154 The Court points out that the fact that a Spanish undertaking, namely Valenciana, experienced 30% production under utilisation of capacity bears no direct relationship to the Hispano-Portuguese agreement found in the SO and in the contested decision. In any event, the document relied on is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49) in order to find that there was an infringement and that Cimpor participated in it. It is precisely a Cimpor memorandum on a meeting of 22 July 1985 which states that the parties present 'expressed their clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country'.

2155 In its written pleadings of 21 January 1998, SECIL refers to an internal memorandum of Cimpor's of 12 February 1987 (document 33.126/108), which allegedly attests to the importation in 1987 by Cimpor of cement in areas on the border with Spain in sufficient quantities for the Spanish undertakings to feel threatened. It also cites a Cimpor document of 12 April 1988 regarding Cementos del Norte (document 33.322/185) which refers to the serious threat from the export of Spanish surplus to Portugal and the need for the dissuasive measures taken by Cimpor. It claims that it could have used those documents to explain the non-collusive relationship between undertakings in Spain and Portugal. It explains that the Spanish market was threatened by the lower prices in Portugal and the Portuguese market by the Spanish surpluses. There was competition, even if it was cautious and restricted by the circumstances, and any thought of limiting it by means of a restrictive agreement would have been an illusion. That analysis was corroborated by the study carried out by Cimpor on 17 May 1988 of the takeover bid made by Cementos del Norte for the Souselas factory (documents 33.322/256 to 269). At the time, Cementos del Norte felt threatened by the Souselas factory's export capacity and its plan to purchase it was seen as a way of eliminating a competitor.

Cimpor was aware of the aggressiveness of the Spanish cement producers and did indeed consider the market of the north of Spain as a natural market with great potential. Neither the strategy pursued by Cementos del Norte nor Cimpor's reaction are consistent with the existence of an agreement between the cement industries of both countries for the purpose of protecting their respective home markets and discouraging trade in cement.

2156 The Commission, in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49), relied on specific documentary evidence in order to establish the existence of a Hispano-Portuguese agreement and the participation of the various parties in it. The documents mentioned in the foregoing paragraph would not have been useful to SECIL in its defence. The Commission has never claimed that the agreement complained of had put an end to all actual or threatened cement export between the two countries concerned. The SO (point 11, second paragraph) and the contested decision (recital 21, paragraphs 3 to 7) refer in fact to various meetings between Portuguese producers and Oficemen 'with the purpose of exchanging information on the development of cement exports between the two countries'. Moreover, the existence of production surpluses in Spain was not such as to render Article 85(1) of the Treaty inapplicable to the anti-competitive conduct of the Portuguese producers, a matter which is unequivocally clear from various items of specific documentary evidence (see paragraphs 2054 to 2092 above). Finally, the circumstances relied upon by the applicant show that the Portuguese and Spanish producers had a real interest in concluding the agreement at issue. Accordingly, if SECIL had been able to show, during the administrative procedure, on the basis of documents 33.322/108, 185 and 256 to 269, that in 1988 there were production surpluses in Spain and a threat of cement being exported between the two countries, that could not have altered the outcome of the procedure. For the sake of completeness, the Court points out that the documents relied upon by SECIL only concern the individual conduct of Cimpor on the market and are not such as to exonerate SECIL in any way.

2157 Fifthly, Cimpor and SECIL submit, in their written pleadings of 21 January 1998, that various documents could have reinforced their argument that the main topics of discussion at the meetings between Spanish and Portuguese producers, during the period covered by the contested decision, were technical requirements and quality control of imported cement. They refer to the minutes of the meetings of the board of directors of Oficemen of 18 September 1986 (documents 33.322/1319 to 1323), of 12 February 1987 (documents 33.322/1329 to 1333) and of 10 March 1988 (documents 33.322/1334 to 1340). The use of those documents during the administrative procedure would have therefore enabled them to strengthen the line of argument that the Spanish undertakings were above all concerned about the unequal conditions of competition and the notion that trade in cement between the two countries should be on the basis of similar technical regulations and qualities. The minutes of Asland's board of directors meeting of 24 September 1986 (documents 33.322/1607 and 1608) would also have been useful to that end. That document purportedly shows that Asland was concerned by cement imports of no declared origin and by the need to adopt measures to thwart them. Far from contemplating seriously the possibility of agreeing to share the market, Asland sought rather the adoption of monitoring statistics and quality checks.

2158 Cimpor relies on other documents which, in its view, could have reinforced its argument that the main topic of discussion at the meetings between Spanish and Portuguese producers, during the period covered by the contested decision, was that of the technical requirements in force in the two countries and their implications for bilateral trade. In its written pleadings of

7 February 1997, it refers to an extract from the agenda for the meeting of the Oficemen board of directors of 15 February 1990 (documents 33.322/1362 and 1363) and, in its written pleadings of 21 January 1998, it relies on minutes No 11/88 of SECIL's board of directors of 12 May 1988 for the meeting with the Spanish cement producers (documents 33.322/1048 and 1049), and an internal SECIL memorandum of 10 May 1988 (documents 33.322/1051 and 1052). The two last-mentioned documents also show that the undertakings in the two countries closely followed changes in technical requirements 'in order to avoid placing obstacles in the way of entry of cement into each country'.

2159 It must be stated that that argument was already pleaded by the applicants during the administrative procedure (contested decision, recital 21, paragraph 10) and rejected in the contested decision. Thus, as the Commission found (contested decision, recital 49, paragraph 3): 'if the parties' concern was to prevent the circulation of cement that did not correspond to the standards of a country, such concern does not explain why the monitoring of cement movements between the two countries by the producers themselves would have brought the cement exported into conformity with the standards of the country of destination. In addition ... it is not the task of an undertaking (or association of undertakings) to act, on its own initiative, in place of the public authorities responsible for implementing the laws of its country ...'. Moreover, it considered (contested decision, recital 21, paragraph 1) that the argument was not sufficient to 'justify the control of any exports from Spain to Portugal since Spanish cement [was] at least grade 35 and thus higher than the Portuguese grade 30'. In so far as documents 33.322/1048 and 1049, 1051 and 1052, 1319 to 1323, 1329 to 1333, 1334 to 1340, 1362, 1363, 1607 and 1608 substantiate an argument which was already put forward during the administrative procedure, and in the absence of any explanation by the applicants on what those documents could add to that argument, it must be held that Cimpor and SECIL have not been able to establish that, had they had access to the said documents during the administrative procedure, that procedure would have had a different outcome.

2160 Cimpor adds, in its written pleadings of 21 January 1998, that various documents show that the producers of other Member States and Cembureau attached importance to harmonisation and to the need for competition to take place in conditions of equality and without dumping (minutes of the meetings of the FIC board of 29 June 1977 (documents 33.126/1953 to 1965), 12 July 1978 (documents 33.126/1967 to 1974), 17 October 1979 (documents 33.126/1976 to 1988), 12 December 1979 (documents 33.126/1990 to 1999), 9 July 1980 (document 33.126/2009), 8 December 1982 (documents 33.126/2026 to 2033), 23 February 1983 (documents 33.126/2035 to 2043) and 13 July 1983 (documents 33.126/2044 to 2049)). Access to those documents during the administrative procedure would have made it possible to emphasise the relevance of technical regulations and quality control in the context of the relationship between the Spanish industry and the Portuguese industry.

2161 However, the Court finds that the documents aforementioned are not connected with the infringement found to have been committed. Moreover, they do not contain any information concerning the Spanish and Portuguese markets or producers. Their contents could not therefore have shed a different light on the specific documentary evidence used by the Commission both in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49).

2162 Sixthly, Cimpor and SECIL refer, in their memoranda of 21 January 1998, to a large number of documents relating to agreements concluded between Italian undertakings and between Italian and Swiss undertakings (documents 33.126/2902, 2916, 2919 to 2921, 2943, 2976, 2985 to 3013, 3014 to 3032, 3033 to 3036, 3042, 3043, 3053 to 3059, 3110 to 3126, 3127 to 3131, 11878 to 11966, 12083 to 12113 and 12116 to 12135). They claim that access to those documents during the administrative procedure would have enabled them to show more clearly and forcefully the weakness of the evidence against them, taking account of the apparently institutionalised and organised market sharing by the undertakings in the cement industry in the various Member States.

2163 In that respect, it is sufficient to observe that the possible existence of institutionalised agreements between Italian and Swiss producers is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission based itself both in the SO (points 11 and 61(c)) and in the contested decision (recitals 21 and 49) in order to find the existence of the infringement and that the Portuguese producers participated in it.

2164 It follows from all the foregoing that the rights of the defence of Oficemen, Cimpor and SECIL were not affected by the lack of access to the parts of the SO and to the documents on which they relied in order to exculpate themselves during the present proceedings.

Conclusion

2165 It follows from all the foregoing (see paragraphs 2036 to 2164 above) that the pleas examined must be dismissed.

VII — *Pleas alleging infringements of Articles 85(1) and 190 of the Treaty, the principle of equal treatment and the rights of the defence in that the Commission finds that there was a Franco-German agreement and concerted practice contrary to Article 85(1) of the Treaty and that various applicants participated therein (contested decision, Article 3(3)(a))*

Preliminary observations

2166 Dyckerhoff (T-35/95), SFIC (T-36/95), Cedest (T-38/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95) and BDZ (T-48/95), which are found in Article 3(3)(a) of the contested decision to have committed an infringement of Article 85(1) of the Treaty

consisting in a Franco-German agreement and concerted practice, dispute the existence of such an agreement and concerted practice and also their participation in the infringement. Ciments Français and Heidelberger specifically dispute the existence of the various elements in respect of that infringement, namely an agreement on the sharing of the Saarland market, various concerted practices and an agreement on the general regulation of cement supplies between France and Germany, or at the very least their participation therein. Dyckerhoff, SFIC, Cedest, Lafarge and BDZ dispute the existence of certain of those elements, or at the very least their participation therein. Ciments Français, Heidelberger and Lafarge dispute the length of their participation in the infringement. Ciments Français also criticises the artificial nature of the link which the Commission finds between the three elements identified in respect of that infringement. The applicants' complaints relate both to the assessment of the economic background to the alleged Franco-German agreement and to the interpretation of the evidence which the Commission puts forward in the contested decision.

2167 Before assessing the substance of the various arguments put forward, it is appropriate to examine the infringement in question as presented in the contested decision.

2168 The Commission states in Article 3(3)(a) of the contested decision that SFIC, Lafarge, Ciments Français, Cedest, BDZ, Dyckerhoff and Heidelberger 'infringed the provisions of Article 85(1) of the Treaty from 23 June 1982 to at least 30 September 1989 by participating in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France'. The reasoning which the Commission devotes to this infringement in the contested decision is to be found, in the account of the facts, in recital 22, paragraphs 1 to 11 and 13 to 18, first subparagraph, and, in the legal assessment, in recital 50, paragraphs 1 to 4.

2169 It is apparent from that reasoning that the Commission, in reliance on the content of a number of documents, finds the existence, from 1982, of an agreement to share the Saarland market and concerted practices between various French and German producers and associations and, from 1984, of an agreement on the general regulation of cement supplies between France and Germany.

2170 The Commission states in recital 50, paragraph 4, first and third subparagraphs:

'In view of the fact that the agreement on the sharing of the Saarland market, the concerted practices involved in the pursuit of a solution on the limiting of sales by Cedest in Germany apart from the Saarland, and the 1984 agreement referred to in the letter of 22 September 1986

all had as their object the sharing of markets and the restriction of cross-frontier flows of cement between France and Germany, the Commission takes the view that the agreements and concerted practices may be deemed to be a single and continuous infringement.

...

The single and continuous infringement relating to the restriction of cross-frontier flows between France and Germany was committed, from 23 June 1982 to 30 September 1989, by SFIC, Cedest, Ciments Français, Lafarge, BDZ, Dyckerhoff and Heidelberger.'

2171 The Commission therefore finds the participation of those applicants in an infringement consisting of various elements, the existence of which it claims to have established on the basis of specific documentary evidence. The arguments put forward by the applicants seek to show that the Commission has failed to adduce proof of its allegations The Court will examine those arguments in turn according to the element of the infringement to which they relate.

Agreement to share the Saarland market

2172 It follows from the contested decision that the Commission, as it has confirmed by implication in its written submissions and expressly in its answer to a written question put by the Court in Cases T-35/95, T-36/95, T-38/95, T-39/95, T-42/95, T-43/95 and T-48/95, considered that one of the constituent elements of the infringement referred to in Article 3(3)(a) of the contested decision was an agreement to share the Saarland market.

2173 Without providing any specific details of the date on which the agreement was concluded or from which it was applied, the Commission observes in the Legal Assessment of the contested decision (recital 50, paragraph 2, first and second subparagraphs):

'The memoranda of 23 June 1982, 22 July 1982 and 17 November 1982 ... show that the sharing of sales on the Saarland market between Ciments Français, Cedest, Heidelberger and Dyckerhoff was an established fact that was not disputed by any of the undertakings concerned, since it was only other markets that were disputed ("Saarland excluded").

The existence of this agreement is confirmed by the statement made by Dyckerhoff to Ciments Français at the meeting on 9 and 10 May 1983 ... that it did not intend to sell in Saarland and France the cement obtained through the grinding of 100 000 tonnes of clinker at the factory of Ciments Luxembourgeois.'

2174 The Commission considers that the existence of this agreement not only predates the period in issue but is also contemporaneous with that period. It points out (recital 22, paragraph 17, second subparagraph) that 'the agreement on Saarland is referred to in the notes of two different producers; the agreement is mentioned not only as a historical fact but also as an existing fact ...'.

2175 The Commission maintains that the three documents to which it refers in recital 50, paragraph 2, first subparagraph, of the contested decision establish that Cedest began to sell cement in German *Länder* other than Saarland, which led the German producers to react by 'attacking' the market in eastern France to the detriment of the French producers there. This move by Cedest did not affect the application of the agreement to share the Saarland market, however, so that the preexisting agreement continued and the other parties concerned by the general regulation of cement supplies between France and Germany, following Cedest's conduct, took part in the agreement to share the Saarland market on that occasion by incorporating it into a broader framework.

2176 The Commission thus explains (recital 50, paragraphs 2, third subparagraph, and 3, first subparagraph):

'This agreement on the sharing of the Saarland market initially involved Ciments Français, Cedest, Heidelberger and Dyckerhoff. However, on the basis of the points made in paragraphs 3, 4 and 5 below, the Commission considers that the agreement forms part of the wider arrangements covering relations as a whole between the German and French producers, not just these four producers alone.

Following the exports by Cedest to the German *Länder* other than Saarland and the German producers' reaction in France, bilateral consultations took place with a view to limiting cross-frontier flows of cement.'

2177 The bilateral agreements referred to correspond, in the structure of the contested decision, to the concerted practices referred to in Article 3(3)(a) of the contested decision.

2178 Furthermore, the Commission states in recital 50, paragraph 4, second subparagraph that:

> '... even though initially SFIC, BDZ and Lafarge were not parties to the agreement on the Saarland, they accepted it as from 23 June 1982, i.e. as from the time when they acted to extend the agreement on the Saarland to other German Länder and to fit the agreement into the broader framework of the regulation of trade flows between France and Germany.'

2179 The Commission also states (recital 50, paragraph 4, first subparagraph) that the fact that 'the agreement on the sharing of the Saarland market, the concerted practices involved in the pursuit of a solution on the limiting of sales by Cedest in Germany apart from the Saarland, and the 1984 agreement referred to in the letter of 22 September 1986' all had the same object gives grounds for it to regard those agreements and concerted practices as a single and continuous infringement.

2180 Consequently, even though in the contested decision the Commission finds an infringement only in respect of the concerted practices implemented between 1982 and 1984 and the agreement concluded in 1984 when it states (recital 50, paragraph 3, final subparagraph) that '[t]he concerted practices described here, which took place from 1982 to 1984, and the 1984 agreement resulting from the letter of 22 September 1986 constitute infringements of Article 85(1) committed by SFIC, Cedest, Ciments Français, Lafarge, BDZ, Dyckerhoff and Heidelberger', its failure expressly to refer to the agreement to share the Saarland market leaves no scope for ambiguity as to the characterisation by the Commission of that agreement in the contested decision, contrary to what is alleged by BDZ. Moreover, the wording of Article 3(3)(a) of the contested decision refers to the participation of the applicants in question in agreements and concerted practices. The use of the plural confirms that the agreement to share the Saarland market is regarded as one of the constituent elements of the infringement.

2181 As regards the evidence, Dyckerhoff, Ciments Français, Heidelberger and BDZ claim that the Commission has failed to establish the existence of an agreement to share the Saarland market in 1982 and 1983. Cedest (T-38/95) denies having participated in such an agreement at that time.

2182 For the purpose of establishing the existence of the agreement, the Commission relies in the contested decision (recitals 22, paragraph 2, and 50, paragraphs 1 and 2) on, first, four documents and, second, the setting-up of a transport company, the Saarländische Silo-Transport GmbH (hereinafter 'SST').

2183 The four documents in question lead the Commission to consider that in 1983 the agreement to share the Saarland market was an established and undisputed fact for Ciments Français, Cedest, Heidelberger and Dyckerhoff (contested decision, recital 50, paragraph 2).

2184 However, the Commission's analysis of those matters in the contested decision and in the context of the present proceedings cannot be accepted.

2185 It is apparent from two documents referred to in the contested decision that the agreement to share the Saarland market to which they refer formed part, at least until Cedest adopted a more aggressive commercial approach in Germany, of a broader framework involving the regulation of transfers of cement between France and Germany.

2186 First, an internal memorandum from Vicat (documents 33.126/6055 to 6057) dated 22 July 1982 and entitled 'Deliveries of German cement to Eastern France', states that sales in the Saarland market, at least until 1977, were made in accordance with a specific quota arrangement between Cedest, Ciments Français, Dyckerhoff and Heidelberger.

2187 In point 1 of that memorandum, which deals with the background to supplies of German cement in eastern France, the author points out that:

'Historically, the starting point to this business was when Saarland became an economic part of Germany in 1959.

... In the period 1947–1959, cement was supplied by French (Thionville and Hagondange) and German steelmakers under a specific quota system. Thus, until recently, deliveries were broken down as follows:

— SCF [Ciments Français] = 120 000 tonnes/year through Saarländische Zement-Gesellschaft (affiliated to SCF);

— Cedest = 90 000 tonnes/year;

— German producers (Dyckerhoff from the Gommel plant and Heidelberger) = 250 000 tonnes/year.

...

This generally accepted situation was considerably altered some five years ago by Cedest which, not content with supplying the Saarland market, acquired an entire section of German consumers representing an annual share of some 100 000 to 120 000 tonnes/year. The German producers protested vehemently, then, tired of fruitless discussions, took the initiative by entering eastern France with the aim of making good their losses on the French market, in particular by targeting Cedest customers.'

2188 The author of the memorandum therefore considered that the previous situation, which included an agreement to share the Saarland market, was considerably altered by Cedest's conduct. Cedest was no longer satisfied with its quota share in Saarland and began to sell a quantity of approximately 120 000 tonnes to German customers outside Saarland. This considerable change in the situation led the German producers to react and to begin to sell their cement in France, more particularly in the east. The author of the memorandum therefore saw the agreement to share the Saarland market as part of a broader arrangement which also covered transfers of cement between France and Germany in areas other than Saarland.

2189 The remaining passages in the document confirm that subsequently the agreement to share the Saarland market, which existed at least from 1959 until 1977, was no longer applied.

2190 Thus the memorandum goes on:

'Despite the devaluation of the French franc and the price freeze (11.6.82), German producers decided to intensify their action in the East.

...

Furthermore, Cedest is spoiling the climate which can only result in conflict, a conflict that is liable to spread at a time when we are endeavouring to increase our tonnage.

The problem remains unsolved, however, as regards the tonnes taken on the French market by German producers, owing to the attitude of Cedest.'

2191 Accordingly, it cannot be concluded from the memorandum in question that an agreement to share the Saarland market existed in 1982, as the Commission claims (contested decision, recital 50, paragraph 2).

2192 Second, it follows from a handwritten internal memorandum dated 23 June 1982 by Lafarge (documents 33.126/6592 to 6596) referred to in recital 22, paragraph 4, of the contested decision that the agreement to share the Saarland market which existed until the 1970s represented the reaction of the producers concerned to the first disruption of relations between French and German producers. In the context of that reaction it was decided to split the Saarland market by giving one half of sales to the French producers and the other half to the German producers, which supports the information in Vicat's memorandum of 22 July 1982 that Cedest and Ciments Français held a quota of 210 000 tonnes and Dyckerhoff and Heidelberger a quota of 250 000 tonnes (see paragraph 2187 above). The Lafarge internal memorandum of 23 June 1982 confirms that the agreement to share the Saarland market fitted into a broader context of regulation of transfers of cement between France and Germany.

2193 That memorandum records discussions between Lafarge and Dyckerhoff. Although the German producer in question is not expressly named in the document, it can be identified from the use of the letters 'GR' in the memorandum to indicate what was said by Mr Grüner, a Dyckerhoff employee, and also from what is stated in the contested decision (recital 22, paragraph 4) and the arguments exchanged by the parties in Cases T-35/95 and T-43/95.

2194 The author of the memorandum reports what Mr Grüner said as follows:

'Gr 1) Background

Two years ago, opportunity to speak to G d'A. about

— Laf. [Lafarge] in Germany

— Cedest's relations — South Germany

The first disruption was Saarland. Rule of the game sharing. France the result being Germany
a price increase of DM 15 or %. Disastrous
clause 5 000 t too much -> necessary.
10 000 reaction

That worked
Towards 1970 the Thionvillaise began to supply 20–30 000 ...
later -} W [Wössingen]
...'

2195 The Commission states in the contested decision (recital 22, paragraph 4), without being contradicted by the applicants, that the 'Thionvillaise' meant Cedest.

2196 It is apparent upon examining the memorandum that Cedest had ceased to comply with the agreement to share the Saarland market at the beginning of the 1970s and had clearly exceeded its quota. Since it follows from Vicat's internal memorandum of 22 July 1982 that Cedest had also sold cement in German regions other than Saarland since the end of the 1970s, which would have considerably altered the position thus far prevailing between France and Germany (see paragraph 2187 above), Lafarge's memorandum confirms that Cedest's conduct and the German producers' reaction related to both the Saarland and the various other border regions.

2197 The author of the Lafarge memorandum states elsewhere that '... Cedest tried to demolish the Fr. sys. ...', which also demonstrates that Cedest's attitude was seen to threaten the entire position.

2198 The author of the memorandum also states that 'BC' asks 'What are Cedest's rights since this has been going on for 10 years?' Those words were spoken by Mr B. Collomb, of Lafarge, who was at the meeting representing the interests of Wössingen (formerly Portland Zementwerk Wössingen, PZW for short), a German subsidiary of Lafarge (contested decision, recital 22, paragraph 11, fourth subparagraph). His words show that the disruption caused by Cedest's conduct had been continuing for 10 years when the memorandum was drafted.

2199 Accordingly, it cannot be maintained that the Lafarge internal memorandum of 23 June 1982 shows that the agreement to share the Saarland market was still being applied in 1982 and 1983.

2200 That document and the preceding document show that the agreement to share the Saarland market was an arrangement whose scope extended beyond the boundaries of Saarland and covered all relations between France and Germany. The agreement was not to sell cement outside the home frontiers and where sales were made these were to be made within the agreed limits, as for the Saarland market, which was an exceptional case owing to its historical attachment. However, the two documents do not show that the agreement still existed in 1982 and 1983, since they record that it was called in question not only by Cedest but also by the German producers.

2201 The Commission cites two further documents in support of its argument: an undated internal note by Lafarge (documents 33.126/6582 and 6583), cited in recital 22, paragraph 7, of the contested decision, setting out the content of discussions held at a meeting on 17 November 1982 between Cedest, Dyckerhoff and Heidelberger, and a summary record drawn up by Ciments Français on 17 May 1983 (documents 33.126/4251 to 4253), cited in recital 22, paragraph 9, of the contested decision, which reports a meeting between Ciments Français and Dyckerhoff on 9 and 10 May 1983.

2202 However, these two documents do not contradict the conclusions which may be drawn from an examination of Vicat's internal memorandum of 22 July 1982 and the Lafarge memorandum of 23 June 1982.

2203 First, the undated internal note by Lafarge, entitled 'Summit Meeting CEDEST/DYCK/HEI 17/11', is headed 'JM to B. Collomb'. The first paragraph is worded as follows: 'Knut BFB called me this afternoon to give me a brief account of yesterday morning's meeting, which continued through lunch, all "in the best atmosphere" — participants: Seillière + Renard Lose-

Grüner Brenke.' The initials 'JM' are those of Mr J. Marichal, representing Lafarge. Mr Seillière and Mr Renard represent Cedest. The abbreviation 'Knut BFB' corresponds to the name of one of Lafarge's associates in its Wössingen subsidiary, Mr Knut Bücker-Flürenbrock. Mr J. Lose and Mr H. Grüner represent Dyckerhoff. Mr T. Brenke represents Heidelberger.

2204 It therefore follows from the first paragraph of the note, which is not reproduced in the contested decision, that the information which it contains comes from someone, Mr Knut Bücker-Flürenbrock, who had not participated in the meeting on 17 November 1982.

2205 In its observations of 7 January 1998 concerning access to the Commission file which it had been granted following the measure of 18 and 19 June 1997, Cedest relied, in particular, on the content of an internal note of Lafarge of 7 January 1983 (documents 33.126/7514 to 7516), to which it had not been given access during the administrative procedure, to challenge the probative value of the internal Lafarge note cited in recital 22, paragraph 7, of the contested decision and to establish that it had continued to act independently in Germany during that period.

2206 It should be emphasised that the note of 7 January 1983, which the Commission, at the hearing in Case T-38/95, did not deny had an objective link with a complaint against Cedest, would not only have been useful to Cedest for the purpose of its rights of defence during the administrative procedure (see paragraph 247 above and paragraphs 2284 to 2290 below) but sheds fresh light on the content of the internal note by Lafarge referred to in recital 22, paragraph 7, of the contested decision as regards what was actually said by Cedest's representatives during the meeting on 17 November 1982 with the representatives of Dyckerhoff and Heidelberger.

2207 The internal note of 7 January 1983 is an internal record of the information obtained by two Lafarge representatives, Mr Collomb and Mr Marichal, at a meeting on 10 December 1982 with, *inter alios*, the representatives of Dyckerhoff and Heidelberger on the occasion of the twenty-fifth anniversary of the brothers E. and K. Bücker-Flürenbrock, Lafarge's associates in Wössingen. Under the heading that note states, 'Lose and Bremke': 'Nothing very special, very friendly. — The traditional refrain: "You should do business in the FGR", but nothing new. — "Yes, we have had a conversation with Cedest. The form was very subdued, pleasant, but essentially there is no change." On the other hand, they made no reference to what Knut Bücker-Flürenbrock claims was said by Cedest at that meeting, namely: "We are quite happy for RMC to obtain additional tonnage of cement from Wössingen. In that case, however, RMC will purchase less cement in Rheinland-Westphalia, that is from Dyckerhoff."'

2208 Several factors show that this extract from the note refers to the meeting on 17 November 1982 between Cedest, Dyckerhoff and Heidelberger. First, Mr Lose represents Dyckerhoff and the

name 'Bremke' corresponds to Mr T. Brenke, who represents Heidelberger. Second, the meeting to which the note of 7 January 1983 refers took place on 10 December 1982, less than a month after the meeting on 17 November 1982 between Cedest, Dyckerhoff and Heidelberger. Third, both notes, the note of 7 January 1983 and the note referred to in the contested decision (recital 22, paragraph 7), are internal notes of Lafarge, drafted by the same person, Mr Marichal. Fourth, the wording of the note of 7 January 1983 shows the link between that note and the undated note referred to in the contested decision (recital 22, paragraph 7). Thus the first paragraph of the undated note states that it is a record of the meeting of 17 November 1982 given to Mr Marichal by Mr K. Bücker-Flürenbrock via the telephone on 18 November 1982 (see paragraph 2203 above). The note of 7 January 1983 not only mentions the pleasant atmosphere at the meeting which Mr Lose, of Dyckerhoff, and Mr Brenke, of Heidelberger, had with the representatives of Cedest, but refers expressly to what Mr Bücker-Flürenbrock ascribes to Cedest during that meeting (see preceding paragraph).

2209 The wording of the note of 7 January 1983 and the source of the information which it records therefore remove all probative value from the document which the Commission used in the contested decision (recital 22, paragraph 7) as evidence of what Cedest's representatives said about the Saarland market at the meeting of 17 November 1982.

2210 First, it directly contradicts the wording of the note cited by the Commission in the contested decision and from which it concludes that Cedest was prepared to limit its sales in Germany and adapt them to market trends (recitals 22, paragraph 7, and 50, paragraph 3, second subparagraph). Second, unlike the internal note cited in the contested decision (recital 22, paragraph 7), they report information obtained from persons, Mr Lose and Mr Brenke, who actually attended the 17 November 1982 meeting between Cedest, Dyckerhoff and Heidelberger.

2211 It follows that, apart from the fact that the failure to grant access to the note during the administrative procedure affected the rights of defence of Cedest (see paragraphs 2284 to 2290 below), the content of the note shows that the Commission committed an error of assessment when, relying on the extracts from the undated internal note quoted in the contested decision stating that ' ... 1. Mr Seillière for the first time produced the following figures (exports to FGR, excluding Saarland): ... 3. Cedest confirmed that it would sell only to RMC ... and to PZW [Wössingen] in Germany. It also agreed in future to adjust its supplies to Germany (excluding Saarland) to delivery trends in that country whether the trend is upward or downward ...', it considered that Cedest was prepared to limit its sales in Germany and adapt them to market trends (contested decision, recital 22, paragraph 7) and had 'stated to Dyckerhoff and Heidelberger that it wished to sell in Germany only to RMC and PZW and agreed "in future to adjust its supplies to Germany (excluding Saarland) to delivery trends in that country, whether the trend [was] upward or downward" (see memorandum of 17 November 1982, paragraph 7 of recital 22)' (contested decision, recital 50, paragraph 3, second subparagraph).

2212 In that context, the Commission cannot establish the existence of an agreement to share the Saarland market in 1982 and 1983 by relying solely on what, according to the Lafarge internal note cited in the contested decision, Mr Knut Bücker-Flürenbrock attributed to Cedest's representatives.

2213 Second, the Commission does not demonstrate that an overall agreement to share the Saarland market was pursued solely on the basis of the summary record drawn up by Ciments Français on 17 May 1983 (contested decision, recital 22, paragraph 9; documents 33.126/4251 to 4253). The very most that can be inferred from that record is that there was an exchange of views between Dyckerhoff and Ciments Français concerning the Saarland market.

2214 The words used indicate that the Saarland situation was seen, by Ciments Français at least, as being different from the 'zone' in which Ciments Français operated through the Luxembourg company Intermoselle, which it owned jointly with Ciments Luxembourgeois and Dyckerhoff.

2215 Thus in the second subparagraph of paragraph 1 the author of the record says of a representative of Dyckerhoff, Mr Grüner, who was to retire: 'He will continue to play an active role, however, especially concerning relations with neighbouring countries. He will therefore probably continue to be involved in one way or another in Intermoselle, Ciments Luxembourgeois and perhaps the situation in Saarland.'

2216 In the second and third subparagraphs of paragraph 5 the author says: 'Mr Doumenc, [who] provided a broad account of the projects which we have agreed with CL [Ciments Luxembourgeois], revealed that we regard our position in IM [Intermoselle] as the starting point for our entire policy in the region, that, on that basis, where we are on an equal footing with DYZ [Dyckerhoff], we should reflect together on future changes in which we should be associated. Similarly, it would be desirable to be on the same side in the sector in Saarland, where there will be changes.' The author of the record thus implicitly states that at that period the two producers concerned were not, or were no longer, on the same side in the sector in the Saarland market and that changes in the market situation were expected.

2217 Last, the author notes in paragraph 6 that 'DYZ [Dyckerhoff] confirmed that talks were nearing completion with CL [Ciments Luxembourgeois] to provide DYZ [Dyckerhoff] with a grinding quota of 100 000 t on CL's [Ciment Luxembourgeois's] grinding plant and for cement deliveries in the Trier region and in the Eifel. These tonnes will not a priori go to Saarland unless there is a definite economic advantage compared with the Goellheim plant which currently delivers to Saarland. The tonnes will never go to France.'

2218 The Commission's interpretation of the summary record cannot be accepted. Even supposing that the words used in paragraph 6 shows that Dyckerhoff intended to inform Ciments Français that it would not alter their respective positions on the Saarland market, they do not establish the existence of an overall agreement to share the Saarland market between French and German producers.

2219 To conclude, it cannot be denied that the first two documents relied on by the Commission (Vicat's note of 22 July 1982 and the Lafarge internal note of 23 June 1982, see paragraphs 2186 to 2200 above) show that an agreement to share the Saarland market existed and operated at least until 1970, or even until 1977. However, the scope of that agreement was wider than that determined by the Commission in the contested decision, and the four documents to which it refers in that decision do not support the view that the agreement was an established and undisputed fact in 1982 and 1983.

2220 Only the existence of the agreement to share the Saarland market, as apprehended in the contested decision, is capable of affecting the legality of Article 3(3)(a) of that decision, since the Commission regards it as one of the elements of the infringement which commenced on 23 June 1982 (see paragraphs 2172 to 2180 above).

2221 As regards the agreement to set up SST, to which the Commission refers in recital 22, paragraph 2, of the contested decision, none of the applicants concerned disputes either the existence of that company or the dates on which, according to the contested decision, it was set up and sold (recital 22, paragraph 2). Dyckerhoff claims that SST has no relevance to any question of the sharing of supplies and that its activities were confined to transporting cement in silos. Heidelberger observes that it had no influence over SST, since it had only a small shareholding in that company, and that it never used SST to transport its cement.

2222 The Commission does not state in the contested decision what role it considers that the agreement to set up SST played in the implementation of the alleged agreement to share the Saarland market. Although it states in its account of the facts (recital 22, paragraph 2) that '[t]he agreement to share the Saarland market was supported by another agreement on the setting-up of a joint cement transport company "Saarlaendische Silo-Transport GmbH", the only company which the associates (Arbed, Ciments Français, Cedest, Wülfrather, Heidelberger and Dyckerhoff) would use to transport their cement to Saarland', it makes no further reference to SST in the legal assessment in establishing the existence of an agreement to share the Saarland market. In its answer to a written question put by the Court in Cases T-35/95, T-38/95, T-39/95 and T-42/95 the Commission states that it mentioned the agreement to set up SST in the context of its account of the facts, but drew no legal inference from it. It further states that Article 3(3)(a) of the contested decision concerning the regulation of cement supplies between Germany and France does not refer to that agreement and that the agreement does not appear to have been applied during the period of the infringement found in Article 3(3)(a).

2223 Consequently, there are no grounds for taking that agreement into consideration in order to rule on whether the agreement to share the Saarland market was a constituent element of the infringement referred to in Article 3(3)(a) of the contested decision.

2224 It follows from all the foregoing that the Commission has failed to demonstrate the existence in 1982 and 1983 of the agreement to share the Saarland market to which it refers in the contested decision. Accordingly, there is no need to decide on the participation of the various parties in such an agreement or on the claims of Ciments Français and Heidelberger that the matters are time barred.

2225 Article 3(3)(a) must therefore be annulled in part in so far as it finds that Dyckerhoff, SFIC, Cedest, Ciments Français, Heidelberger, Lafarge and BDZ participated in an agreement to share the Saarland market from 23 June 1982.

Concerted practices between various French and German producers and associations between 1982 and 1984

2226 Dyckerhoff, SFIC, Cedest, Ciments Français, Heidelberger and Lafarge deny having in any way participated in the concerted practices which the Commission found in the contested decision. BDZ on the other hand does not devote any specific argument to the concerted practices.

2227 Before the merits of the various arguments put forward by the applicants are assessed, it is appropriate to recall the description of the concerted practices given by the Commission in the contested decision.

2228 In recital 50, paragraph 3, first subparagraph, the Commission states:

'Following the exports by Cedest to the German Länder other than Saarland and the German producers' reactions in France, bilateral consultations took place with a view to limiting cross-frontier flows of cement.'

2229 The Commission then refers (same paragraph, second and third subparagraphs) to talks between SFIC and BDZ, to pressure exerted on Cedest by SFIC and the French producers

concerned, to concerted action between Cedest, Dyckerhoff and Heidelberger, to concerted action between Lafarge and Dyckerhoff and to concerted action between Dyckerhoff and Ciments Français.

2230 The Commission observes (fourth subparagraph) that '[t]he problem of relations between French and German producers was discussed, as a "hot spot", at the meeting of Head Delegates on 19 March 1984 (see paragraph 9 of recital 19)'.

2231 The Commission states (fifth subparagraph) that these various instances of collusion are 'concerted practices [which] led to the conclusion of an agreement between the French and German undertakings and associations of undertakings concerned' and observes (seventh subparagraph) that those concerted practices, which took place from 1982 to 1984, constitute infringements of Article 85(1) of the Treaty.

2232 In Article 3(3)(a) of the operative part of the contested decision the Commission finds the existence of an infringement consisting, *inter alia*, of those concerted practices.

2233 In support of the contested decision the Commission relied on the content of a number of documents to establish the five concerted practices referred to in recital 50, paragraph 3, second and third subparagraphs, of the contested decision, which took place in 1982 and 1984 and had 'as their object the sharing of markets and the restriction of cross-frontier flows of cement between France and Germany' (contested decision, recital 50, paragraph 4, first subparagraph) and more particularly to 'extend the agreement on the Saarland to other German Länder and to fit the agreement into the broader framework of the regulation of trade flows between France and Germany' (contested decision, recital 50, paragraph 4, second subparagraph).

2234 Dyckerhoff does not deny that it took part in discussions with German and French producers in 1982 and 1983 or that it was concerned about Cedest's expanding activities in Dyckerhoff's natural market. Similarly, Heidelberger admits that there may have been contacts between French and German producers in 1982 with a view to putting a stop as soon as possible to the cross-frontier supplies which had increased at that time. However, it states that no agreement was concluded.

2235 The Court will examine each of the concerted practices found by the Commission in the order in which they are referred to in recital 50, paragraphs 2 and 3, of the contested decision.

A — Talks between SFIC and BDZ

2236 In recital 50, paragraph 3, second subparagraph, of the contested decision the Commission states that talks were held between SFIC and BDZ and refers to the handwritten internal memorandum of Lafarge of 23 June 1982 (documents 33.126/6592 to 6596) mentioned in recital 22, paragraph 4, of the contested decision, but does not specify the relevant passages.

2237 SFIC disputes the Commission's interpretation of that memorandum in the contested decision, and more particularly its interpretation of the following passage, which is on the first page of that document and reports what was said by Mr Grüner of Dyckerhoff:

'1) Background':

'... then Gemalen Schäben Germany pq domestic
reaction in France. Verband [BDZ] found it very hard to see
all the more so because there was
Not dominate the partner (subsidiary)?
Talks with Fr. syn. [SFIC] and let's suppose that
tonnage increased to the point at which
the market was disrupted
CLK 25/HOZ 25 and PZ 35 mixture
by RMC. Publicity
Waited a very long time without doing anything ...'

2238 SFIC considers that there is no reason to think that the talks in question were talks with BDZ and points out that the note in any event relates to events before 1982.

2239 Although this passage from the note actually refers to BDZ ('Verband') and to talks with SFIC, it appears, as SFIC says, in the context of an historical account by Mr Grüner of the events which marked relations between the French and German industries following Cedest's conduct in the 1970s. Even supposing that such references provide evidence of the existence of talks between SFIC and BDZ, they clearly relate to a period before the note in question was drawn up.

2240 The note therefore fails to establish the existence of talks between SFIC and BDZ alleged to have taken place between 1982 and 1984.

2241 Even though the Commission makes express reference only to that note when it accuses SFIC and BDZ of having colluded (contested decision, recital 50, paragraph 3, second subparagraph), it also adduces two other pieces of evidence to demonstrate that such talks took place between SFIC and BDZ, at least in 1984, when it explains the result, in its view, of the various concerted practices, namely the conclusion of an agreement in 1984.

2242 In recital 50, paragraph 3, fifth subparagraph, of the contested decision the Commission states that the letter of 22 September 1986 from the Chairman of Ciments Français and of SFIC, Mr B. Laplace, to the Chairman of Heidelberger and of BDZ, Mr P. Schuhmacher (contested decision, recital 22, paragraph 10) 'refers [*inter alia*] to the progress achieved as compared with 1984 at the periodic meetings between Mr Laplace, Mr Lose and Mr Brenke'.

2243 At least one passage in that letter (first and second subparagraphs) confirms that meetings were held between the two associations in 1984 to deal with the problems encountered in relations between the French industry and the German industry: 'As you know I have periodic meetings with Jürgen Lose [from Dyckerhoff] and Ted Brenke [from Heidelberger]. I believe, if we look back at the situation we were faced with in 1984, that what we discussed during the course of these meetings has worked reasonably well.' It is significant, moreover, that although the letter is written on Ciments Français notepaper, Mr Laplace makes particular reference to his capacity as Chairman of SFIC (fifth paragraph) and refers to the 'French parties'. Similarly, he does not refer specifically at any point in his letter to the position of Heidelberger, of which Mr Schuhmacher was Chairman, but speaks of the 'German side' and of the 'French and German interests'. Last, the matters dealt with in the letter are within the competence of a national trade association, since they refer to relations between the industries of two different countries.

2244 The Commission also refers to the discussions at the Cembureau Head Delegates meeting on 19 March 1984 in footnote 100 and in recital 50, paragraph 3, subparagraph 4, of the contested decision.

2245 As the Commission points out in footnote 100, it follows from the memorandum to the Chairman dated 15 March 1984, concerning the meeting of Cembureau Head Delegates on 19 March 1984 (documents 33.126/11728 and 11729), referred to in recital 19, paragraph 9, of the contested decision, that exports from France to Germany were seen by the meeting as still being a 'hot spot'. Both SFIC and BDZ participated in that meeting, the former represented by Mr Collomb and the latter by Mr A. von Engelhardt (recital 19, paragraph 8).

2246 The memorandum of 15 March 1984 states that exports from France to Germany were to be discussed and that the discussions did not concern traditional or even structural trade between those two Member States.

2247 Thus item 2, entitled 'Situation on the European markets', states, in particular:

'— Comments on the table showing imports and exports of member countries.

— It will be noted that the discussions will not concern traditional or even structural inter-state trade, e.g. exports from Germany and Belgium to the Netherlands.

— The hot spots are still:

— Exports from Germany to the United Kingdom and Ireland;

— Exports from France to Germany;

— Exports from Spain to Ireland and the United Kingdom.

— A new hot spot is exports from Italy to Switzerland.

— Participants will then be asked to comment round the table.'

2248 The fact that there is no reference to discussions concerning Franco-German relations at the meeting of 19 March 1984 in the notes on the meeting dated 2 April 1994 (documents 33.126/11733 to 11737), cited in recital 19, paragraph 10, of the contested decision, does not

deprive the information in the memorandum of 15 March 1984 concerning discussions between SFIC and BDZ in 1984 of all probative force.

2249 The conclusion reached in the notes on the meeting that '[p]ressure from inter-member trade had slackened considerably through improved bilateral contacts' confirms that, as indicated in the two abovementioned paragraphs from Mr Laplace's letter of 22 September 1986 to Mr Schuhmacher (see paragraph 2243 above), bilateral contacts took place in any event between the French industry and the German industry in 1984. The reference in the memorandum of 15 March 1984 to exports from France to Germany and the fact that SFIC and BDZ were present at the meeting on 19 March 1984 therefore attest to the fact that the two associations did hold talks at that time.

2250 Finally, the content of the documents presented in the contested decision not only gives reason to conclude that talks were held between the two national associations, SFIC and BDZ, at least in 1984, but also shows that the subject-matter of those talks concerned the special situation of relations between the industries of both the countries concerned, and in particular the attempts to limit or regulate exports from one country to the other. The anti-competitive nature of the subject-matter of the talks in which the two associations were involved is therefore established. Moreover, subject to proof to the contrary, which it was for the associations to adduce (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162), it must be held that the talks between SFIC and BDZ influenced their conduct and that of their members concerned by trade between France and Germany.

2251 It follows from the foregoing (paragraphs 2236 to 2250) that the Commission was entitled to find that there was a concerted practice between SFIC and BDZ contrary to Article 85(1) of the Treaty. However, the contested decision does not contain any evidence to show that the concerted practice existed before 1984.It follows that Article 3(3)(a) must be annulled in so far as it finds that there were unlawful talks between SFIC and BDZ before 1984.

B — Pressure exerted on Cedest by SFIC and the other French producers concerned

2252 The Commission infers from the internal memorandum of Lafarge of 23 June 1982 (contested decision, recitals 22, paragraph 4, and 50, paragraph 3, second subparagraph; document 33.126/6592 to 6596) that following concerted action, whose objective was to limit cross-frontier flows of cement, the SFIC and the other French producers concerned exerted pressure on Cedest to restrain its exports to Germany.

2253 In recital 50, paragraph 3, of the contested decision the Commission does not indicate precisely the part of that memorandum from which it drew that inference.

2254 In recital 22, paragraph 16, however, it cites the following passage (p. 3 of the memorandum):

'The industry (Syndicat) and Lafarge in particular applied their full weight when: unregulated competition (Kerpen).

Ground slag dangerous for mixtures.'

2255 When placed in the context of the discussions described in the memorandum, this passage shows that pressure was actually exerted on Cedest. The pressure was anti-competitive in nature: the passages which precede the one set out above show that the purpose of the pressure was to induce Cedest to put a stop to its aggressive commercial policy in Germany and to respect the 'home market principle' (the expression found on p. 2 of the memorandum).

2256 As regards those responsible for the pressure, the Commission refers to SFIC and 'the other French producers concerned' (contested decision, recital 50, paragraph 3, second subparagraph), namely Lafarge and Ciments Français.

2257 SFIC maintains that in the SO the Commission, relying on an extract from the Lafarge internal memorandum of 23 June 1982, criticised it only for having held talks with BDZ. That document does not mention the existence of pressure exerted on Cedest.

2258 It must be pointed out that the information provided in the SO does not identify SFIC as one of those responsible for bringing pressure to bear on Cedest. After citing the extract from the Lafarge internal memorandum of 23 June 1982 concerning the talks between SFIC and BDZ, the Commission states that '[t]he memorandum goes on to refer to pressure brought to bear by Lafarge and Ciments Français on Cedest' (SO, paragraph 12, p. 25). Nor is SFIC criticised elsewhere in the SO for having participated in the pressure on Cedest referred to in the Lafarge memorandum of 23 June 1982. Consequently, the description of this objection in the SO was not worded in such a way that SFIC could be aware that it was accused of the conduct in question. The exercise of its rights of defence was therefore affected. Consequently, Article 3(3)(a) of the contested decision must be annulled in so far as it finds that SFIC participated in a concerted practice designed to exert pressure on Cedest.

2259 As regards Lafarge, it is sufficient to observe that the passage from its internal memorandum of 23 June 1982, cited in paragraph 2254 above, to the effect that 'the industry (Syndicat) and Lafarge in particular applied their full weight ...', reproduces what was said by Mr Collomb, who specifically represented Lafarge's interests. The passage clearly shows that Lafarge brought pressure to bear on Cedest, whatever the effect it may have had on Cedest's conduct. It follows that Lafarge's participation in the conduct referred to in recital 50, paragraph 3, of the contested decision was established in the decision.

2260 Nor does Lafarge devote any specific argument to the abovementioned passage. It merely states that its internal memorandum reveals only that its good offices were sought in the dispute provoked by Cedest and that, as the other documents referred to in recital 22 of the contested decision bear out, there was continuing disagreement among the various parties concerned, which precluded any concerted action or cooperation susceptible of being classified as a concerted practice within the meaning of case-law (Case 48/69 *ICI* v *Commission*, cited in paragraph 636 above, paragraph 64, and Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraphs 214 and 215). In that regard, Lafarge also relies on the content of its internal memorandum concerning a meeting between Cedest, Dyckerhoff and Heidelberger on 17 November 1982 (contested decision, recital 22, paragraph 7) and a summary record drawn up by Ciments Français on 17 May 1983 (contested decision, recital 22, paragraph 9), which show that Cedest did not alter its conduct or withdraw from the German market.

2261 It should be pointed out, however, that even supposing that Lafarge's interpretation of its internal memorandum of 23 June 1982 is correct, it cannot be described as complete. The fact that it was approached to settle the dispute provoked by Cedest does not weaken the evidence that there was in fact concerted action with Ciments Français in particular. Nor does it preclude the possibility that it exerted some pressure on that occasion. The fact that Lafarge holds shares in Cedest is even of such a kind as to confirm the reality of the pressure described in its own internal memorandum of 23 June 1982. The illegal nature of the concerted action aimed at exerting pressure on Cedest has been established (see paragraph 2255 above).

2262 Furthermore, the Commission did not allege that Cedest altered its commercial conduct following the pressure brought to bear by SFIC and the other French producers concerned. In that regard, it merely demonstrated that the exercise of that pressure, following concerted action, was designed to compel Cedest to alter its conduct (see paragraph 2255 above), which is sufficient to find that it was unlawful for the purposes of Article 85(1) of the Treaty (see the case-law cited in paragraph 1674 above). The argument which Lafarge bases on Cedest's conduct after pressure had been brought to bear on it is therefore irrelevant.

2263 In any event, it is necessary to reject Lafarge's argument, first, that it had no interest in exerting any pressure whatsoever on Cedest, having regard to the special features of its situation and that of its German subsidiary Wössingen on the market, and, second, that the 'oil stain' ('tache d'huile') economic theory, which the Commission used to prove the existence of a Franco-German agreement, does not explain Lafarge's competitive conduct in Germany, where

Wössingen's sales increased between 1976 and 1991; moreover, that theory cannot be applied to regional markets scattered throughout the territory.

2264 It should be observed that, contrary to what Lafarge claims, the existence of the concerted action designed to bring pressure to bear on Cedest is established not on the basis of an economic analysis of the market, in the light of an 'oil stain' theory, but on that of specific documentary evidence coming from Cedest itself. The question whether Lafarge had or did not have any 'interest' in bringing pressure to bear on Cedest is therefore irrelevant, since the existence of such pressure has been properly established. Nor is it contradictory for an undertaking to participate in a bilateral agreement designed to ensure respect for home markets and at the same time to seek to strengthen its local subsidiary in a territory concerned by that agreement. That observation also applies to all the concerted actions in which Lafarge is alleged to have participated (see paragraphs 2295 to 2315 and 2331 to 2442 below).

2265 Moreover, a number of items contradict Lafarge's argument. It may be seen, first, that it was preoccupied with the state of Franco-German relations, since a number of documents show that it participated in discussions on that subject (internal memorandum of 23 June 1982 (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596), in which its representative, Mr Collomb, referred in particular to the existence of the 'home market principle'; undated internal note concerning a meeting between Cedest, Dyckerhoff and Heidelberger on 17 November 1982 (contested decision, recital 22, paragraph 7; documents 33.126/6582 and 6583); letter of 28 July 1982 from Mr C. Hummel, of Dyckerhoff, to Mr Collomb, of Lafarge (contested decision, recital 22, paragraph 5; documents 33.126/6597 to 6599) and internal note by Lafarge of 2 September 1982, drawn up by Mr Marichal for Mr Collomb (contested decision, recital 22, paragraph 6; document 33.126/6584)). Then, as the Commission points out in the contested decision, Lafarge had a special interest in taking part in the discussions on Franco-German relations in view of the position of its German subsidiary Wössingen (recital 22, paragraph 13, third and fourth subparagraphs). Last, as the Commission also observes in the contested decision (recital 22, paragraph 13, second subparagraph), even if Lafarge's position were not entirely comparable to that of other French producers, owing to the location of its plants, it was not protected from the consequences of competition between French and German producers in its own trading area, since there was a risk that the conflict provoked by Cedest's attitude in the German market would spread in the event of reprisals on the part of the German producers.

2266 Furthermore, Lafarge's attempt to rely on its own internal memoranda of 6 August 1982 (documents 33.126/7522 to 7524) and 7 January 1983 (documents 33.126/7514 to 7516) is inadmissible under Article 48(2) of the Rules of Procedure, since it relied on them for the first time at the hearing.

2267 In any event, the existence and the content of those two internal memoranda in reality confirms the interest which Lafarge showed in the problems raised by Cedest's conduct in Germany, more particularly because of Lafarge's presence within Wössingen.

2268 The memorandum of 6 August 1982, drawn up by Mr Marichal and entitled 'LC [Lafarge] strategy in Germany "Cedest affair"', consists of three separate parts: A. Forces present, B. Foreseeable movements and C. Proposed action.

2269 In point 3 of part A the author notes that Wössingen 'like others is affected by C.'s [Cedest's] inroads'.

2270 The five points in part C also show that Lafarge felt concerned by Cedest's conduct in Germany:

'1. Refuse so-called concerted action with the two large German producers without Cedest, which can only cause LC [Lafarge] setbacks.

2. Maintain position. "we shall only come if Cedest invites us. In France, where there are minority shareholdings, that is the way it is done".

3. Do not accept even the concept of "compensation" given to PZW [Wössingen] on an undertaking by Cedest not to attack any more which would probably not be complied with (a fool's game) and consequently avoid the slippery slope of ... (thus killing two birds with one stone).

4. Exert a form of blackmail on Cedest: more than CK if no brakes RMC/Ludwig why refrain from using the only means of pressure that seems to be available?

in practice — JM [Mr J. Marichal] tf [no doubt meaning "telephone"] write to B.R. [Mr B. Renard of Cedest] to insist on having the result of the enquiry which he promised L.M. and say that we are relying heavily on his intervention with RMC

— no ... CK to Cedest if no result

Otherwise — we are pleasing an "enemy" (or rather a competitor) of W [Wössingen]

— in refusing those whom W [Wössingen] we must try to manage without it costing us anything

5. Tell Cedest (orally) that we shall not be the inquisitors in the proceedings brought against them in Germany.'

2271 The internal memorandum of 7 January 1983 shows that the Lafarge management were anxious to ascertain the content of the discussions held in Lafarge's absence between Cedest and the German producers Dyckerhoff and Heidelberger at a meeting on 17 November 1982.

2272 Turning last to Ciments Français, it must be stated that the extract from the internal Lafarge memorandum of 23 June 1982 cited in paragraph 2254 above does not expressly mention Ciments Français, although in the SO (paragraph 12, p. 25) the Commission expressly accuses it of bringing pressure to bear on Cedest.

2273 Ciments Français claims that the memorandum in issue provides no grounds for concluding that it participated in discussions about Cedest's sales in Germany, still less in bringing pressure to bear on Cedest.

2274 None the less, it follows from the content of that memorandum, examined in the light of the content of the internal Ciments Français memorandum of 25 January 1983 (documents 33.126/4254 to 4256), cited in recital 22, paragraph 8, of the contested decision, and the summary record drawn up by Ciments Français on 17 May 1983 (contested decision, recital 22, paragraph 9; documents 33.126/4251 to 4253), that the Commission was correct to take the view that, in the context of concerted action whose objective was to limit cross-border trade in cement, Ciments Français brought pressure to bear on Cedest.

2275 In that regard, it should be observed, first, that although Ciments Français is not actually mentioned by name in the extract from the internal Lafarge memorandum of 23 June 1982 concerning pressure on Cedest (see paragraph 2254 above) and although that memorandum describes, in the Commission's own words, a discussion between the representatives of Lafarge and Dyckerhoff (contested decision, recital 22, paragraph 4), the author refers to the 'ind. (Syn)', that is to the French industry, of which Ciments Français indisputably then formed part. Furthermore, Ciments Français is mentioned later in the memorandum, where reference is made to its influence on Cedest, in the following words: 'CF [Ciments Français] we know that it has

less influence on Cedest than L [Lafarge]. Also delivery prices to RMC are below French prices. BC put the ball in Ciments Français's court'. As the Commission observed in its answer to a written question put by the Court in Case T-39/95, the reference to Ciments Français can only be explained by its involvement in the earlier discussions to which the memorandum refers.

2276 Next, it follows from the Ciments Français memorandum of 25 January 1983 and its summary record of 17 May 1983 that Ciments Français was still involved in 1983 in the discussions on Cedest's conduct in Germany. Both documents thus indicate that it participated in discussions with Dyckerhoff on the restriction of Cedest's sales in Germany and the retaliatory measures which Dyckerhoff intended to take against Cedest. Even though those documents are relied upon in the contested decision to support the existence of a different concerted practice, between Ciments Français and Dyckerhoff (see paragraphs 2316 to 2330 below), they confirm Ciment Français's involvement in the concerted action pursuant to which pressure was brought to bear on Cedest by the French industry, as indicated by the Lafarge memorandum of 23 June 1982 (see preceding paragraph). Subject to proof to the contrary, which it was for Ciments Français to adduce (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162), it must be held that the concerted action in question influenced its conduct in trade between France and Germany.

2277 Ciments Français cannot plead lack of interest in Cedest's sales in the Palatinate on the grounds that it was not present in that area, controlled no German producer, did not own shares in Cedest and was not involved in the proceedings brought by the Bundeskartellamt in relation to southern Germany. Ciments Français further points out that it did not have access to the file relating to that national cartel during the administrative procedure.

2278 As the Commission correctly observed in its submissions in Case T-39/95, that argument is irrelevant, since what is at issue is not an agreement to share sales in the Palatinate market but pressure brought to bear to prevent the German producers, who were irritated by Cedest's conduct, from adopting retaliatory measures against the French regions in which Ciments Français was present, for example eastern France, and the only German region where Ciments Français confirms that it was present, Saarland. Moreover, neither in the SO nor in the contested decision did the Commission find that Ciments Français participated in the infringement found in Article 3(3)(a) of the contested decision on the ground that it participated in a national cartel relating to southern Germany which may have been found to exist by the Bundeskartellamt or any other authority.

2279 Nor can Ciments Français find support in the internal Lafarge note concerning a meeting between Cedest, Dyckerhoff and Heidelberger on 17 November 1982 (contested decision, recital 22, paragraph 7; documents 33.126/6582 and 6583) for its argument that it did not participate in bringing pressure to bear on Cedest. Even supposing, as Ciments Français claims, that the note records discussions relating exclusively to Cedest's conduct in the Palatinate, the content of the note has no effect whatsoever on the evidence that Ciments Français participated

in bringing pressure to bear on Cedest, since that evidence is in another document, the Lafarge memorandum of 23 June 1982 (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596). Furthermore, the note relating to the meeting held on 17 November 1982 does not anywhere mention Ciments Français.

2280 Accordingly, it follows that the Commission has shown that Lafarge and Ciments Français brought pressure to bear on Cedest to reduce its sales in the German market. On the other hand, because SFIC's rights of defence were infringed during the administrative procedure (see paragraphs 2257 and 2258 above), its participation in the exercise of such pressure has not been lawfully established.

2281 Moreover, it is established that the pressure in question was anti-competitive (see paragraph 2255 above).

C — Concerted action between Cedest, Dyckerhoff and Heidelberger

2282 The Commission infers the existence of this concerted action from an internal handwritten note by Lafarge recording a meeting between Cedest, Dyckerhoff and Heidelberger on 17 November 1982, during which the parties concerned discussed Cedest's sales in Germany (contested decision, recitals 22, paragraph 7, and 50, paragraph 3, second subparagraph; documents 33.126/6582 and 6583).

2283 None of the three parties concerned has denied that the meeting took place on 17 November 1982 or that it was present at the meeting. Although they do not dispute the subject-matter of the discussions which took place at the meeting, all three claim that, in spite of that particular subject-matter, it did not constitute conduct contrary to Article 85(1) of the Treaty, either because the discussions consisted purely in the communication of an undertaking given by Cedest to Dyckerhoff and Heidelberger, or because they were not followed up, or because it is evident from the handwritten note that Cedest did not give a favourable response to the requests that it give an undertaking, or again because, since Cedest did not agree to the producers' request to cease its aggressive sales policy in Germany, or even contemplate adopting a course of conduct consistent with that request, the attempt was at the very most unilateral and did not in any event constitute a concerted practice contrary to Article 85(1) of the Treaty, which requires, at least, concerted action between two people.

2284 As indicated in paragraph 2205 above, in its observations of 7 January 1998 concerning access to the Commission file which it had been granted following the measure of 18 and 19 June

1997, Cedest relied, in order to establish that it had continued to act independently in Germany, in particular, on the content of an internal note of Lafarge of 7 January 1983 (documents 33.126/7514 to 7516), to which it had not been given access during the administrative procedure.

2285 That internal memorandum is at variance with the content of the Lafarge note concerning the meeting on 17 November 1982 referred to in the contested decision (recital 22, paragraph 7) as regards what was said by Cedest's representatives at that meeting (see paragraphs 2203 to 2210 above).

2286 It is clear, therefore, that that note could have proved useful to Cedest in the exercise of its rights of defence during the administrative procedure (see paragraph 247 above). The administrative procedure might have had a different outcome had Cedest had access to that document before the contested decision was adopted, having regard to its impact on the evidential value of the note describing the meeting on 17 November 1982.

2287 The note of 7 January 1983 contradicts the content of the only document evidencing Cedest's participation in the concerted practice with Dyckerhoff and Heidelberger referred to in Article 3(3)(a) of the contested decision.

2288 Since the concerted practice with Dyckerhoff and Heidelberger is the only one referred to in Article 3(3)(a) of the contested decision in which Cedest is alleged to have participated, that provision must be annulled as against Cedest, in so far as it establishes that Cedest participated in concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France.

2289 In any event, it should be reiterated that the content of the note of 7 January 1983 shows that the Commission committed an error of assessment when it considered that 'Cedest was prepared to limit its sales in Germany and adapt them to market trends' (contested decision, recital 22, paragraph 7) and that 'Cedest stated to Dyckerhoff and Heidelberger that it wished to sell in Germany only to RMC and PZW and that it agreed "in future to adjust its supplies to Germany (excluding Saarland) to delivery trends in that country, whether the trend is upward or downward" (see memorandum of 17 November 1982, paragraph 7 of recital 22)' (contested decision, recital 50, paragraph 3, second subparagraph) (see paragraph 2211 above).

2290 The Commission cannot claim, as it did at the hearing in Case T-38/95, that it also relies on certain passages in the internal Lafarge memorandum of 23 June 1982 (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596). That memorandum makes no mention of specific meetings or undertakings given to German producers by Cedest at such

meetings. The most that can be inferred from the passage worded '... H. Since 1980 we have constantly told our French colleagues not to accept Cedest (81). ...' is that the person making that remark, from Dyckerhoff, was referring to contacts between Dyckerhoff and Cedest in 1981. Apart from the fact that the reference was to events which, even on the assumption that they had actually occurred, did so before the period of the infringement found in Article 3(3)(a) of the contested decision, the Commission made no mention in that decision either of the existence of those contacts between Dyckerhoff and Cedest or of their content.

2291 However, the infringement of Cedest's rights of defence resulting from the infringement of its right to have access to the Commission's file during the administrative procedure, the absence of any evidence that it participated in a concerted practice with Dyckerhoff and Heidelberger on 17 November 1982 and the consequences flowing therefrom do not mean that the findings which the Commission based on the content of the internal Lafarge note referred to in recital 22, paragraph 7, of the contested decision in relation to Dyckerhoff and Heidelberger are unlawful.

2292 Apart from the fact that in their observations on the access to the file which was granted following the measures of organisation of procedure adopted by the Court (see paragraphs 2446, 2447, 2461 and 2462 below) neither of those parties asserted that the internal Lafarge note of 7 January 1983 was relevant, they did not deny having attempted in concert at the meeting on 17 November 1982 to secure undertakings from Cedest. In their case that meeting therefore had an anti-competitive object, since the purpose of that contact between two competitors on the market, Dyckerhoff and Heidelberger, was to influence by common agreement the conduct on the market of an actual or potential competitor (see, in that regard, *Suiker Unie and Others* v *Commission*, cited in paragraph 651 above, paragraph 174; *Rhône-Poulenc* v *Commission*, cited in paragraph 1053 above, paragraph 121; *BASF* v *Commission*, cited in paragraph 1852 above, paragraph 240, and *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 258). Subject to proof to the contrary, which it was for Dyckerhoff and Heidelberger to adduce (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162), it must be held that the concerted action between those two undertakings relating to Cedest's conduct in Germany influenced their conduct in trade between France and Germany.

2293 Heidelberger cannot deny having participated in that concerted practice by relying on the internal memoranda of Lafarge of 23 June and 2 September 1982 (contested decision, recital 22, paragraphs 4 and 6; documents 33.126/6592 to 6596 and 6584), which describe discussions between Lafarge and Dyckerhoff. Apart from the fact that it relies on those two memoranda in order to show that it did not participate in an agreement or concerted action with Lafarge and Dyckerhoff, which the Commission did not allege in the contested decision, the content of the two internal memoranda of Lafarge provides no details of the meeting on 17 November 1982 during which Heidelberger and Dyckerhoff sought to convince Cedest to alter its conduct in Germany.

2294 It follows that the evidence presented by the Commission in the contested decision (recital 22, paragraph 7) justified its conclusion that Dyckerhoff and Heidelberger had infringed Article 85(1) of the Treaty at the meeting with Cedest on 17 November 1982 (contested decision, recital 50, paragraph 3, second subparagraph). The content of the internal memorandum of Lafarge of 7 January 1983, which contradicts the terms of the memorandum referred to in the contested decision solely as regards Cedest's conduct, does not alter that fact.

D — Concerted action between Lafarge and Dyckerhoff

2295 The Commission finds the existence of concerted action between Lafarge and Dyckerhoff on the basis of three documents: a handwritten internal memorandum dated 23 June 1983 by Lafarge (documents 33.126/6592 to 6596) cited in recital 22, paragraph 4, of the contested decision, a letter of 28 July 1982 from Mr Hummel, of Dyckerhoff, to Mr Collomb, of Lafarge (documents 33.126/6597 to 6599), cited in recital 22, paragraph 5, of the contested decision, and an internal handwritten note by Lafarge dated 2 September 1982 (document 33.126/6584), cited in recital 22, paragraph 6, of the contested decision. Those three documents lead the Commission to take the view that 'Lafarge and Dyckerhoff endeavoured to prevent any aggressiveness and to establish a climate of harmony between the French and German producers involved in exports' (contested decision, recital 50, paragraph 3).

2296 As indicated in paragraph 2234 above, Dyckerhoff acknowledges that discussions took place between German and French producers in 1982 and 1983 but makes no specific comment in relation to the three documents presented by the Commission. It merely points out that even if the object of the discussions in question was to encourage Cedest to abandon its aggressive sales policy in Germany, they cannot constitute concerted practices since Cedest did not agree to do as they wished.

2297 That submission must be rejected. Although the discussions undertaken by Dyckerhoff and Lafarge were actually aimed at inducing Cedest, by one means or another, to cease its particular conduct in Germany, they had an anti-competitive object. Subject to proof to the contrary, which it was for Dyckerhoff and Lafarge to adduce (judgments in *Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162), it must be held that the concerted action between those two undertakings influenced their conduct in trade between France and Germany. Such concerted action constitutes an infringement of the prohibition in Article 85(1) of the Treaty (see the case-law cited in paragraph 2292 above).

2298 In the present case the anti-competitive nature of the discussions between Dyckerhoff and Lafarge results specifically from the three documents to which the Commission refers in the contested decision.

2299 Thus the internal memorandum of 23 June 1982 by Lafarge describes a meeting between representatives of Lafarge and Dyckerhoff during which Cedest's conduct and its effects on Franco-German relations were discussed. The memorandum also expressly refers to the principle of respect for home markets, in the following words: 'Home market principle OK. But is it easily complied with — In Belgium? Should perhaps be reviewed at frontier level but not without agreement. Where do we stand with regard to Cedest?'

2300 Similarly, in his letter of 28 July 1982, Mr Hummel, of Dyckerhoff, says: 'And as we are frankly exchanging ideas, I should like to add today that, in our opinion, true cooperation could have positive effects not only as regards your majority holding in Wössingen but especially on Cedest. It should be possible to resolve existing problems through a fundamentally positive attitude on the part of all the participants, in view of the composition of the Cedest and Lafarge administrative boards.'

2301 Lastly, in the internal note by Lafarge dated 2 September 1982 the author, Mr Marichal, describing a telephone conversation with Mr Grüner, of Dyckerhoff, on the same day states, in particular: 'I replied that first of all it was absolutely essential to explore all the possibilities of direct negotiation with Cedest and then, as you had already said, to seek a meeting with the Chairman of Cedest, in which you would be prepared to take part if invited by the Chairman of Cedest. I also said that I considered it too soon to organise a meeting with the German producers affected by Cedest's aggression to discuss what each of them can or cannot tolerate, as long as the talks with Cedest had not taken place... Finally, and still in German, he gave a very good summary of what he took to be our position: No general meeting, but an essential talk between Dyckerhoff (with or without Heidelberger) and the Chairman of Cedest before any other meeting. 2. A meeting with the German producers affected, after the talks, so as to some extent to share the sacrifices if an agreement has been concluded.'

2302 Lafarge claims that the content of the three documents shows that there was persistent disagreement between the various parties concerned.

2303 First, while it acknowledges that its internal memorandum of 23 June 1982 refers to the discussions which it had with Dyckerhoff, it claims that the memorandum contains no trace of any agreement concluded between it and Dyckerhoff. The memorandum establishes only that Lafarge's intervention was approved in the context of a conflict provoked by Cedest's conduct in Germany.

2304 The Court points out that the mere fact that Lafarge acknowledges that its memorandum of 23 June 1982 provides an accurate account of discussions which it had with Dyckerhoff and that those discussions related to Cedest's conduct in Germany, which is already quite plain from the content of that document, shows that it thereby participated in concerted action contrary to Article 85(1) of the Treaty. It is irrelevant whether Lafarge complied with the alleged requests

made by Dyckerhoff, since the content of the internal memorandum shows that those two producers informed one another of conduct which they envisaged adopting in response to Cedest's own conduct. Subject to proof to the contrary, it must be held that the discussions between those two undertakings influenced their conduct in trade between France and Germany, so that their attitude constitutes a concerted practice within the meaning of Article 85(1) of the Treaty (see the case-law cited in paragraph 2292 above).

2305 It is also necessary to reject Lafarge's argument that the reference to 'Home market principle OK' in its memorandum of 23 June 1982 concerned the natural markets theory based on the weight of cement. As the Commission correctly pointed out, if the cement market were actually determined naturally because of the weight of the product in question there would be no need to ensure compliance with such a rule relating to the natural organisation of the market.

2306 Second, Lafarge maintains that the letter of 28 July 1982 from Mr Hummel, of Dyckerhoff, is at the very most an invitation to enter into talks, which is not susceptible of infringing Article 85(1) of the Treaty.

2307 It must be pointed out, however, that the letter in question states that it is in reply to a letter of 8 July 1982 from Lafarge. It also refers to a meeting between the representatives of Dyckerhoff and Lafarge. Those factors already preclude the hypothesis of an isolated initiative by Dyckerhoff which would absolve Lafarge in so far as it merely constituted an invitation to enter into talks. It also follows from Dyckerhoff's letter that both producers were 'frankly exchanging ideas' (see extract reproduced in paragraph 2300 above). Consequently, even if the objective pursued by Mr Hummel was actually to secure Lafarge's intervention with the Cedest administrative board, it is the case that Lafarge discussed with Dyckerhoff the situation in Germany resulting from Cedest's conduct. That conclusion is confirmed by the internal memorandum of 23 June 1982 from Lafarge, which describes a meeting between those two producers one month previously.

2308 Third, Lafarge claims that it follows from its internal note of 2 September 1982 that it was unable to exercise any influence over Cedest and that it had refused to participate in a general meeting.

2309 That argument must also be rejected.

2310 Contrary to what Lafarge claims, the content of its note does not indicate that it was unable to exercise any influence on Cedest. The author of the note, Mr Marichal, stated: 'L [Lafarge] could not in any way impose its viewpoint on Cedest'. The subtle difference between imposing a

viewpoint and exercising influence leaves scope for conduct on Lafarge's part which was anti-competitive, since its purpose was to interfere with the way in which another economic operator on the market, Cedest, determined its conduct. Moreover, contrary to what Lafarge would have the Court believe, Mr Marichal did not consider that any initiative by Lafarge against Cedest was then inevitably doomed to fail. On the contrary, it is apparent from the note that Lafarge was prepared, on certain conditions, to take action to implement the steps undertaken against Cedest. The note states: 'I replied that first of all it was absolutely essential to explore all the possibilities of direct negotiations with Cedest and then, as you had already said, to seek a meeting with the Chairman of Cedest, in which you would be prepared to take part if invited by the Chairman of Cedest.'

2311 Lafarge therefore informed Dyckerhoff that it was prepared to intervene, albeit on certain conditions, notwithstanding that it had acknowledged that it was unable to impose its viewpoint on Cedest.

2312 Nor can Lafarge claim that the content of its note of 2 September 1982 expresses its refusal to participate in a general meeting. Apart from the finding made in the preceding paragraph, it is evident from that note that during the telephone conversation which it describes Mr Marichal set out the reasons why in Lafarge's view it was too soon to organise such a meeting and why it was first essential to explore all possibilities of direct negotiations with Cedest. It is apparent, therefore, that Lafarge and Dyckerhoff discussed the most appropriate way of settling the dispute provoked by Cedest's conduct. What Lafarge's representative said was not therefore the expression of a categorical refusal to participate in a general meeting of the various parties concerned by Cedest's conduct in Germany.

2313 Furthermore, the arguments which Lafarge derives from the particular circumstances of its own and its subsidiary Wössingen's positions on the market must again be rejected, for the reasons set out in paragraphs 2263 to 2265 above.

2314 It follows that, although, as Lafarge observes, good relations between French and German management are not in themselves contrary to Article 85(1) of the Treaty, the content of the three documents on which the Commission relies in the contested decision establishes that Dyckerhoff and Lafarge acted in concert with a view to preventing any aggressiveness and establishing a climate of harmony between the French and German producers (contested decision, recital 50, paragraph 3, third subparagraph).

2315 Moreover, the foregoing considerations confirm that the Commission did not accuse Heidelberger of having participated in an agreement or a concerted practice with Dyckerhoff and Lafarge on the basis of Lafarge's memoranda of 23 June and 2 September 1982 (see paragraph 2293 above).

E — Concerted action by Dyckerhoff and Ciments Français

2316 The Commission infers the existence of concerted action by Dyckerhoff and Ciments Français from two documents, an internal Ciments Français memorandum dated 25 January 1983 (contested decision, recital 22, paragraph 8; documents 33.126/4254 to 4256) and a summary record drawn up on 17 May 1983 by Ciments Français concerning a meeting between Dyckerhoff and Ciments Français on 9 and 10 May 1983 (contested decision, recital 22, paragraph 9; documents 33.126/4251 to 4253)). Those two documents lead the Commission to take the view that 'Dyckerhoff informed Ciments Français of its plans for dealing with the competition from Cedest and its intention not to sell in France' (contested decision, recital 50, paragraph 3, third subparagraph).

2317 Dyckerhoff acknowledges again that discussions between German and French producers took place in 1982 and 1983 but makes no specific comment in relation to the two documents to which the Commission refers (see paragraph 2234 above). Dyckerhoff merely observes that the discussions in question cannot constitute a concerted practice, since they led to no specific result. It analyses the Ciments Français summary record only in connection with the objection alleging an agreement to share the Saarland market. In that regard, Dyckerhoff states that it is not to be inferred from that document that it expressed the intention not to sell in France cement which had been ground at the Ciments Luxembourgeois plant. Point 6 of the summary record merely states that Dyckerhoff explained that it intended to use its grinding quota to supply its customers in the Trier region and in the Eifel.

2318 Ciments Français considers that Dyckerhoff's reference to Cedest's conduct at the meetings to which the two documents relied upon in the contested decision relate, one of which refers to the Luxembourg company Intermoselle, cannot constitute evidence of its participation in a concerted practice. Those documents do not reveal any intention on its part, but show that it merely played a passive role in the matter. Such a passive role does not serve to show, in accordance with the requirements of case-law (*Petrofina* v *Commission*, cited in paragraph 2260 above, paragraphs 214 and 215), that the information provided to Ciments Français was part of a relationship which involved the exchange of information. Ciments Français again emphasises that it was not present in the Palatinate market in which Cedest was active, having regard to the special features of its industrial capacity.

2319 The arguments put forward by Dyckerhoff and Ciments Français must be rejected.

2320 First, neither undertaking claims that the content of the summary record drawn up by Ciments Français on 17 May 1983 does not give a faithful account of the discussions which actually took place on 9 and 10 May 1983.

2321 Second, items 6 and 7 of the record state:

'6. DYZ [Dyckerhoff] confirmed that talks were nearing completion with CL [Ciments Luxembourgeois] to provide DYZ with a grinding quota of 100 000 t on CL's [Ciments Luxembourgeois's] grinding plant and for cement deliveries in the Trier region and in the Eifel. These tonnes will not a priori go to Saarland unless there is a definite economic advantage compared with the Goelheim plant which currently delivers to Saarland. The tonnes will never go to France.

7. DYZ [Dyckerhoff] described its difficulties on the German market following the commercial aggression shown by Cedest on this market, and the measures it had taken and planned to take to deal with the competition.'

2322 It is apparent from item 6 that Dyckerhoff stated during its discussions with Ciments Français that cement deliveries in the Trier region and in the Eifel, which at the time were the subject of talks with Ciments Luxembourgeois, would not *a priori* go to Saarland and would never go to France. Since Ciments Français has stated that it was present in Saarland and in eastern France, Dyckerhoff therefore informed it of conduct on the market which it proposed to adopt in future and took care to point out that it would avoid the areas in which Ciments Français was active. Ciments Français agreed to discuss the matter. A discussion on the future conduct of at least one of the two operators concerned, in point of fact Dyckerhoff, constitutes a concerted practice prohibited by Article 85(1) of the Treaty, because, subject to proof to the contrary, which it was for the undertakings concerned to adduce, it must be held that their concerted action influenced their conduct in trade between France and Germany (see the consistent line of decisions cited in paragraph 2292 above).

2323 Contrary to what Ciments Français claims, the discussions on the destination of the quantities ground at the Ciments Luxembourgeois plant did not relate solely to deliveries of cement produced from clinker supplied by Intermoselle, since, as the Commission observes in the contested decision (recital 22, paragraph 15, third subparagraph), the record of the meeting states that the discussions concerned cement destined for the Trier region or the Eifel.

2324 The anti-competitive nature of the discussions between Dyckerhoff and Ciments Français on 9 and 10 May 1983 is confirmed by item 7 of the record of the meeting, which shows that Dyckerhoff informed Ciments Français of its proposals to deal with competition from Cedest in Germany.

2325 Third, it follows from the internal Ciments Français memorandum dated 25 January 1983 recording a visit to Dyckerhoff on 21 January 1983 that both producers discussed Cedest's sales in Germany and Dyckerhoff's sales in France. Item 3, which sets out comments on the items on

the agenda of a meeting scheduled for 15 February 1983, states that item 7 of that agenda, entitled 'Franco-German relations' (document 33.126/4259), deals with Cedest's sales in Germany and Dyckerhoff's sales in France ('Item 7. In fact concerns sales by Cedest in Germany and by DYZ [Dyckerhoff] in France (request by Mr Gruner)'). As the Commission observes in its submissions, it is irrelevant that Dyckerhoff took the initiative in discussing Cedest's conduct in Germany with Ciments Français, since that question had by common agreement been included on the agenda of a meeting between the two producers.

2326 The content of the memorandum of 25 January 1983 confirms at the very least that Dyckerhoff and Ciments Français intended to discuss Cedest's conduct in Germany and Dyckerhoff's conduct in France in reaction to Cedest's conduct. It also confirms the anti-competitive nature of the discussions.

2327 It follows that the Commission has established that Dyckerhoff and Ciments Français participated in the concerted action which it describes in recital 50, paragraph 3, third subparagraph, of the contested decision.

2328 It should further be emphasised that despite its denials Ciments Français did have a particular interest in discussing Cedest's conduct in Germany with Dyckerhoff, in view of the fear of possible reprisals in eastern France by the German manufacturers. The matters raised at the two meetings between Dyckerhoff and Ciments Français referred to in the two documents in question constitute particularly convincing evidence that that was so. Further confirmation of the fact that Ciments Français had an interest in Cedest's conduct in Germany is provided, as the Commission observes in the contested decision (recital 22, paragraph 15, second subparagraph), by the content of an internal memorandum from Vicat dated 22 July 1982 (contested decision, recital 22, paragraph 1; documents 33.126/6055 to 6057), which states: 'Very tense relations thus arose between Cedest and SCF [Ciments Français], further heightened by the battle taking place between these two competitors in the Lower Rhine and Moselle regions.' This extract confirms not only the existence of intense competition between Cedest and Ciments Français, as the latter claims, but also of serious tension aggravated by the competition between those two producers in certain regions. The tension was therefore not the result of the fact that, as the author of the memorandum claims, the two producers concerned were in competition in the Lower Rhine and Moselle regions.

2329 It follows from all the foregoing considerations, therefore, that the Commission has demonstrated in the contested decision that '[f]ollowing the exports by Cedest to the German Länder other than Saarland and the German producers' reactions in France, bilateral consultations took place with a view to limiting cross-frontier flows of cement' (contested decision, recital 50, paragraph 3, first subparagraph) involving Dyckerhoff (paragraphs 2282 to 2328 above), SFIC (paragraphs 2236 to 2251 above), Ciments Français (paragraphs 2252 to 2281 and 2316 to 2328 above), Heidelberger (paragraphs 2282 to 2294 above), Lafarge (paragraphs 2252 to 2281 and 2295 to 2315 above) and BDZ (paragraphs 2236 to 2251 above).

2330 In any event, the arguments whereby Ciments Français, Heidelberger and Lafarge seek to show an error of assessment in the economic analysis of the Franco-German market in order to dispute their participation in the concerted practices found in Article 3(3)(a) of the contested decision must be rejected, since the various concerted practices and the participation of the various applicants concerned were established on the basis of documents whose probative value does not need to be considered in the light of an economic analysis of the relevant market (see paragraphs 263 and 264 above).

General regulation of cement supplies between France and Germany

2331 Dyckerhoff (T-35/95), SFIC (T-36/95), Cedest (T-38/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95) and BDZ (T-48/95) deny that an agreement on the general regulation of cement supplies between France and Germany was concluded, as the Commission asserts in the contested decision (recitals 22, paragraph 10, and 50, paragraph 3, fifth subparagraph), or that they participated in that agreement.

2332 Before the Court assesses the merits of their arguments it is appropriate to set out the allegations which the Commission makes in the contested decision.

2333 In recital 50, paragraph 3, fifth subparagraph, the Commission states:

'All these concerted practices led to the conclusion of an agreement between the French and German undertakings and associations of undertakings concerned. The letter of 22 September 1986 refers to the progress achieved as compared with 1984 at the periodic meetings between Mr Laplace, Mr Lose and Mr Brenke, an agreement reached in 1984, the possibility of renewing the agreement, and a difference between French and German supplies. The memorandum of 12 August 1987 refers to continued discussions to resolve the questions raised in the letter of 22 September 1986 ...'

2334 The Commission further states (recital 22, paragraph 10, third subparagraph):

'The Commission does not have any proof concerning the renewal of the agreement, but the statistics on French deliveries to Germany and German deliveries to France (see paragraph 12 below) show that the agreement between SFIC, Lafarge, Ciments Français and Cedest on the one hand and BDZ, Heidelberger and Dyckerhoff on the other hand continued after 1986.'

2335 The Commission thus identifies first the conclusion in 1984 of an agreement on the general regulation of supplies between France and Germany, then the possibility of renewing the agreement in 1986 and, last, the existence of the agreement after 1986. In the operative part of the contested decision (Article 3(3)(a)) it merely states that the parties concerned infringed Article 85(1) of the Treaty 'from 23 June 1980 to at least 30 September 1989 by participating in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France'.

A — Conclusion of an agreement in 1984

2336 All the applicants concerned deny having participated in the conclusion of an agreement in 1984. Dyckerhoff, Ciments Français, Heidelberger and Lafarge criticise the Commission in particular for using a document, the letter of 22 September 1986 from Mr Laplace to Mr Schuhmacher (contested decision, recital 22, paragraph 10), from which, they maintain, it is impossible to ascertain the content of the alleged agreement concluded in 1984 or to identify the parties which concluded it.

2337 It should be pointed out that Mr Laplace, who drafted the letter, was both Chairman of Ciments Français and Chairman of SFIC, while Mr Schuhmacher, to whom it was sent, was both Chairman of Heidelberger and Chairman of BDZ (contested decision, recital 22, paragraph 10). In the contested decision the Commission considered the letter against the general background revealed by the other documents referred to in recitals 22 and 50.

2338 After setting out the content of the letter, the Commission concluded (contested decision, recital 22, paragraph 10, third subparagraph):

'The following essential points emerge from the letter: that there was an agreement between certain French and German enterprises (SFIC, Lafarge, Ciments Français and Cedest on the one hand, and BDZ, Heidelberger and Dyckerhoff on the other hand); that the performance or interpretation of the agreement gave rise to disputes submitted for arbitration; that there were discussions on renewal of the agreement; that the gap between French deliveries and German deliveries was not the result of bilateral discussions ... between the French and German enterprises but of differences of opinion between the French enterprises; that the chairmen of the French and German associations met on 11 October 1986 to discuss the two problems referred to in the letter and agreed, as regards quantities, to deal officially with the problem after the Franco-German meeting which took place in Paris on 27 and 28 October 1986 (according to documents 33.126/14764-14768).'

2339 The Commission also observes (recital 50, paragraph 3, seventh subparagraph):

'... the 1984 agreement resulting from the letter of 22 September 1986 constitute[s] [an] infringement of Article 85(1) committed by SFIC, Cedest, Ciments Français, Lafarge, BDZ, Dyckerhoff and Heidelberger.'

2340 The criticisms made by the four applicants named in paragraph 2336 above provide no grounds for holding the finding by the Commission to be invalid. In the contested decision the Commission established the existence of an agreement on the general regulation of cement supplies between France and Germany and the purpose of that agreement and also identified the parties to that agreement.

2341 First, it should be observed that although there is no document formally entitled 'agreement on the general regulation of supplies between France and Germany' or any single item of evidence of the organisation of a special meeting during which all the parties concerned expressed their views, the probative force of the documentary evidence put forward by the Commission in the contested decision must be evaluated in the light of the events which marked relations between the French and German industries before 1984, the reality and anti-competitive nature of which have already been established (see paragraphs 2226 to 2330 above). It is settled law that an agreement within the meaning of Article 85(1) of the Treaty does not necessarily have to be recorded in writing (*Tepea* v *Commission*, cited in paragraph 2061 above, paragraph 41). For there to be an agreement, it is sufficient for the undertakings or associations of undertakings in question to have expressed their joint intention to conduct themselves in the market in a particular way (see the case-law cited in paragraph 1010 above). It is not therefore essential to determine the precise date on which such an agreement was concluded, once the existence of a concurrence of wills is established on the basis of documentary evidence.

2342 First, a number of documents identified by the Commission in the contested decision establish the existence of the agreement on the general regulation of cement supplies between France and Germany both in 1984 and in 1986.

2343 In the first place, it follows from a number of passages in the letter of 22 September 1986 from the Chairman of Ciments Français and of SFIC, Mr Laplace, to the Chairman of Heidelberger and of BDZ, Mr Schuhmacher, which was drafted several weeks before the meeting between the German industry and the French industry in Paris on 27 and 28 October 1986, that an agreement between the two industries on French and German supplies had been concluded in 1984 and that it still existed then, since its renewal was discussed.

2344 Thus Mr Laplace wrote (first, second and sixth paragraphs):

'As you know, I have periodic meetings with Jürgen Lose and Ted Brenke.

I believe, if we look at the situation facing us in 1984, that what we discussed at those meetings has worked well.

...

The second problem concerns the future. Ted Brenke expressed during our last meeting the opinion that, if we were to renew our agreement, there would be a demand from the German side that the gap existing since 1984 between French and German deliveries be reduced. I told him that, if this demand were to be maintained, I saw very little hope in our reaching a further agreement. As you remember, there was no logical and, even less, ethical justification for this gap, which was not, in fact, the result of bilateral discussions between French and German interests, but resulted from a far more complicated pattern of discussion which included conflicts between the French parties, and would probably have included conflicts on the German side had we not agreed then to leave Wössingen aside for the time being. I do not believe that we can have so many people agree on something new unless they are under pressure, and the very purpose of a renewal is not to let such a pressure develop ...'

2345 In the light of those factors, the Commission was entitled to take the view that at that time there still existed an agreement, concluded in 1984, between the French industry and the German industry on the regulation of cement supplies between France and Germany and that its renewal was contemplated when the letter was drafted. It is therefore necessary to reject the argument of Dyckerhoff and Heidelberger that the content of the letter demonstrates that the agreement concluded in 1984 no longer existed in any event on 22 September 1986.

2346 Next, the memorandum to the Chairman dated 15 March 1984 shows that the Chairman of Cembureau intended that the Head Delegates should discuss French exports to Germany at their meeting on 19 March 1984 as one of the 'hot spots' then still existing. It is true that, although the notes on that meeting no longer mention French exports to Germany, the participants in the meeting held on 19 March 1984 concluded that the pressure from inter-member trade had slackened considerably through improved bilateral contacts (see contested decision, recitals 19, paragraphs 9 and 10, and 50, paragraph 3, fourth subparagraph; see also footnote 100; documents 33.126/11728, 11729 and 11733 to 11737) (see paragraphs 2245 to 2250 above). The fact that the 'hot spot' referred to in the abovementioned memorandum was exclusively concerned with French exports to Germany — and not German exports to France — confirms that the parties involved in Franco-German relations concluded an

agreement which resolved at least a large proportion of the problems which had given rise to the concerted practices which were a feature of 1982 and 1983, in particular Cedest's conduct on the German market and the retaliatory measures taken by the German producers. The fact that French exports to Germany continued to be problematic confirms that, as indicated in the letter of 22 September 1986, the German industry concerned (the 'German side') intended to secure a reduction in the gap between the volume of French exports to Germany and that of German exports to France when the agreement concluded in 1984 was renewed.

2347 SFIC claims, however, that the memorandum of 15 March 1984, which is merely cited in a footnote in the section of the contested decision devoted to the Franco-German agreement, has no connection with the internal memorandum of 23 June 1982 by Lafarge (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596) or with the Franco-German agreement in general. It reaches that conclusion on the basis of a contradiction which it finds between the conclusions of the meeting of 19 March 1984 set out in the notes on the meeting drawn up on 2 April 1984 (recital 19, paragraph 10; documents 33.126/11733 to 11737) that 'exports had tended to shrink' and the trends registered in the statistics, otherwise used by the Commission to characterise the Franco-German agreement (recital 22, paragraph 10, in fine), according to which cement exports from Germany to France had increased between 1985 and 1989.

2348 First, the interpretation of the actual wording of the contested decision advocated by SFIC cannot be accepted. The Commission refers to the memorandum of 15 March 1984 not only in footnote 100 but also in recital 50, paragraph 3, fourth subparagraph, of the contested decision.

2349 Second, it must be pointed out that the contradiction complained of by SFIC results from an abbreviated presentation of the matters in the contested decision. Since only exports from France to Germany are seen in the memorandum to the Chairman dated 15 March 1984 as being problematic in regard to the rule on non-transhipment to internal markets in the Cembureau agreement, the conclusion reached in the notes on the meeting drawn up on 2 April 1984 that 'exports had tended to shrink' can refer only to exports from France to Germany. Consequently, that conclusion is not at variance with the trend which the Commission noted in the statistics referred to in recital 22, paragraph 12, of the contested decision, to the effect that exports from Germany to France had increased between 1985 and 1989.

2350 Furthermore, the conclusions reached in the notes on the meeting are more qualified than SFIC suggests, since they state: 'Pressure from inter-member trade had slackened considerably through improved bilateral contacts. Exports had tended to shrink but there was still a threat from outsiders.'

2351 Last, SFIC infers the existence of a contradiction from the comparison of two factors relating to different periods, the first before 19 March 1984 and the second after that date.

2352 Similarly, the fact that French exports to Germany were not mentioned as a 'hot spot' in the notes dated 2 April 1984 on the meeting of Cembureau Head Delegates held on 19 March 1984 (contested decision, recital 19, paragraph 10), whereas they were referred to as such in the memorandum to the Chairman dated 15 March 1984 (contested decision, recital 19, paragraph 9), does not mean, as Ciments Français maintains, that the conclusion reached by the Cembureau Head Delegates at their meeting on 19 March 1984 that pressure from inter-member trade had slackened considerably through improved bilateral contacts does not concern Franco-German relations. Having regard to the contacts between the French and German industries, to which the letter of 22 September 1986 unequivocally attests (see paragraphs 2242 and 2243 above), and the reference to French exports to Germany in the memorandum of 15 March 1984, the fact that there is no reference to Franco-German relations in the notes on the meeting is of such a nature as to show that the Cembureau Head Delegates considered that they no longer presented a problem and were therefore no longer a 'hot spot'.

2353 Lafarge cannot infer from the reference to French exports to Germany in the memorandum to the Chairman dated 15 March 1984 that there was disagreement which showed that the agreement allegedly concluded in 1984 did not exist. It cannot be ruled out that the agreement was concluded in 1984 after the Head Delegates meeting on 19 March 1984. Furthermore, even on the assumption that it was concluded before that meeting, it cannot be ruled out that the disagreement or the problem remaining between the French and German industries was the result of the German desire to reduce the gap between the volumes of cement exported by the French producers and the German producers.

2354 It is therefore irrelevant that it has not been possible to determine the precise date on which that agreement was concluded in 1984, since the evidence adduced by the Commission indicates that an agreement within the meaning of Article 85(1) of the Treaty was concluded in 1984.

2355 Dyckerhoff and Heidelberger claim that it is contradictory to find that the agreement commenced in 1984 when, according to the letter of 22 September 1986, the German producers sought to reduce the gap which had existed since 1984 between French and German deliveries. Dyckerhoff adds that that contradiction also follows from the fact that Franco-German supplies were one of the 'hot spots' examined at the Cembureau Head Delegates meeting on 19 March 1984 and from the fact that the agreements and concerted practices relating to supplies between France and Germany, referred to in Article 3(3)(a) of the contested decision, are found to have commenced on 23 June 1982.

2356 In reality there is no contradiction following from the matters which, according to Dyckerhoff and Heidelberger, rule out the conclusion of an agreement in 1984. First, it follows from the letter of 22 September 1986 that it was the German producers' desire to reduce the gap between French imports into Germany and German imports into France that led Mr Laplace to talk of renewing the agreement. Then, as indicated in paragraphs 2347 to 2353 above, the fact that Franco-German deliveries were discussed at the Cembureau Head Delegates meeting on 19 March 1984 provides further evidence that negotiations took place between the French and German industries and that an agreement was concluded between them, since the documentary evidence submitted by the parties shows that those deliveries were not subsequently discussed within Cembureau. Last, Dyckerhoff is confusing two different matters: first, the single and continuous infringement involving the regulation of cement supplies from France to Germany and from Germany to France between 23 June 1982 and 30 September 1989, which includes all the concerted practices and agreements established by the Commission in recital 50, paragraphs 1 to 4, of the contested decision (see paragraph 2170 above) and, second, the agreement having the same purpose concluded in 1984, referred to more specifically in recital 50, paragraph 3, fifth subparagraph, of the contested decision. Since the latter agreement is just one of the constituent elements of the single and continuous infringement it is not contradictory to find that it commenced on a different date from that on which the 1984 agreement is found to have commenced.

2357 Second, the passages from the letter of 22 September 1986 quoted in paragraph 2344 above, and more particularly the one to the effect that Ted Brenke expressed the opinion that, if the agreement were to be renewed, there would be a demand from the German side that the gap existing since 1984 between French and German deliveries be reduced, shows that the object of the agreement, which was still in force in 1986, was to regulate cement supplies between France and Germany.

2358 None of the evidence adduced by the applicants permits the conclusion that the object of the agreement was limited to areas other than Saarland. In that regard, Ciments Français cannot rely on a distinction between the object of the various constituent elements of the infringement referred to in Article 3(3)(a) of the contested decision, the alleged agreement to share the Saarland market, the concerted practices relating to Cedest's sales in the Palatinate and the agreement concluded generally. It is sufficient to find that all those elements concern the sharing of the market and that no distinction between Saarland and the other frontier areas concerned is apparent from the wording of the letter of 22 September 1986. Any geographical distinction between the first element, the alleged agreement to share the Saarland market, and the second, the concerted practices relating to Cedest's commercial conduct in Germany, is not justified in terms of the evidence of the existence of an agreement involving the general regulation of cement sales between France and Germany, having regard to the wording of the letter of 22 September 1986.

2359 Accordingly, there is no need to distinguish what the parties had in mind for Saarland from what they intended for the other areas in the context of that agreement involving the general regulation of the markets. It follows that the Commission was entitled to take the view that the 1984 agreement had as its object the sharing of markets and the restriction of cross-frontier flows of cement between France and Germany (contested decision, recital 50, paragraph 4, first subparagraph). In any event, even on the assumption that the allegations that the agreement did not concern Saarland are well founded, it is none the less the case that such an agreement still involved the regulation of sales between France and Germany.

2360 Nor can Ciments Français maintain in that regard that neither the content of the agreement concluded in 1984 nor, *a fortiori*, its anti-competitive nature can be established on the basis of a letter drafted on 22 September 1986, which refers, without more, to the mere existence of an agreement. The absence of a formal document recording in precise terms the content of a concurrence of wills between a number of economic operators in a market does not necessarily mean that it is impossible to identify the elements of an agreement contrary to Article 85(1) of the Treaty. In this case the Commission established, upon examining the letter of 22 September 1986 in the light of the other documents referred to in the contested decision (see paragraphs 2226 to 2330 above), that the agreement concluded in 1984 had as its object the regulation of cement sales between France and Germany. Furthermore, the fact that the Commission established the existence of that agreement mainly on the basis of a letter drafted in 1986, after the agreement in question had been concluded, shows both that the agreement was concluded and that it was implemented.

2361 In the present case the object of the agreement concluded in 1984 and still in force in 1986, namely to regulate cement supplies between France and Germany, was sufficient to establish that it was in the nature of an infringement.

2362 Third, it is necessary to identify the parties to that agreement.

2363 As regards, first, the two national associations, SFIC and BDZ, it has already been found that the letter of 22 September 1986 indicates at a number of points that they participated in the agreement (see paragraphs 2242 and 2243 above).

2364 Furthermore, SFIC has nothing specific to say about that letter from its Chairman to the Chairman of BDZ.

2365 BDZ, on the other hand, puts forward a number of arguments in order to show that it did not participate in the agreement concluded in 1984. It relies on the fact that there is no copy of the letter in its own files and that its Director General, Mr Steinbach, only became aware of the letter upon reading the SO.

2366 The Commission rightly observes in the contested decision (recital 22, paragraph 18) that, as the letter was sent to the Chairman of BDZ, Mr Schuhmacher, there is no need to determine whether there was a copy of the letter in Mr Steinbach's files or the point at which he became aware of it. It is sufficient to establish that the writer of the letter, referring to his capacity as Chairman of SFIC, considered that Mr Schuhmacher represented the German cement industry's interests in its relations with the French cement industry, which could only be because of Mr Schuhmacher's then position as head of BDZ. It is also significant that the letter uses

expressions such as 'French and German interests', 'French side' and 'German side' (see paragraph 2243 above).

2367 BDZ cannot rely in its defence on its allegation that the handwritten comments in German on the letter of 22 September 1986 show that Mr Schuhmacher had no intention of discussing the matters dealt with in the letter at the meeting between the French and German industries in Paris in October 1986. At the most, those comments confirm that the addressee of the letter, Mr Schuhmacher, regarded the letter as falling within the scope of his activities in the national association of cement producers in his country, namely BDZ. They are as follows:

'Conversation of 11.10:

(a) Agreed in principle on function of arbitrators

(b) No to the quantity ratios, official discussion only after Paris'.

2368 As regards the memorandum to the Chairman dated 15 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729) concerning French exports to Germany, it was intended to prepare for a meeting of Cembureau Head Delegates in which SFIC and BDZ participated as members of Cembureau representing the interests of the cement industries of their countries. The Commission was therefore right to find in the contested decision that SFIC and BDZ had participated in the agreement concluded in 1984 and which was still in force in 1986.

2369 BDZ questions how it could have participated in an agreement from 23 June 1982, when in the contested decision the Commission alleges the existence of concerted practices between 1982 and 1984 and relies on the finding of an agreement only from 1984.

2370 Like Dyckerhoff (see paragraph 2356 above), BDZ confuses the single and continuous infringement involving the regulation of cement supplies from France to Germany and from Germany to France between 23 June 1982 and 30 September 1989, which embraces all the concerted practices and agreements identified by the Commission in recital 50, paragraphs 1 to 4, of the contested decision, with the agreement having the same object concluded in 1984, which is referred to more specifically in recital 50, paragraph 3, fifth subparagraph, of the contested decision and is just one of the elements constituting the single and continuous infringement.

2371 BDZ also claims that the Lafarge internal memorandum of 23 June 1982 (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596), in so far as it refers to a discussion between producers in which Lafarge did not take part, is no evidence of its accession to an agreement to share the markets. It also questions the connection which the Commission attempts to make between Mr Schuhmacher's activities in the summer of 1985 and BDZ's participation in agreements to share the French and German markets.

2372 In that regard, it must be observed that the Commission did not claim that it established BDZ's participation in a market-sharing agreement on the basis of the Lafarge memorandum of 23 June 1982. That document is referred to in the contested decision (recitals 22, paragraph 4, and 50, paragraph 3, second subparagraph) in order to show that talks were held between SFIC and BDZ (see paragraphs 2236 to 2251 above). Moreover, as the Commission correctly observes, no connection was established between Mr Schuhmacher's activities during the summer of 1985 and BDZ's participation in the infringement referred to in Article 3(3)(a) of the contested decision. BDZ's argument is therefore devoid of purpose.

2373 As regards Ciments Français, it transpires that, as well as being affiliated to SFIC, it was chaired by the writer of the letter of 22 September 1986, Mr Laplace. Referring to his capacity as Chairman of SFIC, Mr Laplace expressed his view on behalf of the members of that association and, first and foremost, on behalf of his own company, Ciments Français. Furthermore, the fifth paragraph of the letter reads: 'The reason why I am proposing this is that while we can bestow that authority on the arbiters, I for one, as chairman of the Syndicate, have none when it comes to taking even small decisions regarding the rights of my constituents, other than my own company, and would have to refer to all of them, at their top level for everything, which is very cumbersome.'

2374 Ciments Français's participation in the agreement involving the general regulation of supplies also forms part of the extension of its conduct before 1984, which consisted *inter alia* in bringing pressure to bear on Cedest and in taking part in bilateral concerted action with Dyckerhoff (see paragraphs 2252 to 2281 and 2316 to 2328 above).

2375 As regards Lafarge, it must be pointed out that it is a member of SFIC and that the Chairman of SFIC, Mr Laplace, expressly stated in his letter of 22 September 1986 that in order to take the least decision concerning the rights of the members of SFIC he would have to refer to their leaders (fifth paragraph of the letter, referred to in paragraph 2373 above). That shows that, having regard to SFIC's internal decision-making procedure, Lafarge was directly involved in the conclusion of the agreement in 1984. Nor has Lafarge relied on any document to show that it abandoned the agreement concluded in 1984. In that regard, contrary to what it claims, the reference to Wössingen in the letter of 22 September 1986 cannot be presented as evidence that Lafarge did not participate in the agreement concluded in 1984. Although it is apparent from the sixth paragraph of that letter that at the time when the agreement was concluded a decision had been taken not to determine Wössingen's case, that does not mean that Lafarge did not participate in the agreement. The only inference that can be drawn is that Wössingen's position in Germany still posed a problem in 1984. Lafarge itself stated in its submissions that the only reference to Wössingen in the Bundeskartellamt's decision of 12 September 1988 concerning an

agreement in southern Germany concerned its relations with the other German cement producers after May 1986, which confirms that Wössingen's position up to that date was a special case. On the other hand, there is nothing to support the conclusion that this special position of Wössingen in Germany was taken by the other parties to the agreement, whether French or German, to mean that Lafarge was not participating in it.

2376 Moreover, it follows from documents 33.126/6976 to 6979 and 33.126/16556 (contested decision, recital 22, paragraph 11) that Lafarge's representatives on the Wössingen supervisory board expressed the wish that Wössingen should take part in the quota system for southern Germany. The Bundeskartellamt inquiry and decision of 12 September 1988 concerning that quota allocation for southern Germany revealed that Lafarge had agreed with Mr Schuhmacher, the Chairman of BDZ and of Heidelberger, that Wössingen should take part in that agreement (contested decision, recital 22, paragraph 11, fourth subparagraph; documents 33.126/6720 to 6745).

2377 Lafarge claims that the reference in the contested decision to the Bundeskartellamt decision of 12 September 1988 infringes its rights of defence, in so far as that decision appears in the file of national complaints relating to the German market, which were dropped, and the decision was only supplementary evidence in the SO. Lafarge states that Wössingen is mentioned in the Bundeskartellamt decision only in connection with its relations with the other German cement producers after May 1986, so that the Commission could not find on the basis of that decision that Lafarge took part in an alleged Franco-German agreement before May 1986. It accuses the Commission of having distorted the content of the Bundeskartellamt decision in relation to Wössingen.

2378 Those arguments must be rejected.

2379 As regards the alleged infringement of Lafarge's rights of defence, it is sufficient to observe that the Commission made specific reference in the part of the SO dealing with the Franco-German agreement (paragraph 12, p. 28) to all the matters set out in the contested decision, recital 22, paragraph 11, and that all the documents referred to on that occasion were in the Box (see paragraph 95 above).

2380 As regards the content of the Bundeskartellamt decision, it should be observed that the decision is referred to in recital 22, paragraph 11, of the contested decision. According to footnote 104, however, which is included in that paragraph, the facts which paragraph 11 describes 'are not part of the objections of the Commission [and] are referred to solely in order to present a fuller picture of the relationships between the various actors'. Irrespective of whether or not the Commission used the content of the Bundekartellamt's decision to establish Lafarge's participation in the infringement referred to in Article 3(3)(a), it suffices to find that the facts set out in recital 22, paragraph 11, of the contested decision were explicitly mentioned in point 12 of the SO (Chapter 2) and that the documents relied on by the Commission in that

connection were all in the Box (see paragraph 95 above). In those circumstances, there is no question of an infringement of Lafarge's rights of defence in that regard.

2381 It should be pointed out, next, that Lafarge did not dispute the fact, established on the basis of documents cited in the contested decision, that on 27 September 1985 its representatives on the Wössingen supervisory board expressed the wish that Wössingen should take part in the quota system for southern Germany and that Lafarge agreed with Mr Schuhmacher, Chairman of BDZ and of Heidelberger, that Wössingen should be able to take part in that agreement (see paragraph 2376 above).

2382 The proximity of the date on which the agreement involving the general regulation of cement supplies between France and Germany was concluded (1984) to the date on which Wössingen joined the agreement concerning southern Germany (1985), when considered together with the intervention of Mr Schuhmacher — Chairman of BDZ, recipient of the letter of 22 September 1986 and negotiator with Lafarge vis-à-vis the agreement for southern Germany — is further evidence of Lafarge's participation in the agreement concluded in 1984.

2383 Furthermore, as in the case of Ciments Français (see paragraph 2374 above), Lafarge's participation in the agreement involving the general regulation of supplies is also an extension of its conduct before 1984, which consisted *inter alia* in bringing pressure to bear on Cedest and in taking part in bilateral concerted action with Dyckerhoff (see paragraphs 2252 to 2281 and 2295 to 2315 above).

2384 As regards Cedest, it is clear that there are already grounds for annulling Article 3(3)(a) of the contested decision in so far as it finds that it participated in the first two constituent elements of the infringement in question, namely the alleged agreement to share the Saarland market and the concerted practices between 1982 and 1984 (see paragraphs 2225 and 2288 above). According to the contested decision (recital 50, paragraphs 1 to 3), it was those first two elements which led to the conclusion of an agreement in 1984, which is the only other element constituting the infringement referred to in Article 3(3)(a). The Commission cannot therefore find that Cedest participated in the third element, since its participation in the first two elements cannot be regarded as established, for both procedural and substantive reasons (see paragraphs 2211 and 2284 to 2290 above), and there is no direct evidence that Cedest participated in the agreement concluded in 1984. Cedest's membership of SFIC cannot in itself suffice in that regard, since SFIC also includes other members which were not identified by the Commission as parties to the agreement concluded in 1984.

2385 It follows that in the contested decision the Commission has failed to establish to the requisite factual and legal standard that Cedest participated in the infringement referred to in Article 3(3)(a). That provision must therefore be annulled in so far as it relates to Cedest.

2386 As regards Dyckerhoff, it is apparent from the letter of 22 September 1986 that since 1984 one of its representatives, Mr Lose, had participated in periodic meetings with the Chairman of SFIC, Mr Laplace, and Mr Brenke, of Heidelberger (contested decision, recital 22, paragraph 10, first subparagraph). As in the case of Ciments Français and Lafarge (see paragraphs 2374 and 2383 above), Dyckerhoff's participation in that agreement involving the general regulation of supplies is the continuation of its pre-1984 conduct, which consisted *inter alia* in taking part in bilateral concerted actions with Heidelberger, with Lafarge and with Ciments Français (see paragraphs 2282 to 2328 above).

2387 As regards Heidelberger, it must be pointed out that the recipient of the letter of 22 September 1986 was not only Chairman of BDZ but also Chairman of Heidelberger. Furthermore, in that letter the Chairman of SFIC, Mr Laplace, mentions periodic meetings with Mr Lose, of Dyckerhoff, and Mr Brenke, of Heidelberger, since 1984. As in the case of the other French and German producers concerned (see preceding paragraph), Heidelberger's participation in that agreement involving the general regulation of supplies was the continuation of its pre-1984 conduct, which consisted *inter alia* in taking part in bilateral concerted action with Dyckerhoff (see paragraphs 2282 to 2294 above).

2388 As in the case of the concerted practices examined above (see paragraph 2330), the Court must reject the arguments whereby Ciments Français, Heidelberger and Lafarge seek to establish an error of assessment in the economic analysis of the Franco-German market in order to challenge the finding, in Article 3(3)(a) of the contested decision, that they participated in the agreement involving the general regulation of cement sales between France and Germany. The existence and content of that agreement and the participation of the various applicants concerned were established on the basis of documents whose probative value does not need to be assessed in the light of an economic analysis of the relevant market.

2389 It follows from all the foregoing that the Commission was entitled to take the view that, apart from Cedest (see paragraphs 2384 and 2385 above), all the French and German producers involved in cement supplies between France and Germany had participated in an agreement involving the general regulation of cement supplies between those two Member States.

B — Pursuit of the agreement after 1986

2390 Dyckerhoff, Ciments Français, Heidelberger and BDZ complain of the lack of proof that the agreement was renewed, a lack of proof acknowledged by the Commission in the contested decision (recital 22, paragraph 10, third subparagraph): 'The Commission does not have any proof concerning the renewal of the agreement ...'. The applicants consider that since the Commission had no proof that the agreement was renewed it could not then rely (same paragraph) solely on an analysis of the statistics exchanged by the national associations in

question to establish that the agreement was renewed. They claim that there is at least an alternative economic explanation to the findings deriving from those statistics.

2391 However, although it is clear from the contested decision, that in order to establish that the parties to the 1984 agreement intended to renew it, the Commission once again refers to the letter of 22 September 1986 (see recital 50, paragraph 3, fifth subparagraph: 'The letter of 22 September 1986 refers to ... the possibility of renewing the agreement'), the Court finds that, contrary to what is suggested by the applicants, the Commission did not accept the existence of an agreement renewed in 1986 or later as part of the infringement of Article 85(1) to which it refers in Article 3(3)(a) of the contested decision.

2392 The Commission actually used its findings from the statistics exchanged by the two national associations to confirm that the concurrence of wills existing since 1984 between the French and German industries had continued, not to show that the agreement concluded in 1984 had been renewed. Thus in recital 22, paragraph 10, third subparagraph *in fine*, of the contested decision the Commission states: 'The Commission does not have any proof concerning the renewal of the agreement, but the statistics on French deliveries to Germany and German deliveries to France ... show that the agreement between SFIC, Lafarge, Ciments Français and Cedest on the one hand and BDZ, Heidelberger and Dyckerhoff on the other hand continued after 1986.'

2393 Although the Commission does not have any proof that the agreement concluded in 1984 was renewed and acknowledges that fact in the contested decision, the parties' intention to improve the agreement arrived at in 1984 and still in force in 1986 is clearly apparent from the passages from the letter of 22 September 1986 (contested decision, recital 22, paragraph 10; documents 33.126/3574 to 3576) quoted in paragraph 2344 above. The meetings between Mr Laplace, Mr Lose and Mr Brenke and the need to have recourse to arbitrators (Schiedsrichter), and also the 'German side's' desire to reduce the gap existing since 1984 between French and German deliveries, show that the parties then wished to continue their agreement on the regulation of sales between France and Germany, if necessary by refining the scope of their concurrence of wills in order to settle all the problems encountered in the Franco-German frontier area.

2394 Dyckerhoff cannot claim that the letter of 22 September 1986 does not describe any discussion having as its object the renewal of an agreement. The sixth paragraph of the letter refers on an number of occasions to the renewal of an agreement ('if we were to renew our agreement', 'very little hope in our reaching a further agreement' and 'the very purpose of a renewal is not to let such a pressure develop').

2395 Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ claim that, having regard to the judgment in *Woodpulp II*, cited in paragraph 106 above (paragraph 71), the analysis of the statistics relating to deliveries between France and Germany could not serve to demonstrate

the continuation of the agreement concluded in 1984, since there is an alternative economic explanation to the collusion found in the contested decision.

2396 Furthermore, Dyckerhoff, SFIC, Ciments Français and Heidelberger dispute the evidential value of the content of the internal Heidelberger memorandum of 12 August 1987 (document 33.126/3573) cited in recital 22, paragraph 10, fourth and fifth subparagraphs. They further maintain that this document, which is not referred to in the SO, could not be used against them in the contested decision.

2397 The Court points out that the argument alleging an infringement of the rights of the defence has already been rejected in paragraph 345 above.

2398 Before assessing the merits of the other arguments, it is appropriate to re-examine the relevant passages of the contested decision. In the contested decision the Commission, after observing that it has no proof concerning the renewal of the agreement, claims that the statistics on French deliveries to Germany and German deliveries to France between 1 January 1985 and 30 September 1989 show that the agreement continued after 1986 (recital 22, paragraph 10, third subparagraph *in fine*). It goes on to state that according to an internal Heidelberger memorandum of 12 August 1987 the Franco-German discussions continued in 1987. In recital 22, paragraph 12, third subparagraph, the Commission observes that a comparison of these data 'shows that "the gap existing since 1984 between French and German deliveries" (letter of 22 September 1986 ...) was reduced'.

2399 In its submissions in Case T-48/95 the Commission confirmed that it had concluded from the changes in the statistics that the agreement had continued beyond 1986.

2400 The Commission therefore puts forward two different pieces of evidence to demonstrate that the concurrence of wills which materialised in 1984 and still existed in 1986, the purpose of which was to regulate cement sales between France and Germany, survived at the very least until 30 September 1989: the findings from the statistics set out in recital 22, paragraph 12, and the Heidelberger memorandum of 12 August 1987 (contested decision, recital 22, paragraph 10).

2401 It is necessary, first, to assess the evidential value of the memorandum of 12 August 1987.

2402 Heidelberger cannot claim that the complaint alleging the continuation of the agreement in 1987 was not made against it in the SO. There is nothing in the SO to indicate that the Commission considered that the concurrence of wills found to exist in 1984 no longer existed in

1987 (see also paragraph 576 above). On the contrary, in the passages of the SO dealing with the Franco-German agreement the Commission took great care not to state that the concurrence of wills had ceased. It even observed that the handwritten comments on the letter of 22 September 1986 showed that the problem of the quantities exported to France and Germany had been discussed after the Franco-German meeting on 27 and 28 October 1986 (SO, paragraph 12, p. 27).

2403 Dyckerhoff and Heidelberger claim that the content of the memorandum of 12 August 1987 shows that there was no agreement. Ciments Français states that there is nothing in the memorandum to indicate the content of the 1984 agreement or that the agreement was renewed.

2404 Those arguments must be rejected.

2405 First, the Commission used the memorandum of 12 August 1987 not to demonstrate the existence, the continuation or the renewal of the agreement concluded in 1984 but rather to show that the Franco-German discussions referred to in the letter of 22 September 1986 had continued. Thus the Commission states in the contested decision (recital 22, paragraph 10, third and fourth subparagraphs): 'According to an internal Heidelberger memorandum of 12 August 1987 (document 33.126/3573), the Franco-German talks continued in 1987: "I agreed with Mr Laplace to discuss, before his term of office in the French cement industry came to an end, a number of well-known unresolved matters. You will meet him with the Cembureau delegation that is leaving for Russia. I should like to discuss with you, before you meet him, the content of your talks with him. Annex". The Annex is the letter of 22 September 1986 referred to above.' The reference to 'well-known ... matters' which were 'unresolved' and the fact that the letter of 22 September 1986 is annexed to the memorandum show that the 'matters' concerned relate to the possible renewal of the agreement with which the letter deals. According to the content of the letter, the parties to the agreement wished to improve it and extend its scope to the regulation of certain matters left in abeyance when it was concluded in 1984, such as the reduction of the gap between the volumes of deliveries in both countries. The fact that such questions still subsisted therefore shows that the concurrence of wills which came into existence in 1984 and which was again referred to in the letter of 22 September 1986 still existed in August 1987.

2406 On the other hand, the continuation of the concurrence of wills whose existence is established in 1984 and 1986 in the case of Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ (see paragraphs 2363 to 2389 above) is also apparent from the fact that the letter of 22 September 1986 from the Chairman of SFIC and of Ciments Français to the Chairman of BDZ and of Heidelberger was annexed to the Heidelberger memorandum of 12 August 1987.

2407 Furthermore, Lafarge and BDZ have made no criticism or particular comment in relation to the Heidelberger memorandum or to its use by the Commission in the contested decision.

2408 Second, it is necessary to assess the conclusiveness of the findings based on the statistics reproduced in recital 22, paragraph 12, of the contested decision.

2409 In recital 22, paragraph 10, of the contested decision the Commission states that the statistics show that the agreement continued after 1986. In recital 22, paragraph 12, third subparagraph, it considers that a comparison of these statistics shows that the gap existing since 1984 between French and German deliveries referred to in the letter of 22 September 1986 was reduced. In recital 50, paragraph 3, sixth subparagraph, it explains that the exchanges of information between the two associations indicate that the reduction sought in the difference between the French and German supplies was achieved.

2410 It is true that in March 1984 exports from France to Germany were still regarded as a 'hot spot' (see memorandum to the Chairman dated 15 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729)); that the letter from the Chairman of SFIC and of Ciments Français to the Chairman of BDZ and of Heidelberger dated 22 September 1986 (see paragraphs 2343 and 2344 above) indicates that the German industry concerned expressed the desire to reduce the gap between the volume of French exports to Germany and that of German exports to France; and that none of the applicants concerned disputes the reality of the trend towards the reduction of that gap between 1 January 1985 and 30 September 1989 as a result of an increase in German exports to France, a point confirmed by the data reproduced in recital 22, paragraph 12, of the contested decision. However, it must be emphasised that at the hearing Ciments Français submitted an alternative economic explanation which the Commission, contrary to what it maintains in the contested decision (recital 22, paragraph 15) and in its submissions, did not succeed in refuting.

2411 Ciments Français explained that the reasons for a trend towards a reduction in the gap were the greater expansion of the French regional market and the higher level of French prices in comparison with German prices.

2412 In rejecting the explanation that cement producers found French prices more attractive in 1986, 1987 and 1988 the Commission presented a table based on documents setting out the prices communicated to Cembureau by BDZ (documents 33.126/15161 and 15163) and by SFIC (documents 33.126/15168 to 15170) from which it is clear that German prices were higher than French prices. The Commission concluded (contested decision, recital 22, paragraph 15, sixth subparagraph): '... French prices were not at all more attractive than German prices in the period 1986–88. On the contrary, the price difference is all the greater considering that the German PZ35 cement has a lower resistance grade than the French CPJ45 and CPA55R grades.' The Commission therefore concluded (recital 22, paragraph 15, final subparagraph): 'It is clear that the explanations given by Ciments Français are not supported by the facts.'

2413 In the present proceedings Ciments Français pointed out to the Commission that it had committed an error of assessment when comparing the German prices communicated to Cembureau by BDZ with the French prices communicated to Cembureau by SFIC, in that it presents them as 'gross ex-works price[s]' (contested decision, recital 22, paragraph 15), whereas the prices communicated to Cembureau by BDZ were delivered prices and those communicated to Cembureau by SFIC were 'ex-works' prices.

2414 It follows from documents 33.126/15161 to 15163 and 15168 to 15170, which are referred to in the contested decision (recital 22, paragraph 15), that, as Ciments Français emphasises, the prices communicated to Cembureau by BDZ and SFIC are not comparable as such, since the former are delivered prices ('frei site' or 'frei station bundesgebiet') and the latter 'ex-works prices'. It is also clear from a table presented by Ciments Français (annex 30 to the application in Case T-39/95) that the expression 'frei station bundesgebiet' does not take account of the ex-works price. That table, which originated in a Cembureau database and is dated May 1994, sets out the prices for Germany for the years 1979 to 1993. It refers to 'delivered on site' or 'delivered to site' prices which, for the months and years referred to in documents 33.126/15161 to 15163, correspond to the prices in the table in recital 22, paragraph 15, of the contested decision. The latter table clearly contains an error, since it describes the prices indicated in documents 33.126/15161 to 15163 as 'German average gross ex-works price communicated by BDZ only for PZ 35'. As such, the table therefore has no evidential value.

2415 Ciments Français also submitted other documents in order to establish, on the basis of a comparison between delivered prices at various places, that French prices were higher than German prices for the years 1986, 1987 and 1989 (annex 30 to the application in Case T-39/95). However, the Commission did not discuss the content of those documents, but merely referred to the contested decision.

2416 In such circumstances, the Commission cannot rely on an analysis of the data reproduced in recital 22, paragraph 12, of the contested decision to establish the continuation of an agreement between the French industry and the German industry on the regulation of sales between the two countries. It has failed to demonstrate that the only plausible explanation for the reduction in the gap between the volume of French exports and the volume of German exports resulting principally from the increase in German exports was the continuation of an agreement (*Woodpulp II*, cited in paragraph 106 above, paragraph 71). The reduction in the gap could equally well result from competitive conduct on the part of the undertakings concerned and in particular from the fact that cement producers found French prices more attractive in 1986, 1987, 1988 and 1989, as Ciments Français explained to the Commission during the administrative procedure.

2417 Accordingly, there is no need to examine the other arguments put forward by the applicants to challenge the value of the statistics on which the Commission relied, since the existence of a

reasonable alternative economic explanation deprives those statistics of all probative force as regards all the applicants concerned by Article 3(3)(a).

2418 It follows from the foregoing (see paragraphs 2390 to 2417 above) that the evidence referred to in the contested decision establishes the continuation of the agreement referred to in Article 3(3)(a) of the contested decision only until 12 August 1987, the date on which the Heidelberger memorandum was drafted (recital 22, paragraph 10, fourth subparagraph). It follows that Article 3(3)(a) must be annulled in so far as it finds the existence of an infringement of Article 85(1) of the Treaty after 12 August 1987 and finds that Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ participated in such an infringement after that date.

2419 For the remainder, Heidelberger cannot claim that the Commission reversed the burden of proof by requiring it to show that it did not participate in any of the elements of the infringement referred to in Article 3(3)(a) of the contested decision. Nor can it rely on the existence of only a small number of documents referred to in the contested decision that concern it. The Commission has shown, on the basis of documents, that Heidelberger participated in the infringement in question. The fact that Heidelberger considers that only the letter of 22 September 1986 and its internal memorandum of 12 August 1987 concern it is not of such a nature as to undermine the evidence that it participated in the infringement in question. The precise number of documents used to prove its participation is not decisive, since it is only their evidential value which is relevant. Furthermore, other documents, such as the internal Lafarge memorandum referring to the meeting on 17 November 1982 between Dyckerhoff, Heidelberger and Cedest (see paragraphs 2282 to 2294 above), establish Heidelberger's participation in the infringement referred to in Article 3(3)(a).

2420 As a result of this assessment of the arguments put forward by the applicants referred to in Article 3(3)(a) of the contested decision, it has been determined whether or not each of the constituent elements of the infringement referred to in that provision has been established as against those parties. However, a number of them have specifically disputed the duration of their participation in the infringement.

Duration of the participation of certain parties in the infringement referred to in Article 3(3)(a)

2421 Ciments Français complains of the artificial nature of the construction whereby the Commission establishes a link between the various elements found to be an infringement in Article 3(3)(a) of the contested decision, when those elements have different actors and distinct objectives, as the Commission acknowledges in the contested decision.

2422 Heidelberger claims that the Commission has failed to adduce evidence that the agreements and concerted practices in question continued until 30 September 1989.

2423 Lafarge questions how the Commission is able in its case to take the date of 30 September 1989 as the date on which the infringement ceased without adducing evidence that it participated in the infringement until that date.

2424 Before assessing the merits of those various arguments, it is appropriate to consider the passages in the contested decision which deal with that point.

2425 It is apparent from the contested decision that the question of the duration of the infringement referred to in Article 3(3)(a) is linked to the question of its single and continuous nature. The Commission states (recital 50, paragraph 4): 'In view of the fact that the agreement on the sharing of the Saarland market, the concerted practices involved in the pursuit of a solution on the limiting of sales by Cedest in Germany apart from the Saarland, and the 1984 agreement referred to in the letter of 22 September 1986 all had as their object the sharing of markets and the restriction of cross-frontier flows of cement between France and Germany, the Commission takes the view that the agreements and concerted practices may be deemed to be a single and continuous infringement. In addition, even though initially SFIC, BDZ and Lafarge were not parties to the agreement on the Saarland, they accepted it as from 23 June 1982, i.e. as from the time when they acted to extend the agreement on the Saarland to other German Länder and to fit the agreement into the broader framework of the regulation of trade flows between France and Germany. The single and continuous infringement relating to the restriction of cross-frontier flows between France and Germany was committed, from 23 June 1982 to 30 September 1989, by SFIC, Cedest, Ciments Français, Lafarge, BDZ, Dyckerhoff and Heidelberger.'

2426 It should be observed that for there to be a 'single infringement' there must be a series of efforts made by the various parties in pursuit of a single anti-competitive economic aim (see in particular *Rhône-Poulenc*, cited in paragraph 1053 above, paragraphs 125 and 126).

2427 In the present case it is therefore necessary to ascertain whether the conduct complained of in Article 3(3)(a) of the contested decision was part of a single infringement.

2428 It has already been established that the Commission did not demonstrate the existence throughout the material period of one of the constituent elements of the infringement referred to in Article 3(3)(a), namely the alleged agreement on the sharing of the Saarland market (see paragraphs 2172 to 2225 above). It is therefore necessary to determine whether, even in the absence of that constituent element, the existence of a single and continuous infringement is still established.

2429 The identity of object between the different elements of the infringement which were properly established is not open to dispute. Both the various concerted practices between 1982 and 1984, and the 1984 agreement, which remained in force until 12 August 1987, had as their object the regulation of cross-frontier flows of cement between France and Germany or the sharing of the markets (see paragraphs 2226 to 2420 above).

2430 Moreover, the participants in those aspects of the unlawful conduct knew, or ought to have known, that it was part of an overall plan in pursuit of that common unlawful object.

2431 The criticisms put forward by Ciments Français must therefore be rejected. Even if it were established, the mere fact, on which that undertaking relies, that the various elements of the single infringement found by the Commission did not have a wholly similar geographical scope does not show that those elements did not have an identical object, namely the regulation of flows of cement between France and Germany.

2432 The participation of Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ in that single infringement is established, as all those applicants participated in one or other of the concerted practices established by the Commission and also in the 1984 agreement. The fact that Article 3(3)(a) of the contested decision must be annulled in so far as it finds that Cedest participated in an infringement of Article 85(1) of the Treaty does not affect that finding.

2433 Consequently, the Commission has demonstrated that the unlawful acts referred to in Article 3(3)(a) whose existence it has duly shown, were sufficiently alike in terms of parties involved and subject-matter to be classified as a single infringement.

2434 When assessing the continuous nature of the infringement in the case of Ciments Français, Heidelberger and Lafarge, the Court must have regard to the various unlawful acts which have been validly attributed to them and the related dates.

2435 Ciments Français participated with Lafarge in a concerted practice whose object was to bring pressure to bear on Cedest and which was established on the basis of a document dating from 23 June 1982 (see paragraphs 2252 to 2281 above). It also participated with Dyckerhoff in a concerted practice, established on the basis of two documents dated 25 January and 17 May 1983 (see paragraphs 2316 to 2328 above). From 1984 to 12 August 1987 it participated in the agreement involving the general regulation of cement supplies between France and Germany (see paragraphs 2332 to 2418 above). The continuous nature of its participation in the single infringement is therefore established from 23 June 1982 to 12 August 1987.

2436 Heidelberger participated in a concerted practice with Dyckerhoff, established on the basis of a document relating to a meeting on 17 November 1982 (see paragraphs 2282 to 2294 above) and, from 1984 to 12 August 1987, in the agreement involving the general regulation of cement supplies between France and Germany (see paragraphs 2332 to 2418 above). The continuous nature of its participation in the single infringement is therefore established only from 17 November 1982 to 12 August 1987. Article 3(3)(a) of the contested decision must therefore be annulled in so far as it finds that Heidelberger participated in the infringement from 23 June to 16 November 1982.

2437 Lafarge participated with Ciments Français in a concerted practice whose object was to bring pressure to bear on Cedest and which was established on the basis of a document dated 23 June 1982 (see paragraphs 2252 to 2281 above). It also participated with Dyckerhoff in a concerted practice, established on the basis of three documents dated 23 June, 28 July and 2 September 1982 (see paragraphs 2295 to 2315 above). From 1984 to 12 August 1987 it participated in the agreement involving the general regulation of cement supplies between France and Germany (see paragraphs 2332 to 2418 above). The continuous nature of its participation in the single infringement is therefore established from 23 June 1982 to 12 August 1987.

2438 Dyckerhoff also pleads infringement of Article 190 of the Treaty. However, it does not allege any failure to state reasons or any inadequacy of the reasons for the passages of the contested decision which deal with the Franco-German agreement. Its plea must therefore be rejected.

2439 It follows from all the foregoing that the Commission did not infringe either Article 85(1) or Article 190 of the Treaty in finding, to the extent determined in paragraphs 2172 to 2438 above, that Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ participated in the infringement referred to in Article 3(3)(a) of the contested decision.

2440 Ciments Français also states that the Commission discriminated unjustifiably in its treatment of the objection relating to Spain and Portugal as against that of the objection relating to France and Germany: in the former case, it found only the trade association liable, and not the Spanish producers, whereas in the latter case it found the individual producers, including Ciments Français, liable as well as the national trade associations. Nor does the fact that the Spanish undertakings did not directly participate in the negotiations complained of justify that discrimination since, as the Commission itself has acknowledged, those undertakings were concerned by the alleged agreement and certain documents clearly show the significant role which they played. The Commission's approach to the members of the Spanish trade association in the case of the Hispano-Portuguese complaint is thus at variance with its approach to the indirect members of Cembureau in attributing the Cembureau agreement to them.

2441 That argument must be rejected. Even on the assumption that Ciments Français's position is comparable on all points with that of the Spanish producers to which it refers, it follows from

the case-law (*Woodpulp II*, cited in paragraph 106 above, paragraph 146) that the fact that a trader who was in a position similar to that of Ciments Français was not found by the Commission to have committed any infringement cannot in any event constitute a ground for setting aside the finding of an infringement by that applicant, provided that the infringement was properly established. The foregoing grounds have enabled the Court to find that in the contested decision the Commission has established that both Ciments Français and the national trade association to which it belongs, namely SFIC, participated in the infringement referred to in Article 3(3)(a).

2442 SFIC and Ciments Français also dispute, in the context of the arguments specifically devoted to the legality of Article 3(3)(a), the existence of a link between that infringement and the Cembureau agreement. That argument will be dealt with in the context of the examination of the single nature of the infringement referred to in Article 1 of the contested decision (see paragraphs 4045 to 4048 and 4152 to 4154 below).

2443 As well as disputing the existence of a Franco-German agreement, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ also complain of an infringement of their rights of defence owing to the fact that they were denied access during the administrative procedure to documents in the Commission's file which might have proved useful to their defence.

Access to the file

2444 Only Lafarge (T-43/95) maintains that it did not have access, prior to the adoption of the contested decision, to incriminating evidence relating to the infringement found in Article 3(3)(a). In its observations of 10 February 1997 it maintains that the documents from the German Bundeskartellamt file relating to its decision of 12 September 1988 (documents 33.126/20481, 20418 to 20443, 20416, 20417, 20492 to 20495, 20497 to 20499 and 20384 to 20394) were used by the Commission to establish an infringement. At the hearing in Case T-43/95 Lafarge stated, in answer to a question put by the Court, that the infringement in question was the cartel on the cement market in South-West Germany which was referred to in the chapters of the SO dealing with the German market (chapters 6 and 16).

2445 That argument must be rejected for the reasons stated in paragraph 296 above.

2446 Dyckerhoff, SFIC, Ciments Français, Heidelberger and BDZ have formulated a series of observations concerning access to exculpatory documents, based on those which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 and 168 above). Lafarge (T-43/95) has made no particular criticism on that point. At the

hearing it also stated, in answer to a question put by the Court, that it was not relying on its internal memoranda of 6 August 1982 and 7 January 1983 in respect of the infringement of its right of access to the file.

2447 Dyckerhoff claims that the documents which it was able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 confirm that the relations between the German and French producers and their national associations, BDZ and SFIC, do not give rise to any legal objection. In its observations of 7 February 1997 it observes that documents 33.126/14861 to 14874, 14883, 14802 to 14804, 19264 and 14801, which consist of the minutes of internal meetings of the French association and the annexes thereto, have no connection with the objections made against it but show that Franco-German relations consisted of contacts to which there was no objection in law, so that acquaintance with their content might have proved useful to the defence of its interests in the administrative procedure. In its observations of 5 January 1998 it again refers to documents 33.126/15443 to 15453 (record of what was said at a meeting between the delegations of German and French cement producers on 6 and 7 December 1983), 6044 to 6047 (letter from SNFCC dated 17 April 1989 communicating information relating to cement imports from the Federal German Republic for 1988 and the first two months of 1989) and 14623 (table of cement imports from the same Member State for 1989), the content of which confirms that the German and French cement producers merely engaged in a general exchange of views.

2448 The content of those documents, as analysed by Dyckerhoff, is not of such a nature as to establish that Dyckerhoff's rights of defence were infringed during the administrative procedure. It sheds no new light on the direct documentary evidence which, in so far as determined above, served to establish the objections made against Dyckerhoff in the SO (chapter 2, paragraph 12, and chapter 10, paragraph 61(d)) and in the contested decision (recitals 22 and 50, Article 3(3)(a)). Moreover, document 33.126/19264 (document 128 in the French national file), which is annexed to Dyckerhoff's observations of 7 February 1997, does not correspond to the description of its content given by Dyckerhoff, since it is a list of the references of three Greek undertakings and four Spanish undertakings. Similarly, apart from the fact that the statistics in documents 33.126/6044 to 6047 confirm the Commission's findings in paragraph 12 *in fine* of the SO (Chapter 2) and recital 22, paragraph 12, of the contested decision, there is clearly no longer any need to rule on Dyckerhoff's allegation that its rights of defence were infringed in that regard, since the Court has been able to conclude on the basis of the foregoing assessment that Article 3(3)(a) of the contested decision must be annulled in so far as it finds the existence of an infringement on the basis of the statistics in the table set out in recital 22, paragraph 12 (see paragraphs 2408 to 2418 above).

2449 Ciments Français claims that the documents which it was able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 might have proved useful to its defence. In its observations of 10 February 1997 it puts forward four arguments on the basis of the documents which it selected from those consulted.

2450 First, it maintains that the chapters of the SO on Germany would have enabled it to show that the Commission reached opposite conclusions concerning the existence of a Franco-German agreement and the identity of the parties to that agreement, depending on whether it looked at them from a national or an international viewpoint. Ciments Français points out that the chapters of the SO in question refer to the existence of three cartels connected with southern Germany but do not mention its name or that of its subsidiary, SZG. In that regard, it emphasises that it is the only French cement producer concerned by the objection relating to the Franco-German agreement which is not referred to in the German chapters of the SO. It alleges that the passages in the SO contradict the very documents on which the Commission relies as against it in connection with the alleged Franco-German agreement, more particularly the Vicat memorandum of 22 July 1982 (contested decision, recital 22, paragraph 1) and the Lafarge memorandum of 23 June 1982 (contested decision, recital 22, paragraph 4). In any event, the mere existence of a chapter of the SO devoted to Germany and referring to an alleged Franco-German agreement indicates that it was essential that Ciments Français had access to all the objections and documents relating to that alleged agreement.

2451 First, it should be pointed out that the Commission relied in the SO (chapter 2, paragraph 12, and chapter 10, paragraph 61(d)) and in the contested decision (recitals 22 and 50) on specific documentary evidence to establish the existence of the Franco-German agreements and/or concerted practices and Ciments Français's participation in them. The fact that there is no reference to Ciments Français in the chapters of the SO on Germany (chapters 6 and 16) is not of such a kind as to shed new light on the specific documentary evidence which establishes the infringement referred to in Article 3(3)(a) of the contested decision and Ciments Français's participation in those agreements and concerted practices to the extent determined above. Furthermore, contrary to what Ciments Français claims, the objections made specifically against the German producers in the chapters of the SO on Germany are not presented as being closely linked with those relating to the Franco-German agreements and practices. The cartels covering southern Germany are not confused, on a reading of the chapters of the SO devoted to Germany, with the Franco-German agreements and practices in which Ciments Français is accused of having participated. Nor do the passages in the German chapter of the SO on the Franco-German agreements and practices contain evidence against Ciments Français not mentioned in the international chapter of the SO dealing with the Franco-German agreements and practices (see paragraph 114 above). It follows that the fact that Ciments Français did not have access to the chapters of the SO on Germany (chapters 6 and 16) during the administrative procedure could not harm its defence.

2452 Second, Ciments Français observes that the Bundeskartellamt decision of 1 June 1989 concerning three cartels in southern Germany (annex 2 to its observations; pp. 176 to 209 of the 'German file') also fail to mention its name or that of its subsidiary, SZG, and do not refer to the existence of a Franco-German agreement whose object was to share the Saarland market or an agreement aimed at restricting Cedest's exports.

2453 That argument must be rejected for the reasons stated in paragraph 2451 above.

2454 Third, Ciments Français submits that a number of documents make it possible to place the letter dated 22 September 1986 from Mr Laplace, Chairman of SFIC and of Ciments Français, to Mr

Schuhmacher, Chairman of BDZ and of Heidelberger (contested decision, recital 22, paragraph 10) in its proper context, namely normal and lawful relations with the French and German associations enjoyed independently of their members. That letter does not therefore in any way establish the existence of an agreement on the sharing of the markets in 1984 in which Ciments Français participated. Ciments Français refers to the evidence of Mr Steinbach, Chairman of BDZ, to the Commission on 6 March 1990 (document 33.126/16386), the letters of 21 November 1989 and 6 February 1990 from SNFCC to BDZ (documents 33.126/16603 to 16608) and the letters of 31 January and 16 February 1990 from BDZ to SNFCC (documents 33.126/16601 and 16602). Ciments Français further states that the existence of independent and normal relations between the two associations was already suggested by the letter dated 20 December 1983 from the German association to the French association, which is in the French file (document 33.126/14762). It also refers, by way of example, to document 33.126/14894, in the French file, which sets out information communicated to the French association by BDZ for several years, and to documents 33.126/14814, 14816, 14818 and 14820, to show that BDZ was in the habit of sending overall statistics to the French association.

2455 It should be observed at the outset that Ciments Français cannot derive any argument from the letter of 20 December 1983 (document 33.126/14762) in the context of its plea alleging infringement of its rights of defence (see paragraph 266 above), as it had access to that document during the administrative procedure.

2456 Nor do the other documents on which it relies establish an infringement of its rights of defence during the administrative procedure. First, they are not susceptible of shedding new light on the content of the letter of 22 September 1986 (contested decision, recital 22, paragraph, 10) with regard to the context in which that letter was drafted as described in those documents. All the documents in question were drafted months, or even years, after the letter of 22 September 1986. Next, it is apparent from the SO (Chapter 2, paragraph 12) that the Commission had observed that the French and German associations had been exchanging statistics for several years. Last, the content of those documents does not shed a different light on the documents referred to in the SO (Chapter 2, paragraph 12) and in the contested decision (recital 22), which show that relations between the French and German industries were not limited solely to the innocent exchange of statistics between the two national trade associations, as, according to Ciments Français, the documents to which it had access following the measure of organisation of procedure of 2 October 1996 establish. It follows that Ciments Français's third argument must also be rejected.

2457 Fourth, Ciments Français claims that the documents relating to the Hispano-Portuguese agreement confirm its argument that the fact that it is accused of having allegedly participated in actions to limit exports between France and Germany is incompatible with the treatment of the situation in Spain and Portugal and reveals discrimination in the procedure. It also observes that only the Spanish trade association is held liable in the contested decision in connection with the Hispano-Portuguese agreement, although in the SO the Commission maintained that the Spanish trade association and representatives of certain Spanish producers had participated in meetings aimed at overcoming the problems posed by Portuguese cement exports to Spain. By way of example, it refers to documents 33.322/1410 to 1412 and 1400, also referred to in

recital 21, paragraph 5, of the contested decision but which remained inaccessible throughout the administrative procedure.

2458 However, Ciments Français cannot claim to establish on that basis that there was an infringement of its rights of defence during the administrative procedure. It is sufficient to observe that, as Ciments Français itself states in its submissions, the content of the SO (paragraphs 11 and 61(c)) did not give grounds for the conclusion that the Commission would not find that the Spanish undertakings referred to therein had participated in the Hispano-Portuguese agreement. Access to the documents during the administrative procedure would not therefore have allowed Ciments Français to persuade the Commission to adopt a different decision on that point. Its fourth argument must therefore be rejected.

2459 In its observations of 21 November 1997 Ciments Français put forward eight documents on the basis of which it sought to establish that it did not participate in the Franco-German agreements and concerted practices, regarded as a single and continuous infringement, referred to in Article 3(3)(a) of the contested decision. It refers to a letter from Cedest to Lafarge dated 4 January 1979 describing the difficulties encountered in the relations between Cedest and Wössingen or between Cedest and Lafarge (documents 33.126/7505 to 7507); an internal Lafarge memorandum dated 30 June 1982 which also describes the deterioration of relations between Cedest and Wössingen and between Cedest and Lafarge and the anxiety of the large German cement producers (documents 33.126/7038 to 7040); an internal Lafarge memorandum dated 6 August 1982, which refers to Lafarge's strategy in Germany and to the Cedest affair and mentions, in particular, the forces present and the proposals for action (documents 33.126/7522 to 7524); an internal Lafarge memorandum dated 7 September 1982 which shows that the problems caused by Cedest's deliveries to Germany still concerned the same protagonists in France and in Germany (documents 33.126/6686 and 6687); a telex from Lafarge dated 26 October 1982 referring to the commitments given by Cedest to Wössingen in the past (documents 33.126/7110); and an internal Lafarge memorandum dated 7 January 1983 referring to discussions between Heidelberger and Dyckerhoff on the situation in Rheinland-Westphalia and describing a meeting between themselves and Cedest (documents 33.126/7514 and 7516). Ciments Français concludes from the fact that there is no reference to its name in those various documents that it was not concerned by the situation brought about by Cedest's conduct in Germany. It adds that in a memorandum dated 23 May 1985, probably attributable to Lafarge, Ciments Français is always presented as an minor player in the Franco-German area, since Lafarge regards it as a competitor in France but not in Germany (documents 33.126/7408 to 7412). Ciments Français also observes that an internal Heidelberger memorandum dated 22 February 1983 describes Heidelberger's proposals to penetrate France in retaliation against Cedest and shows the intensity of competition between French and German producers at a time when the Commission claims that those producers were combining to share the market (document 33.126/3477). Those various documents far from corroborate the documents presented by the Commission, in particular the Vicat memorandum dated 22 July 1982 (contested decision, recital 22, paragraph 1), which, moreover, comes from an undertaking which, according to the Commission, is not even concerned by that situation. Ciments Français also concludes from those documents that the Franco-German agreement referred to in the international objections and the Franco-German cartel centred on Wössingen referred to in the German national objections were inextricably linked, since Wössingen's commercial policy in Germany and Cedest's exports to Germany were the cause of the practices identified in the international objections. The documents also make it possible to call in question the link which the Commission has established between the alleged agreement on

sharing the Saarland market and the other practices called in question under the alleged Franco-German agreements and practices. They therefore preclude the existence of a single and continuous infringement.

2460 It should be observed, however, that the documents referred to above are not susceptible of establishing the existence of an infringement of Ciments Français's rights of defence. The comments which it makes on the basis of those documents do not shed new light on the specific documentary evidence which the Commission used to establish Ciments Français's participation in the concerted practice designed to bring pressure to bear on Cedest (SO, chapter 2, paragraph 12; contested decision, recitals 22, paragraph 4, and 50, paragraph 3), the concerted practice with Dyckerhoff (SO, chapter 2, paragraph 12; contested decision, recitals 22, paragraphs 8 and 9, and 50, paragraph 3) and the agreement on the sharing of the markets concluded in 1984 (SO, chapter 2, paragraph 12; contested decision, recitals 22, paragraph 10, and 50, paragraph 3). As regards the latter, it should be observed that its existence follows in particular from the letter dated 22 September 1986 which Mr Laplace, Chairman of SFIC and of Ciments Français, sent to Mr Schuhmacher, Chairman of BDZ and of Heidelberger (contested decision, recital 22, paragraph 10).

2461 Heidelberger claims that the documents which it was able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 confirm that no Franco-German agreement was established and, in any event, that it did not participate in such an agreement. In its observations of 10 February 1997 it states at several points that the only conclusion that can be drawn from the documents in the French file is that the French undertakings were concerned only with the situation on the French market. It thus refers to documents 33.126/14809, 14810, 14826, 14827, 14894, 5626 to 5634, 5637 to 5640, 5641 to 5644, 5645 to 5647, 5651 to 5656, 5664 to 5670, 5675, 13529, 5705 to 5708 and 5718, as confirming that the French undertakings were anxious to restrict the volume of imports into their national market but contains no evidence to support the conclusion that there was an agreement between French and German producers and certainly not one between Heidelberger and the French producers.

2462 In its observations of 20 February 1998 Heidelberger again claims that documents 33.126/4135 and 4383 confirm that the alleged Franco-German agreement did not exist. The first document is an internal Ciments Français memorandum dated 15 May 1986, the content of which indicates that Ciments Français was then considering extending its services to the German market; that contradicts the existence of a Franco-German agreement. Heidelberger emphasises that the Commission relied mainly on the content of a letter which the Chairman of Ciments Français sent to its own Chairman on 22 September 1986 to demonstrate the existence of that alleged agreement (contested decision, recital 50, paragraph 3). The second document is also an internal Ciments Français memorandum describing its thoughts on the strategy which would allow it to penetrate the European markets; that helps refute the existence of a Cembureau principle of non-transhipment to domestic markets and, *a fortiori*, of a Franco-German agreement.

2463 The content of the documents referred to in the previous paragraphs, as analysed by Heidelberger, is not of such a nature as to establish an infringement of its rights of defence during the administrative procedure. It sheds no fresh light on the specific documentary evidence on which the Commission relied in the SO (chapter 2, paragraph 12, and chapter 10, paragraph 61(d)) and in the contested decision (recitals 22 and 50) in order to establish the existence of the Franco-German agreements and concerted practices and Heidelberger's participation therein. Furthermore, according to the information on the List (see paragraph 5 above), documents 33.126/14809 and 14826 were accessible during the administrative procedure (see paragraph 250 above). During the administrative procedure Heidelberger could therefore have raised the argument which it now raises before the Court. Last, it follows from the internal Ciments Français memorandum dated 15 May 1986 (document 33.126/4135) that the form of expansion referred to in that memorandum entailed working together with other undertakings active on the European market. As the Commission rightly points out in its observations of 30 March 1998, however, apart from the fact that that circumstance sheds no fresh light on the specific documentary evidence used by it, the agreements and the expansion strategies involving company takeovers are not mutually exclusive.

2464 BDZ claims in its observations of 16 January 1998 that SFIC's statistics reveal the existence of a significant volume of exports by French producers between 1978 and 1988 (documents 33.126/1427, 14630, 14637, 14661 and 14663), which confirms that there was no agreement between French and German manufacturers.

2465 However, the documents on which BDZ relies also fail to establish the existence of an infringement of its rights of defence during the administrative procedure.

2466 Document 33.126/1427 has no relevance to BDZ's argument, since it sets out the general conditions of sale of CCB (see paragraph 1169 above). It must therefore be disregarded without further examination.

2467 Next, while it is true that documents 33.126/14630 and 14637, extracts from the SNFCC 'Courier d'Information' of 10 October 1989, contain data on French exports for 1978 to 1988, for two reasons BDZ cannot draw any particular conclusions from those documents as to the evidential significance of the volume of French exports to Germany between 1978 and 1988. First, the tables in both those documents relate to export deliveries of 'all binding materials' and clinker, without distinguishing between their destinations outside France, which makes it impossible to draw any conclusions as to the volume of French exports of cement to Germany. Second, even supposing that those figures related only to French exports of cement to Germany, the 'export deliveries of all binding materials' analysed in document 33.126/14630 went from 1 198 000 tonnes in 1978 to 1 153 000 tonnes in 1988. Similarly, the data relating to clinker exports between 1978 and 1988 set out in document 33.126/14637 indicate that those deliveries went from 2 310 000 tonnes in 1978 to 878 000 tonnes in 1988. A mere reading of those documents therefore contradicts the very basis of BDZ's argument. Nor, for two reasons, can documents 33.126/14661 and 14663, which are extracts from SNFCC's monthly information bulletin for December 1987, be relied on to support that argument. First, like documents 33.126/14630 and 14637, documents 33.126/14661 and 14663 fail to state the

destinations of the exports which they record. Second, the data set out in documents 33.126/14661 and 14663 only contain a comparison between the years 1986 and 1987. In any event, the Court has already found on the basis of direct documentary evidence that the Commission has shown that BDZ participated in the infringement referred to in Article 3(3)(a).

2468 It follows from the foregoing that the rights of defence of Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge and BDZ in relation to their participation in the infringement referred to in Article 3(3)(a) of the contested decision, unlike those of Cedest, were not affected by the fact that they did not have access to the documents on which they have relied during the present procedure (see paragraphs 2284 to 2289 above).

Conclusion

2469 To conclude, Article 3(3)(a) of the contested decision will be annulled:

— as regards Cedest, in its entirety;

— as regards Dyckerhoff, Ciments Français and Lafarge, in so far as it finds that they participated in an agreement on sharing the Saarland market and in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— as regards SFIC, in so far as it finds that it participated in an agreement on the sharing of the Saarland market, in a concerted practice with BDZ before 1984, in a concerted practice aimed at exerting pressure on Cedest and in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— as regards Heidelberger, in so far as it finds that it participated in an agreement on the sharing of the Saarland market and in an infringement of Article 85(1) of the Treaty between 23 June and 16 November 1982 and after 12 August 1987;

— as regards BDZ, in so far as it finds that it participated in an agreement on the sharing of the Saarland market, in a concerted practice with SFIC before 1984 and in an infringement of Article 85(1) of the Treaty after 12 August 1987.

2470 The remaining pleas which have been considered are rejected.

VIII — *Pleas alleging infringements of Article 85(1) of the Treaty and of the rights of the defence in that the Commission finds the existence of a concerted practice between SFIC and BDZ contrary to Article 85(1) of the Treaty (contested decision, Article 3(3)(b))*

Concerted practice between SFIC and BDZ

2471 Although SFIC (T-36/95) and BDZ (T-48/95) do not deny having exchanged statistics on the volume of exports between France and Germany, they dispute the anti-competitive nature of those exchanges and, accordingly, the finding that they constituted an infringement. They rely on the fact that those exchanges took place prior to the conduct referred to in Article 3(3)(a) of the contested decision, on the real objective of such exchanges, on the fact that the statistics exchanged were lawful in the light of the Commission's previous decisions and the Court's case-law, and also on the fact that they did not transmit more precise, individualised information or information on French supplies to Germany broken down according to the Land of destination.

2472 Before assessing the merits of those arguments, it is appropriate to recall the infringement referred to in Article 3(3)(b) of the contested decision.

2473 In that provision the Commission states that: '[SFIC and BDZ] infringed the provisions of Article 85(1) of the EC Treaty from 1 January 1985 to 30 September 1989 by participating in a concerted practice involving the exchange of information designed to monitor compliance with the quantitative restrictions on exports between France and Germany and to monitor the destination of such exports in terms of the various German Länder.'

2474 In the recitals of the contested decision the Commission deals with the infringement in question in The Facts, in recital 22, paragraphs 12 and 18, and in the Legal Assessment, in recital 50, paragraph 5.

2475 In recital 22, paragraph 12, the Commission states:

'SFIC and BDZ have for several years exchanged monthly data on French exports to Germany and German exports to France. The stated aim of the exchange is to be able to compare the data in the possession of the two associations with those published by the national statistical institutes. Although the data exchanged are aggregate and do not contain any indication of destination by region and although the data published by the various statistical institutes and those published by the Statistisches Bundesamt do not indicate destination by region, BDZ is able, each quarter, to establish that imports from various countries are intended for specific Länder and to publish those results. In particular, BDZ is able to state that French cement imports have always been intended for Rheinland-Pfalz, Saarland and Baden-Württemberg, with tonnages for each *Land*, as can be seen from the figures available at the time of verification for the last five years: [table].

This system of data exchange is a means of monitoring the implementation of the agreement on regulating sales between French and German enterprises (see paragraph 10 above).

A comparison of these data shows that "the gap existing since 1984 between French and German deliveries" (letter of 22 September 1986 referred to above in paragraph 10) was reduced.'

2476 The data in the table presented by the Commission in recital 22, paragraph 12, of the contested decision are, first, the annual volume of French exports to Germany for the *Länder* of Rheinland-Pfalz, Saarland and Baden-Württemberg, and the total of those exports, and, second, the annual volume of German exports to France.

2477 In recital 22, paragraph 18, of the contested decision the Commission answers the arguments put forward by BDZ to justify, on the basis of mathematical estimates, the existence of data on French exports for each Land.

2478 In recital 50, paragraph 5, the Commission makes the following analysis:

'The exchange of statistical information between SFIC and BDZ constitute, on the basis of the data available (see paragraph 12 of recital 22), from 1 January 1985 to 30 September 1989, a concerted practice restricting competition within the meaning of Article 85(1). The exchange of information must be seen in the context of the market-sharing agreements mentioned above, the aim being to allow the two associations concerned to monitor compliance with the quantitative

restrictions on exports and the Länder for which they were intended (see paragraph 12 of recital 22). As stated in paragraphs 12 and 18 of recital 22, determining which Länder exports were intended for cannot be properly explained in any other terms than concerted action based on the exchange of data. This practice creates an artificial market situation in which abnormal transparency and stability in trade between Member States tend to rigidify the behaviour of economic agents and to eliminate the risks inherent in competition.'

2479 It is apparent from the words used by the Commission in the contested decision, therefore, that it took the view that the concerted practice in question was ancillary to the infringement referred to in Article 3(3)(a) of the contested decision. In recital 22, paragraph 12, second subparagraph, the Commission emphasised that '[t]his system of data exchange is a means of monitoring the implementation of the agreement on regulating sales between French and German enterprises' and refers to paragraph 10 of that recital. In recital 50, paragraph 5, it again states, with particular reference to recital 22, paragraph 12, that '[t]he exchange of information must be seen in the context of the market-sharing agreements mentioned above'.

2480 It is also apparent from the wording of the contested decision that the Commission considers that the concerted practice referred to in Article 3(3)(b) has a twofold object: first, to monitor compliance with the quantitative restrictions on exports between France and Germany and, second, to monitor the destination of such exports in terms of the various German Länder. The German version of the contested decision brings out even more the twofold object which the Commission attributes to the concerted practice. Article 3(3)(b) reads: '[SFIC] und [BDZ] haben vom 1. Januar 1985 bis 30. September 1988 gegen Artikel 85 Absatz 1 EG-Vertrag verstoßen, indem sie an einer abgestimmten Verhaltensweise betreffend den Austausch von Informationen zwecks Kontrolle der Einhaltung der mengenmäßigen Ausfuhrbegrenzungen zwischen Frankreich und Deutschland sowie zur Kontrolle der für die verschiedenen Bundesländer bestimmten Leiferungen teilgonommen haben.' The Commission cannot therefore claim, as it did at the hearing in Case T-48/95, that it established the breakdown of French exports in terms of the various Länder in response to an argument developed by the applicants concerned during the administrative procedure. It is sufficient to point out that the Commission already referred in the SO (paragraph 12, p. 29, and paragraph 61(d), pp. 174 and 175) to that twofold object of the infringement referred to in Article 3(3)(b) of the contested decision.

2481 The Commission therefore considers, as it confirmed in its submissions in Case T-48/95, that the exchanges of overall statistics in themselves made it possible to monitor the implementation of the agreement involving the general regulation of sales between France and Germany, even though such exchanges of overall data between trade associations, taken in isolation, are not unlawful. That position corroborates the first object which the Commission attributes in the contested decision to the infringement referred to in Article 3(3)(b).

2482 First, in the context of Franco-German relations at the material time, in which both SFIC and BDZ had an active part (see paragraphs 2236 to 2251 and 2332 to 2418 above), the exchanges of official statistics enabled SFIC and BDZ to monitor compliance with the agreement concluded in 1984. In that regard, it is sufficient to point out that when the Chairman of SFIC, Mr Laplace, sent his letter of 22 September 1986 (contested decision, recital 22, paragraph 10; documents 33.126/3574 to 3576) to the Chairman of BDZ, Mr Schuhmacher, the opposing parties were discussing the gap between French deliveries to Germany and German deliveries to France with a view to renewing the agreement concluded in 1984 (see paragraph 2344 above). The Commission was therefore able to take the view that the statistics exchanged were used to monitor the quantitative restrictions which had been adopted and to envisage possible improvements for the future, in the context of the discussions on the renewal of the agreement concluded in 1984.

2483 In any event, the argument derived from the fact that those exchanges took place before the conduct referred to in Article 3(3)(a) of the contested decision must be rejected. A practice between national associations may, over the course of its existence, play a new role, separate from the role or roles which it previously had. The mere fact that a particular practice predated other conduct is therefore not a sufficient criterion on which to establish that it is lawful, having regard to all the roles which the practice may be called upon to serve.

2484 Next, the anti-competitive nature of a concerted practice whose object is to monitor an agreement to regulate cement deliveries between two Member States is not open to dispute. Subject to proof to the contrary, which it was for the two associations to adduce (see *Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162), it must be held that the exchanges of information between them influenced their conduct and that of their members concerned by trade between France and Germany.

2485 Last, although the first object of the concerted practice between SFIC and BDZ referred to in Article 3(3)(b) must be regarded as established, as SFIC and BDZ have not disputed that the exchanges did actually take place, it should be pointed out that, having regard to the relationship which the Commission has established between the conduct referred to in Article 3(3)(b) and that referred to in Article 3(3)(a) (see paragraph 2479 above), the exchanges of information between SFIC and BDZ no longer constituted an infringement after the date on which the infringement referred to in Article 3(3)(a) is deemed to have ceased. Accordingly, Article 3(3)(b) of the contested decision must also be annulled in so far as it establishes an infringement of Article 85(1) of the Treaty after 12 August 1987 (see paragraph 2418 above).

2486 As regards the second object of the concerted practice consisting in monitoring the destination of French exports to Germany in terms of Länder, it should be observed that the Commission has not presented any document to establish that the data on French exports for each Land found at BDZ's premises (documents 33.126/16709, 16702, 16694, 16686, 16609, 16706, 16698 and 16683) were taken directly from the data transmitted by SFIC. The Commission in fact considered that, having regard to the quarterly exchanges of overall statistics between SFIC

and BDZ, the existence of precise data on French exports to individual Länder could be explained only by concerted action between the two associations concerned.

2487 However, such reasoning does not establish with certainty the intervention of SFIC or concerted action between it and BDZ. Furthermore, BDZ explained both during the administrative procedure (contested decision, recital 22, paragraph 18, second and third subparagraphs) and in the present proceedings, that the statistics derive from estimates which it prepared on the basis of official statistics, the location of French plants and transport costs, and that they were later compared with data provided by the various *Länder*. The arguments which the Commission puts forward in the contested decision (recital 22, paragraph 18, fourth, fifth and sixth subparagraphs) and in its submissions to refute those explanations do not deprive them of all relevance.

2488 Furthermore, SFIC stated at the hearing in Case T-36/95, without being contradicted by the Commission on that point, that the overall statistics on French imports to Germany which it provided to BDZ do not correspond to those which BDZ arrived at in its own calculations on the basis of its estimates broken down into *Länder*.

2489 The Commission could not therefore accuse SFIC and BDZ of having colluded in order to monitor the destination in terms of Länder of French exports to Germany.

2490 Accordingly, Article 3(3)(b) of the contested decision must be annulled in so far as it finds the existence, from 1 January 1985 to 12 August 1987, of a concerted practice between SFIC and BDZ designed to monitor the destination in terms of *Länder* of French exports to Germany.

2491 On the other hand, in spite of the illegal aspects of Article 3(3)(b) of the contested decision identified in paragraphs 2485 and 2490 above, and contrary to the allegations made by BDZ, the Commission did not infringe Article 85(1) of the Treaty by stating that '[t]his practice creates an artificial market situation in which abnormal transparency and stability in trade between Member States tend to rigidify the behaviour of economic agents and to eliminate the risks inherent in competition' (contested decision, recital 50, paragraph 5, *in fine*).

2492 As well as disputing the existence of the concerted practice found in Article 3(3)(b) of the contested decision, SFIC and BDZ complain of an infringement of their rights of defence in so far as they were denied access during the administrative procedure to documents in the Commission's file which might have proved useful to their defence.

Access to the file

2493 SFIC complains that the Commission did not allow it to express a view during the administrative procedure on the statistical model which had been sent to it by BDZ on 4 May 1993 and which it mentions in recital 22, paragraph 18, of the contested decision (see paragraph 375 above). However, Article 3(3)(b) will be annulled in so far as it finds the existence of a concerted practice between SFIC and BDZ to monitor the destination of exports from France to Germany in terms of the various German *Länder* (see paragraph 2490 above). Accordingly, SFIC's argument has become devoid of purpose.

2494 As regards the incriminating evidence, SFIC and BDZ made a series of observations based on the documents which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1997.

2495 In its observations of 10 February 1997 and 7 January 1998 SFIC claims that all the documents in the German file were essential to its defence, since it would have enabled it to establish that BDZ had no information at its disposal which would have allowed it to put a figure on French imports for each Land in the statistics distributed to its members. In support of its argument, it refers more particularly to certain documents to which it considers it should have had access.

2496 The Court finds, however, that having regard to what was held in relation to the legality of Article 3(3)(b) (see paragraphs 2486 to 2490 above), that argument has become devoid of purpose, since the Commission has not established that SFIC and BDZ exchanged information allowing them to monitor the breakdown of French exports between the various German Länder.

2497 In its observations of 10 February 1997 BDZ observes that the documents which it was able to consult following the measure of 2 October 1996 make no reference to any exchange of information other than that of insignificant overall figures. There is nothing in the documents from the French file to indicate that figures breaking down French imports between the various Länder were communicated to it. BDZ relies on the letter which its Chairman sent to the Chairman of SFIC on 20 December 1983 (document 33.126/14762) and to minutes of various meetings between the two associations and between their members.

2498 It should be pointed out that BDZ cannot derive any argument from its Chairman's letter of 20 December 1983 in the context of the plea alleging infringement of its rights of defence during the administrative procedure (see paragraph 266 above).

2499 As regards the other documents relied on, it must again be found that, having regard to what was held in relation to the legality of Article 3(3)(b) (see paragraphs 2486 to 2490 above), BDZ's argument has become devoid of purpose, since the Commission has not established that SFIC and BDZ exchanged information allowing them to monitor the breakdown of French exports between the various German Länder.

2500 In its observations of 16 January 1998 BDZ again claims that documents 33.126/14809 to 14827 show that the sole object of the exchanges of overall statistics between the two national associations was to verify the overall import figures provided by the French customs, which were available to everyone.

2501 That argument does not demonstrate that there has been an infringement of its rights of defence. The content of the documents in question does not shed a different light on the content of the documents on which the Commission relied in finding that BDZ participated in a concerted practice with SFIC designed to monitor compliance with the quantitative restrictions on exports between France and Germany. The mere fact that the object of the exchanges of data between SFIC and BDZ was to check the figures provided by the French customs does not preclude the same data being used to monitor the quantitative restrictions agreed between the French and German industries.

2502 It follows from the foregoing that the rights of defence of SFIC and BDZ concerning their participation in the infringement referred to in Article 3(3)(b) of the contested decision, as found to have been properly established after the above assessment (see paragraphs 2471 to 2491 above), were not affected by the lack of access to the documents on which they relied in the present proceedings.

2503 It follows, first, that Article 3(3)(b) of the contested decision must be annulled, in so far as it finds that the exchange of information between SFIC and BDZ included information on French exports to Germany according to the Land of destination. That conclusion does not preclude the finding that that exchange of information was designed to monitor compliance with the quantitative restrictions on exports between France and Germany. Second, Article 3(3)(b) of the contested decision must be annulled in so far as it finds an infringement of Article 85(1) of the Treaty after 12 August 1987. The remainder of the pleas which have been considered must be rejected.

IX — *Pleas alleging infringement of Articles 85(1) and 190 of the Treaty, of the principle of equal treatment, of the rights of the defence, and abuse of process and misuse of powers in that the Commission finds that there were agreements and concerted practices within the framework of the ETF contrary to Article 85(1) of the Treaty and that the various applicants participated in them (contested decision, Article 4(1), (2), (3)(a) and (b) and (4)(a) to (h))*

Preliminary observations

2504 At the end of 1985 and beginning of 1986 the Greek cement producers, which had significantly increased their production capacities between the second half of the 1970s and the start of the 1980s to meet the strong demand from the construction and technical equipment markets in the Middle East, turned towards Europe in an attempt to solve overcapacity problems linked to the collapse, towards the end of 1985, of those markets in the Middle East (contested decision, recital 24, paragraph 1).

2505 In Article 4 of the contested decision, the Commission finds a series of infringements of Article 85(1) of the Treaty, following the emergence of the 'Greek problem', namely:

— 'the agreement on the setting-up of the Cembureau Task Force or European Task Force' (Article 4(1));

— 'an agreement on the setting-up of the Joint Trading Company, Interciment SA, having as its purpose the carrying-out of the persuasive and dissuasive measures against those threatening the stability of the member countries' markets' (Article 4(2));

— 'concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular' (Article 4(3)(a));

— '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));

— 'agreements and concerted practices designed to deflect the Greek production surplus and to curb Greek cement imports into the Member States' (Article 4(4)(a) to (h)).

2506 The Commission claims that those various agreements and practices arose from a single and continuous agreement intended to eliminate imports into the Member States of cement from Greece (contested decision, recital 53, in particular paragraphs 2, 3, 9 and 14).

2507 In the operative part of the contested decision, however, the Commission does not find that that single and continuous agreement existed as such. Thus, Article 4(1) refers to 'the agreement on the setting-up of the Cembureau Task Force or European Task Force', and not 'the single and continuous agreement relating to the setting-up of the Cembureau Task Force or ETF and the various measures adopted at the meetings to eliminate imports into Western Europe and, in particular, to prevent imports of Greek cement into the Member States' (contested decision, recital 53, point 9).

2508 The Commission confirmed this interpretation when replying to the written question raised by the Court of First Instance between 15 May and 15 June 1998 concerning the cases relating to the undertakings and associations of undertakings referred to in Article 4(1) of the contested decision:

'In the Commission's view, Article 4(1) does indeed relate only to the setting -up or organisation of the ETF (bearing in mind that participation in the setting-up of an organisation is tantamount to agreement to the proposed activities for that organisation).'

2509 In Article 4 of the contested decision, the Commission in actual fact deals separately with the various elements alleged to constitute the single and continuous agreement in relation to the 'Cembureau Task Force or European Task Force', not mentioning the same addressees each time, and finds a different duration for each of them.

2510 In its rejoinder in Case T-43/95 (p. 41), it explains:

'Careful reading of Article 4 of the decision shows that the various paragraphs of that article do not all involve the same undertakings, or the same dates, and they are therefore not mere empty repetition. The reason is that the Commission pointed out, first, the actual setting-up of the ETF

(referred to in paragraph 1) and, second, various practical measures implemented on the recommendation of the ETF, but not all the protagonists were involved in those various measures at the same time.'

2511 In its reply to the Court's written question referred to in paragraph 2508, the Commission adds:

'In the operative part of the decision the Commission sought to distinguish between the setting-up or actual existence of the ETF (Article 4(1)), which is an infringement quite independently of any implementing measures, and the various measures adopted and applied within the framework of the ETF (Article 4(2) to (4)).'

2512 In order to assess the legality of Article 4 of the contested decision, the Court must ascertain whether the Commission was right to decide that the agreements and concerted practices found in that article did in fact exist. Furthermore, it will be necessary to consider the submissions by which some applicants dispute the Commission's classification, in recital 53 of the contested decision, of those various agreements and practices as 'a single and continuous agreement'.

The agreement relating to the setting-up of the ETF (contested decision, Article 4(1))

2513 According to Article 4(1) of the contested decision, Cembureau, Holderbank, Blue Circle, Oficemen, Asland, Uniland, Hispacement, SFIC, Lafarge, Ciments Français, BDZ, Dyckerhoff, Heidelberger, CBR, Aker, EUROC, Aalborg, Irish Cement, Italcementi, Unicem and Cementir 'infringed the provisions of Article 85(1) of the EC Treaty as from 28 May 1986 by participating in the agreement on the setting-up of the Cembureau Task Force or European Task Force'.

2514 Except for Hispacement, which has not brought an action for annulment of the contested decision, all the undertakings and associations of undertakings mentioned in Article 4(1) put forward arguments for annulment of that provision. Two of the applicants allege lack of consistency between the SO and the contested decision. A series of arguments seeks to show that the agreement on the setting-up of the ETF was not an infringement. Most of the applicants deny any unlawful involvement in that agreement. Finally, some of them dispute the duration of the infringement or, at least the duration of their participation in it. The applicants concerned will be identified when those various arguments are considered.

2515 Furthermore, Cembureau, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Asland, Uniland, Oficemen, Irish Cement, Italcementi, Holderbank, Aker, EUROC, Cementir und Blue Circle allege that the Commission, in finding the infringement referred to in Article 4(1) of the contested decision, infringed their rights of defence by not making available to them during the administrative procedure the whole of the SO and the investigation file, thus depriving them of allegedly exculpatory evidence.

2516 Halkis (T-104/95) puts forward a series of arguments seeking to deny any involvement in the infringements described in Article 4, in particular in Article 4(1) of the contested decision. Inasmuch as those arguments are adduced by an applicant who has not been charged with those infringements, they must be dismissed at this point.

2517 Following the measure of 18 and 19 June 1997, Vicat (T-37/95) lodged a series of documents which, it claims, might have been useful in its defence during the administrative procedure in order to establish that it was absolutely not involved, whether directly or indirectly — through the SNIC — in the ETF and its unlawful activities. For the reasons set out above at paragraph 255, that line of argument must also be rejected.

A — Consistency between the SO and the contested decision

2518 Aalborg asserts that the SO presented the facts as showing, on the one hand, a set of agreements or concerted practices on the circulation of price information from an unspecified date in 1983 and, on the other hand, continuous agreements on the home market rule and/or concerted practices 'resulting originally from and conditioned by the laying down of and compliance with the home market rule' which had existed for dozens of years (SO, point 61). In the contested decision, the Commission altered that characterisation of the facts and referred instead, in particular, to an agreement concerning the ETF, concluded on 28 May 1986.

2519 The Court points out, however, that the Commission devoted the second section of Chapter 2 of the SO (points 16 to 20) to setting out the facts relating to the 'Cembureau Task Force or European Task Force'.

2520 Point 17 describes the circumstances relating in particular to the 'setting-up and activity of "Cembureau Task Force or European Task Force"'.

2521 The Commission began by mentioning the meeting held in Rome on 28 May 1986:

'(a) *Meeting in Rome.* On 28 May 1986, the representatives of Blue Circle, Ciments Français and Lafarge, Holderbank, Heidelberger and Dyckerhoff, Italcementi, Asland and Cembureau held a meeting in Rome to examine and draw up defensive measures ("the stick") and supportive measures ("the carrot") vis-à-vis the Greek producers who were exporting cement to the European countries. The participants decided to set up a working group comprising the representatives of the United Kingdom, Spanish, French and Italian industries assisted by Cembureau.'

2522 In paragraph 61 of the SO, the Commission stated:

'The most flagrant and most serious application of the home market rule occurred in connection with the so-called "Greek problem" (see Section 2, points 16 to 20). Cembureau and all the other members mobilised in order to attack the member which had dared to infringe the home market rule: a Task Force was set up ...'.

2523 Point 61(h), which is the legal assessment of the facts set out concerning the 'Cembureau Task Force or European Task Force', states that the agreements and practices entered into within the ETF, including the agreement setting up the latter, must be viewed as the implementation of a single plan established by Cembureau and a series of undertakings and associations of undertakings, including Aalborg, against the Greek producers for having infringed the home market rule. Those agreements and practices were considered to be 'clear infringements of Article 85(1)'. They were found to exist 'as of 1986'.

2524 The infringement found in Article 4(1) of the contested decision to have been committed by, *inter alia*, Aalborg in connection with the agreement setting up the ETF, was therefore clearly referred to in the SO, both in the summary of facts and in the legal assessment.

2525 Aalborg's submissions must therefore be rejected.

2526 Unicem claims that, in the SO, the ETF was referred to solely in connection with the disagreement with the Greek producers on account of their infringement of the home market rule. By contrast, in the contested decision, the Commission considered that the object of the ETF was wider than the attempt to prevent imports from Greece.

2527 In this connection, it is true that, in the contested decision, the Commission finds (recital 53, paragraph 7) that 'ETF's purpose... is thus general and not simply confined to the problem of Greek exports', which it did not mention expressly in the part of the SO concerning the ETF.

2528 None the less, the document on which the Commission relies in this part of the contested decision in concluding that the objective pursued by the ETF was general in nature, is the record of the meeting of the ETF held on 19 August 1986 in Geneva (contested decision, recital 25, paragraph 15). That document, appended by Aker and EUROC to their reply to the SO, was sent by letter of 9 July 1992 by the Commission to all the relevant addressees of the SO, including Unicem, which were requested to make known any comments on that document (contested decision, recital 2, paragraph 3). Unicem therefore had the opportunity, during the administrative procedure, to put forward its comments concerning the definition of the objective pursued by the ETF as it appeared in that document.

2529 Its argument must therefore be rejected.

B — Unlawful nature of the agreement setting up the ETF

2530 In recital 53, paragraph 7, of the contested decision, the Commission explains why it was prompted to consider the agreement setting up the ETF to be contrary to Article 85(1) of the Treaty:

'The record of the ETF meeting held in Geneva on 19 August 1986 (see paragraph 15 of recital 25) makes it clear what the sole objective pursued is: "*ETF's purpose is to evaluate measures to eliminate imports to Western Europe, presently from Greece. ETF shall recommend measures to the Head Delegates*". The aim is thus general and not simply confined to the problem of Greek exports: it thus falls wholly within the framework of the Cembureau agreement on non-transhipment to home markets.'

2531 The applicants concerned put forward, in essence, nine arguments disputing the unlawful nature of the agreement setting up the ETF.

2532 First, CBR, Dyckerhoff, SFIC, Ciments Français, Lafarge, Italcementi, Holderbank, Aker, EUROC and Blue Circle claim that ETF's central function was lawful, since it was to make the national and European authorities aware of the problems caused to the Western European cement industry by cheap imports from Greece. Uniland (T-58/95) alleges that, in the contested

decision, the Commission did not mention the effort by some members of the European cement industry to hold lawful dialogue with Community authorities.

2533 In support of its submissions, CBR refers to document 33.126/18761, in which Holderbank, replying to a request for information addressed to it by the Commission in 1990 concerning the ETF, explained that the essential role of the latter was to support the intensive lobbying activities of the European cement industry, between the end of summer 1986 and beginning of 1987, with a view to persuading the European authorities to adopt measures against the anti-competitive conduct of the Hellenic Republic and its cement producers. Uniland, Italcementi and Holderbank refer to the meeting which the representatives of the European cement industry had with Mr Sutherland, a member of the Commission, in November 1986, in order to inform him and, through him, the College of Commissioners, of the concern to which the scheme of State aid granted to Greek producers gave rise. In addition, Holderbank produced various documents illustrating the political steps taken to that end by the European cement producers, in particular in relation to members of the European Parliament and Members of the Commission. Italcementi complains that the Commission referred exclusively, in its assessment of the lawfulness of ETF's objectives, to the actions described in the document mentioned in paragraphs 3 to 7 of recital 25 of the contested decision, whereas that document was finalised at a meeting held earlier than that of 9 June 1986, during which the formal decision to set up the ETF was adopted (contested decision, recital 25, paragraphs 8 and 10).

2534 To illustrate the actual result of those political actions, Uniland and Italcementi claim that it was through those actions that the Commission reversed its 1985 decision in which it had authorised Greece to grant export aid to its producers (Commission Decision 86/614/EEC of 16 December 1986 amending Commission Decision 85/594/EEC authorising Greece to take certain safeguard measures under Article 108(3) of the EEC Treaty (OJ 1986 L 357, p. 28)). Holderbank refers to the questions asked of the Commission by certain members of the European Parliament concerning the 'Greek problem' and the replies given in March 1987 and May 1988 by Mr Sutherland, a member of the Commission.

2535 Aker and EUROC further allege that the exchange of information at ETF level was also intended to evaluate the extent to which risks of imports into Western Europe of cement from Greece had or had not been reduced by the Greek producers' opening up alternative outlets in non-member countries.

2536 The Court finds that several documents referred to in the presentation of the facts relating to the setting-up and activities of the ETF (contested decision, recital 25) do in fact show that, in order to settle the Greek problem, the European cement producers took action to make the national and Community authorities aware of the problem.

2537 However, the report of the ETF meeting held in Geneva on 19 August 1986, referred to by the Commission in recital 53, paragraph 7, of the contested decision, defines the ETF's objective as follows:

'ETF's purpose is to evaluate measures to eliminate imports to Western Europe, presently from Greece. ETF shall recommend measures to the Head Delegates.'

2538 That objective is confirmed by the minutes of the meeting of ETF Head Delegates and representatives in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 24: document 33.126/18858):

'The ETF was set up in order to examine possible "dissuasive" and "persuasive" measures to counter the arrival of cheap cement on European markets (primarily against Greek imports into the United Kingdom) and to submit recommendations to the Head Delegates.'

2539 The allusion, in that second extract, to 'dissuasive' and 'persuasive' measures necessarily refers back to the paper entitled 'Collective response to problems posed by destabilising cement industry', which was finalised by a working group consisting of several representatives of the European cement industry, from 3 to 5 June 1986 in Zurich and then in Céligny (contested decision, recital 25, paragraphs 2 to 7; documents 33.126/18772 to 18779, 'the Zurich/Céligny document'), and which, in substance, contains the following explanations concerning the measures involved:

'Dissuasive measures ("Stick Actions")

— Defence of European domestic markets by various means, e.g. administrative obstacles, imposition of quality standards, action by Associations, penalising of customers purchasing imported cement.

— Attacking the export markets of producers destabilising the market by taking the place of Greek suppliers in various countries (Algeria, United States, West Africa, Egypt and Saudi Arabia) or by making Greek exports unprofitable.

— Boycott of shipping companies controlled by the producers destabilising the market;

— Studying the possibility of exporting cement to Greece and, if the cost is too high, studying the possibility of "guerilla" measures and of exporting other products manufactured by the subsidiaries of European cement producers.

— Studying the situation of floating silos and intermediaries.

— Seeking the assistance of international banks to "convince" the producers destabilising the market, intermediaries and shipowners to cooperate.

Persuasive measures ("Carrot Actions")

Purchase of available tonnage from producers destabilising the market and its channelling towards the United States (Blue Circle, Holderbank, Lafarge, Cementa/Norcem and others could do this), West Africa (France could be responsible for this), other countries (complex solutions are envisaged if necessary).'

2540 In the light of the foregoing, the Commission was justified in considering that the object of the ETF was 'the prevention of trade in cement in the Community and the partitioning of national markets to the benefit of local producers and the detriment of consumers' (contested decision, recital 53, paragraph 14). The Commission was therefore fully entitled to conclude (same paragraph) that such a restriction of competition constituted 'a clear infringement of Article 85(1) of the Treaty'.

2541 The arguments of the applicants referred to at paragraph 2532 above must therefore be rejected.

2542 Holderbank claims that the ETF discussions took place in the presence of MEPs, government representatives and Commission agents. In this connection, it mentions the documentation forwarded to the members of the European Parliament allegedly present at the meeting of 9 September 1986 in Baden-Baden, and also the press release drawn up by the president of the

parliamentary committee responsible for economic, monetary and industrial policy (Annexes 11d and 11e to its application).

2543 It must, however, be pointed out that the documents submitted by Holderbank indicate at most that representatives of the European cement industry met members of the European Parliament in Strasbourg on 10 September 1986, to make them conscious of the problems connected with imports of cement from Greece into European markets. They do not support the claim that the meetings of or concerning the ETF, described in recital 25 of the contested decision — in particular the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 to 33) — were held in the presence of representatives of the Community authorities.

2544 In any event, Holderbank's allegations cannot obscure the documents analysed at paragraphs 2537 to 2540 above, which show that the ETF was given an obviously anti-competitive objective, namely, to examine, with a view to submitting recommendations to the Head Delegates, dissuasive and persuasive measures likely to eliminate cheap imports of cement into Western European markets.

2545 It follows that Holderbank's argument must be rejected.

2546 Second, Blue Circle claims that the agreement setting up the ETF was a purely preparatory act, with no anti-competitive object. The common intention of the founder members of the ETF never went beyond setting it up.

2547 However, it must once again be held that those allegations are plainly contradicted by the bundle of documents considered in paragraphs 2537 to 2540 above, which show that the ETF was assigned an anti-competitive object from the beginning.

2548 Blue Circle also states that there never was an anti-competitive plan common to the members of the ETF. It claims that the Commission erred in law in contending, in recital 53, paragraph 5, in the preamble to the contested decision, that it was not necessary to show that there was a common intention of the parties to conduct themselves on the market in an anti-competitive manner in order to prove the existence of an agreement or practice contrary to Article 85(1) of the Treaty.

2549 The Court points out, however, that the contentions which Blue Circle imputes to the Commission do not appear in recital 53, paragraph 5, in the preamble to the contested decision. At that point in the recitals, the Commission merely states, on the basis of the judgment in Case

T-2/89 *Petrofina* v *Commission* cited in paragraph 2260 above, paragraph 210, that 'where a restrictive agreement is complex in character, it is not necessary for all the undertakings to express their formal assent to a particular course of action adopted by the others, since it is sufficient for some of them to have indicated their general support and conducted themselves accordingly'.

2550 In any event, and without prejudice to the assessment to be made in paragraphs 2592 to 2782 below as to the merits of the Commission's decision finding that the various undertakings and associations of undertakings referred to in Article 4(1) of the contested decision took part in the agreement setting up the ETF, it is already clear from the analysis in paragraphs 2537 to 2540 above that the formation of the ETF was prompted by a manifestly anti-competitive common intention.

2551 Blue Circle's arguments must therefore be rejected.

2552 Third, CBR, Dyckerhoff, SFIC, Ciments Français, Lafarge, BDZ, Uniland, Italcementi, Holderbank, Aker, EUROC and Blue Circle claim that the Commission's assessment of the economic and legal context in which the ETF was set up was inaccurate or inadequate. The ETF was set up as an act of legitimate self defence against imports from Greece, unlawfully aided by the public authorities. In that regard, Lafarge and Holderbank claim that the Commission's list, in footnote 113 of the contested decision, of State aids received at that time by the Greek cement industry is incomplete.

2553 The SFIC considers that, in such a context, it was not open to the Commission to be satisfied with establishing participation in meetings. It ought also to have shown that measures contrary to Article 85(1) of the Treaty had been adopted, in particular by SFIC, against Greek cement producers. Lafarge maintains that, in accordance with the case-law of the Court (*Suiker Unie and Others* v *Commission*, cited at paragraph 651 above), if government measures seriously distort competition, thus preventing traders from following the normal patterns of competition, Article 85(1) of the Treaty is no longer applicable. Aker and EUROC, after pointing out that one of the objectives of the Treaty is to establish 'a system ensuring that competition in the internal market is not distorted' (Article 3g), consider, on the basis of the judgment in Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215, paragraph 24, where undertakings and Member States perform acts or adopt measures which distort competition, Article 85(1) of the Treaty must not be applied to actions which are intended only to eliminate the consequences of those incompatible measures.

2554 Lafarge, BDZ, Uniland, Italcementi, Holderbank, Aker, EUROC and Blue Circle allege that the Commission did not adopt the measures which were necessary in order to ensure that the distortion of competition caused by the aid unlawfully received by the Greek producers was swiftly eliminated. In support of their arguments, Lafarge, Uniland, Italcementi, Holderbank and Blue Circle cite the judgment in Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and*

Others v *Commission* [1995] ECR II-1971, which annulled a Commission decision of 1 August 1991, contained in Commission communication 92/C 1/03 pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties concerning aid to Heracles General Cement Company in Greece (OJ 1992 C 1, p. 4), a decision which had declared that aid granted by the Hellenic Republic was compatible with the common market.

2555 Those various arguments cannot be accepted.

2556 They seek in essence to claim exemption from the prohibition laid down in Article 85(1) of the Treaty, on account of the particular circumstances surrounding the setting-up of the ETF. The conditions for such an exemption are expressly and exhaustively listed in Article 85(3) of the Treaty. Any grant of such an exemption in this case would, in addition, have required formal notification to the Commission of the agreement setting up the ETF (Case 30/78 *Distillers Company* v *Commission*, cited in paragraph 150 above, paragraphs 19 to 24, and *Van Landewyck and Others* v *Commission*, cited in paragraph 717 above, paragraphs 61 and 62).

2557 Moreover, undertakings cannot justify infringement of the rules on competition by claiming that they were forced into it by the conduct of other traders (see, *inter alia*, Case 16/61 *Modena* v *High Authority* [1962] ECR 289 and *Musique Diffusion Française and Others* v *Commission*, cited in paragraph 439 above, paragraphs 90 and 100).

2558 Nor can the fact that traders have, in the present case, received public aid justify the adoption of private anti-competitive initiatives, even if the aid in question was unlawful. As the Commission correctly points out in recital 53, paragraph 8, while undertakings have the right 'not only to notify the competent authorities (including the Commission itself) of any infringements of national or Community provisions, but also to make a joint approach for this purpose, which necessarily presupposes the ability to hold preparatory discussions amongst themselves', they are not entitled to take the law into their own hands by substituting themselves for the authorities with competence to penalise any infringements of national and/or Community law and by preventing, through measures adopted on their own initiative, the movement of products within the internal market (see *Hilti* v *Commission*, cited in paragraph 2082 above, paragraphs 115 to 119, and *SCK and FNK* v *Commission*, cited in paragraph 485 above, paragraph 194). The case-law relied on by Lafarge and by Aker and EUROC (see paragraph 2553 above) is irrelevant in that regard.

2559 Nor can the laxity allegedly displayed by the Commission in connection with the file on Greek State aid justify unlawful initiatives adopted by the undertakings in order to resolve the 'Greek problem'. Even on the assumption that the Commission has failed to fulfil certain of its

obligations under Article 155 of the EC Treaty (now Article 211 EC), that fact cannot justify any infringements of Community law (see *Landewyck* v *Commission*, cited in paragraph 717 above, paragraph 84, and *Tréfilunion* v *Commission*, cited in paragraph 223 above, paragraph 127). Moreover, it is apparent from the Zurich/Céligny document (contested decision, recital 25, paragraphs 3 to 7; documents 33.126/18772 to 18779) that the route of unlawful private actions was chosen from the beginning without awaiting the outcome of a parallel, lawful route. Accordingly, the alleged uncertainties connected with that latter course of action cannot even be put forward as a reason for recourse to private anti-competitive measures.

2560 Finally, as the Commission rightly observes in recital 53, paragraph 8, of the contested decision, the various documents considered above in paragraphs 2537 to 2540 show that while the ETF's prime responsibility was to study measures intended to prevent cheap imports onto Western European markets of cement from Greece, it had a wider mission, namely, the elimination of any import of cheap cement likely to destabilise European markets. Justification of the ETF merely by reference to the threat of allegedly unlawful imports from Greece cannot therfore be accepted.

2561 In conclusion, the applicants' explanations based on necessity arising out of the threats of imports from Greece cannot render Article 85(1) of the Treaty inapplicable to the agreement referred to in Article 4(1) of the contested decision.

2562 Lafarge alleges that the Commission was guilty of abuse of process and misuse of powers, in that it chose to apply Article 85 of the Treaty without previously or simultaneously applying Article 93 of the Treaty (now Article 88 EC) against the Greek practices.

2563 However, a decision is vitiated by misuse of powers only if it is apparent, on the basis of objective, relevant and consistent evidence, that it was adopted with the exclusive or main purpose of achieving ends other than those stated (see the case-law cited at paragraph 779 above).

2564 In the present case, the Commission explains, in particular at recital 53, paragraph 7, of the contested decision that it judged the agreement setting up the ETF to be contrary to Article 85(1) of the Treaty on the grounds that the objective pursued by that agreement was 'to evaluate measures to eliminate imports to Western Europe [i.e.] imports from Greece'. It having been concluded in the analysis developed at paragraphs 2537 to 2540 above that that assessment was well founded, Lafarge's submission alleging misuse of power or abuse of process by the Commission must therefore be rejected.

2565 Italcementi claims, citing Commission Decision 92/444/EEC of 30 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/33.494 — Scottish Salmon Board) (OJ 1992 L 246, p. 37), that in so far as the European industries tried, through the ETF, to protect themselves against disturbances on the market, when safeguard measures were likely to be implemented by the Community public administration, the Commission ought, as in the case giving rise to that decision, to have confined itself to the finding of infringement of the Treaty, without imposing any penalty on the undertakings concerned, *a fortiori* because such an approach was authorised by the Court (Case 7/82 *GVL* v *Commission* [1983] ECR 483, paragraph 25).

2566 It must, however, be observed that, as is clear from a simple reading of Article 9 of the contested decision (see also recital 65, paragraph 8), the infringements found in Article 4 of the contested decision did not give rise, in themselves, to the imposition of a fine, since only the infringement found in Article 1, concerning participation in the Cembureau agreement, was penalised.

2567 In any event, in comparison with the case which gave rise to Decision 92/444 of 30 July 1992, cited above, there are differences in the facts of the present case which make it impossible for Italcementi to rely on the position adopted by the Commission in that decision. Thus, in the Scottish Salmon Board case dumping had been formally recognised by the Commission, which was not the case in the present instance. Moreover, the setting-up of the ETF, which sought the general elimination of imports of cement into Western Europe, pursued an objective which, unlike that of the Scottish Salmon Board, went far beyond adopting defensive measures against 'disturbances' in respect of which the Community authorities were likely to take action.

2568 For those various reasons, Italcementi's argument must be rejected.

2569 Fourth, CBR, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Italcementi, Holderbank and Blue Circle consider that the setting-up of the ETF cannot be considered to constitute an infringement, since its members constantly displayed their concern to comply with Community law, by agreeing, first, to submit the measures contemplated to legal scrutiny to ensure their lawfulness and, second, to notify the Community authorities thereof. In this connection, they refer to various documents mentioned in recital 25 of the contested decision (record of the meeting held on 28 May 1986 in Rome (contested decision, recital 25, paragraph 1; document 33.126/18771); the Zurich/Céligny document; minutes of the ETF meeting of 21 October 1986 (contested decision, recital 25, paragraphs 34 to 38, in particular paragraph 35; documents 33.126/18895 to 18900, in particular 18895 and 18896); 'notes of the meeting of EEC cement industry representatives in the Hilton Hotel, Brussels, at 9.00 a.m., 6 November 1986', (contested decision, recital 25, paragraphs 39 to 43, in particular paragraph 40; documents 33.126/19007 and 19008)).

2570 The Court finds that the various documents put forward by the applicants do in fact reveal the wish of the members of the ETF to ensure compliance with Community law. However, the fact

remains that the ETF was set up with the objective of considering, with a view to making recommendations to the Head Delegates, dissuasive and persuasive measures intended to eliminate imports (primarily those from Greece) into Western European markets, without awaiting the result of the contacts and legal opinions envisaged. Furthermore, none of the applicants is able to show that the Community authorities were informed of the setting-up of the ETF. In any event, the submissions of the applicants cannot hide the lack of formal notification to the Commission, under Article 85(3) of the Treaty, of the agreement setting up the ETF, the only conceivable lawful method for an agreement whose object was plainly contrary to Article 85(1) of the Treaty (see, to this effect, the case-law cited above at paragraph 2556).

2571 It follows that the applicants' argument must be rejected.

2572 Lafarge, Italcementi and Holderbank assert that, at their meeting on 6 November 1986 with Mr Sutherland, a member of the Commission, the European cement producers informed him of the existence of the ETF and of its goals. According to Italcementi, on that occasion Mr Sutherland approved the ETF's activities.

2573 However, the document relied on in this connection by the applicants ('notes of the meeting with Commissioner Sutherland in Brussels, 6 November 1986 at 11.00'; documents 33.126/19009 and 19010) do not bear out such assertions. At most, it would appear that representatives of the European cement industry made the member of the Commission aware of their common anxieties concerning the Greek situation and their desire to find a solution which would reconcile the various interests in play. That document does not show that the setting-up of the ETF, its objective or the dissuasive and persuasive measures that it had been instructed to consider in order to deal with the threat created by Greek imports were made known to Mr Sutherland or that he approved them. In any event, that line of argument cannot hide the fact that there was no formal notification to the Commission of the agreement setting up the ETF or, therefore, that the agreement was unlawful.

2574 The arguments of Lafarge, Italcementi and Holderbank must, therefore, be rejected.

2575 Fifth, Aalborg claims that there is no reference in any of the documents concerning the ETF to the Cembureau agreement. Blue Circle submits that there is nothing in the contested decision to show that those participating in the ETF had the common objective of implementing the Cembureau agreement.

2576 However, it must be found that those submissions cannot prevail over the documents analysed at paragraphs 2537 to 2540 above, which prove the anti-competitive purpose of the ETF.

2577 Sixth, Aker and EUROC maintain that the Commission found the ETF to be contrary to Article 85 of the Treaty solely on the ground that it came within the framework of the single and continuous agreement relating to the protection of home markets.

2578 That argument must be rejected. In the words of recital 53, paragraph 7, of the contested decision, the Commission concluded that the ETF was contrary to Article 85(1) of the Treaty, not because it was connected to the Cembureau agreement but on the basis of the evidence in the record of the ETF meeting held in Geneva on 19 August 1986, set out in paragraph 2537 above. That information also led the Commission to take the view that the objective of the ETF '[fell] wholly within the framework of the Cembureau agreement on non-transhipment to home markets' (same paragraph). The correctness of the latter assessment will be considered in paragraphs 4050 to 4052 below.

2579 Seventh, Lafarge considers that the Commission misunderstood the relevant geographical market in the case concerning Greece. In its view, that market consisted solely of the European harbour areas and their immediate hinterlands, where there was little vertical integration and large independent purchasers.

2580 It should, however, be pointed out that that claim is contradicted by various documents showing that the relevant geographical market to which the agreement referred to in Article 4(1) of the contested decision relates had the European dimension described by the Commission in recital 11 thereof. Thus it is clear from the record of the meeting held on 28 May 1986 in Rome — first meeting described in recital 25 of the contested decision in relation to the Greek question — that 'all countries [of Western Europe]' were concerned by the decision of the Greek industry to export 2 million surplus tonnes a year, a decision which was at the origin of the 'common front' reaction of the European producers, based on dissuasive and persuasive measures (contested decision, recital 25, paragraph 1; document 33.126/18771). Moreover, the Zurich/Céligny document advocated 'cooperation between the common market/ Western European producers' in order to confront the threat of destabilising imports which was of concern 'to the whole of Europe and not only to the countries under immediate attack'. Last, it has already been pointed out (see paragraphs 2537 and 2538 above) that, in the words of the reports of the ETF meeting held on 19 August 1986 in Geneva (contested decision, recital 25, paragraph 15: annex 15 to the reply by Aker and EUROC to the SO) and the meeting of the Head Delegates and representatives of the ETF on 9 September 1986 in Baden-Baden (contested decision, recital 25, paragraph 24; documents 33.126/18849 to 18862), the objective of the ETF was to examine dissuasive and persuasive measures to eliminate imports of cement into European markets.

2581 In any event, Lafarge's argument cannot prevail against the analysis, in paragraphs 2537 to 2540 above, showing that the Commission was justified in finding that the agreement setting up the ETF was contrary to Article 85(1) of the Treaty.

2582 Lafarge's argument must therefore be rejected.

2583 Eighth, several of the applicants put forward a series of arguments intended to establish that the setting-up of the ETF had not given rise to any effect, measure, action or decision liable to restrict competition in the common market.

2584 Lafarge thus claims that the ETF was a think-tank, with mere power to submit proposals. The setting-up of the ETF was therefore not in itself a measure falling within the scope of Article 85(1) of the Treaty. That think-tank was unable to reach a concurrence of wills, since it lacked any decision-making power — which was reserved exclusively to the Head Delegates — and it could not have caused any restriction of competition, since its powers were confined to the formulation of mere proposals. Lafarge adds that the only two measures proposed by the ETF in order to settle the 'Greek problem' were actions intended to raise the consciousness of national and Community authorities, on the one hand, and the creation of Interciment, on the other. However, none of those measures was unlawful. Article 4(1) of the contested decision, which classifies the setting-up of the ETF as an infringement of Article 85(1) of the Treaty, is, in Lafarge's opinion, ultimately devoid of purpose, because the creation of Interciment, the only measure to which the setting-up of the ETF led, is found to be unlawful in Article 4(2).

2585 Aalborg claims that, with the exception of Interciment, a dormant company, the ETF never went beyond the stage of intentions.

2586 Holderbank points out that none of the reprisal measures discussed within the ETF was actually put into effect.

2587 Aker and EUROC maintain that the ETF was a discussion group, the founder members of which did not in any definite way commit themselves to unlawful collective action. They add that the agreement setting-up the ETF did not have an appreciable effect on competition.

2588 Blue Circle claims that the ETF and its working subgroups were think-tanks and forums for the exchange of information, and never led to collective decisions. Furthermore, the ETF was not convened again after March 1987, because it had never put forward any useful proposals.

2589 However, none of those arguments can refute the findings that follow from the documents referred to in recital 25 of the contested decision, namely that, when the problem of imports of Greek cement arose, various representatives of the European cement industry agreed to set up the ETF, giving it the objective of examining dissuasive and persuasive measures intended to eliminate imports of cement into European markets, primarily those from Greece, and to recommend to the Head Delegates the measures to be adopted for that purpose. Around that initiative, a concurrence of wills therefore emerged, that is to say, an agreement within the meaning of Article 85(1) of the Treaty (see to that effect the case-law cited in paragraph 1010 above), the objective of which the Commission correctly found (see paragraphs 2537 to 2540 above) to be anti-competitive. For the purposes of application of Article 85(1) of the Treaty, it is not necessary to take account of the actual effects of an agreement, once it is plain that the agreement is intended to prevent, restrict or distort competition within the common market (see the case-law cited in paragraph 837 above). Therefore, there is no need to consider the various arguments of the applicants seeking to demonstrate that the setting-up of the ETF did not lead to any effect, result, measure or decision restrictive of competition, and it must be concluded that the Commission was justified in treating the agreement setting up the ETF, referred to in Article 4(1) of the contested decision, as an infringement of Article 85(1) of the Treaty.

2590 Ninth, Aker and EUROC maintain that the agreement setting up the ETF had no appreciable effect on trade between Member States.

2591 It must however be recalled that, by prohibiting agreements the object or effect of which is to restrict competition and which are liable to affect trade between Member States, Article 85(1) of the Treaty does not require it to be established that the agreement or concerted practice in question has in fact appreciably affected that trade, proof of which, in most cases, would be difficult to establish. It requires proof that the agreement or practice was capable of having such an effect. An agreement may thus affect trade between Member States where it is possible to foresee with a sufficient degree of probability, on the basis of a set of factors of law or of fact, that the agreement or practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see, to that effect, the case-law cited in paragraph 1986 above). By its very objective, which was to eliminate imports into Western Europe (see the documents examined in paragraphs 2537 to 2540 above), the agreement setting up the ETF was capable of having an appreciable effect on trade in cement within the common market. Aker and EUROC's argument must therefore be rejected.

C — Participation, in the agreement setting up the ETF, of the applicants named in Article 4(1) of the contested decision

1. Preliminary observations

2592 The following applicants are alleged to have committed the infringement relating to the agreement setting up the ETF: CBR, Cembureau, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Asland, Uniland, Oficemen, Irish Cement, Italcementi, Holderbank, Aker, EUROC, Cementir and Blue Circle.

2593 In recital 53, paragraph 2, of the contested decision, the Commission explains:

'The concurrence of wills on the part of each participant was expressed at various meetings and, in particular, at the meetings of the Head Delegates as well as through participation in the various actions undertaken.'

2594 It is common ground that the appearance of the 'Greek problem' gave rise, in 1986 and 1987, to a series of meetings between representatives of the European cement industry, in particular to those described by the Commission in recital 25 of the contested decision:

— the meeting on 28 May 1986 in Rome (recital 25, paragraph 1);

— working party meetings from 3 to 5 June 1986 in Zurich and then in Céligny (paragraphs 2 to 7);

— meeting on 9 June 1986 in Stockholm (paragraphs 8 to 10);

— eight meetings of the ETF: on 17 June 1986 in London (paragraph 11), on 2 July 1986 in Milan (paragraph 12), on 8 July 1986 in Geneva (paragraph 13), on 19 August 1986 in Geneva (paragraphs 14 to 20), on 9 September 1986 in Baden-Baden (paragraph 21), on 21 October 1986 in Geneva (paragraphs 34 to 38), on 9 January 1987 in Milan (paragraph 44) and on 11 February 1987 in Geneva (paragraphs 45 and 46);

— meeting of the ETF working subgroup on 'stick actions' on 17 March 1987 (paragraph 47);

— meeting of the 'Head Delegates and representatives of the taskforce' on 9 September 1986 in Baden-Baden (paragraphs 22 to 33);

— meeting of 'EEC cement industry representatives' on 6 November 1986 in Brussels (paragraphs 39 to 43);

— a meeting at the end of May 1987, connected with Cembureau's general assembly (paragraph 48).

2595 Except for Holderbank and Blue Circle, which deny only that the setting-up of the ETF was an infringement and, in the alternative, dispute the duration of that infringement — arguments which are analysed at paragraphs 2532 to 2561, 2569 to 2576 and 2583 to 2589 above and at paragraphs 2791 to 2808 below, respectively — all the applicants named in Article 4(1) of the contested decision deny that they participated in the infringement referred to therein.

2. CBR

2596 CBR claims not to have been represented in the ETF and not to have taken part in any of the meetings described in recital 25 of the contested decision. It acknowledges that the Belgian Head Delegate was present at the meeting on 9 June 1986 in Stockholm. At that meeting, the only decision taken was to create Interciment. CBR acknowledges that the Belgian Head Delegate was present at the meeting in Baden-Baden on 9 September 1986, described in recital 25, paragraphs 22 to 32 of the contested decision. None the less, that meeting was purely informative: it enabled the members of the ETF to put forward the conclusions drawn from their work and to prepare the next day's meeting, in Strasbourg, with members of the European Parliament. Moreover, at that meeting it was decided to keep Interciment dormant. CBR admits that the Belgian industry was represented at the meeting held on 6 November 1986. It claims, however, that that meeting merely served as preparation for the meeting arranged the same day with Mr Sutherland, a member of the Commission, concerning the file relating to Greece. It was also confirmed at that meeting that Interciment would remain dormant. CBR submits that it did not take part in any other meeting of the ETF until it was dissolved, nor did it take part in any of its working subgroups.

2597 It must be pointed out that the Belgian Head Delegate present at the meeting in Stockholm on 9 June 1986 was Mr Van Hove, then Chairman of CBR (reply by CBR on 16 June 1998 to the written question of the Court). At that meeting, Mr Van Hove represented the interests of the Belgian industry as a whole, including those of CBR, which he could not disregard, taking account of the major role which he then played in CBR.

2598 According to Holderbank's reply 7b of 7 May 1990 to a request by the Commission for information (contested decision, recital 25, paragraph 10; document 33.126/18755), the participants at the meeting in Stockholm held on 9 June 1986 'decided formally to set up the ETF'. It is, moreover, clear from the record of the meeting held in Rome on 28 May 1986 ('informal meeting concerning the Greek problems, Rome, 28 May 1986'; contested decision, recital 25, paragraph 1; document 33.126/18771) that the participants in that meeting agreed to meet again in Stockholm on 9 June 1986 and that, for the purposes of that Stockholm meeting, they had instructed a restricted working group to meet in Zurich the week after in order to prepare detailed documentation on all aspects concerning possible defensive measures. For its part, Holderbank had suggested preparing, immediately after the Rome meeting, a 'position paper' including several draft persuasive measures. Read in conjunction with the information in the records of the meeting of the ETF held on 19 August 1986 and the meeting of Head Delegates and representatives of the ETF held on 9 September 1986 concerning the objective given to the ETF (see paragraphs 2537 and 2538 above), that information supports the conclusion that, at the meeting held in Stockholm on 9 June 1986, the participants endorsed the Zurich/Céligny document and charged the ETF with considering the dissuasive and persuasive measures recommended by that document.

2599 Furthermore, it is apparent from the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 that 'Mr P. Sytor, Cimenteries CBR, Belgium' took part in that meeting (contested decision, recital 25, paragraph 23; document 33.126/18857). For the other participants, Mr Sytor was the CBR representative.

2600 According to the minutes of the meeting (contested decision, recital 25, paragraphs 22 to 32; documents 33.126/18849 to 18862), at the beginning of the meeting the ETF's objective was recapitulated in the following terms: The ETF was established in order 'to examine possible "dissuasive" and "persuasive" measures to counter the arrival of cheap cement on European markets (primarily against Greek imports into the United Kingdom) and to submit recommendations to the Head Delegates'. The ETF then identified a series of subjects requiring study and investigation: agreement with the Greek industry; retaliatory action on the traditional markets for Greek export; exports to Greece; threats from other countries; cement dealers. As the ETF was overloaded with work and had not proposed any significant solution since it had been set up, the decision was taken to create various working subgroups (subgroup of intermediaries; subgroup 'Greek export markets'; subgroup 'exports to Greece'; subgroup 'exchange of defensive experiences'; subgroup 'threats from other countries'), coordination of which was to be carried out by the ETF and work submitted from time to time to the Head Delegates. Several of the dissuasive and persuasive measures contemplated in the Zurich/Céligny document were then examined. Decisions or positions were adopted on some of these: thus, it was decided to continue negotiations with a view to an agreement intended to absorb Greek excess capacity, the ETF was instructed to submit recommendations to the Head Delegates by the end of September concerning the feasibility of exports to Greece as retaliation, and it was decided to gather further information following Blue Circle's fruitless approaches to

Banque Worms and to Crédit Suisse France with a view to cutting the flow of finance to Bouri, the intermediary of the Greek producers in the United Kingdom. It was also agreed that, while the joint trading company, Interciment, which had been constituted in accordance with the decision adopted in Stockholm on 9 June 1986, would for the time being remain dormant, it should be ready to become operational in order to implement the dissuasive and persuasive measures.

2601 The notes of the meeting held in Brussels on 6 November 1986 mention the presence of Mr Van Hove at that meeting of 'EEC cement industry representatives' (contested decision, recital 25, paragraph 39; document 33.126/19007). At that meeting, Mr Van Hove thus represented the Belgian industry and, in particular, CBR, of which he was at the time the chairman and chief executive officer.

2602 According to the notes of that meeting (contested decision, recital 25, paragraphs 39 to 43; documents 33.126/19007 and 19008), discussions were held, as CBR maintains, concerning the meeting arranged with the member of the Commission responsible for competition policy. However, it was also agreed at that meeting that 'the task force would continue to meet from time to time and review developments' concerning the development of Greek imports into European markets.

2603 In the absence of evidence to the contrary, CBR, by taking part in the meeting in Stockholm on 9 June 1986, the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 and in the meeting held in Brussels on 6 November 1986, approved or at least gave the other participants the impression that it approved the setting-up of the ETF and the evaluation by the ETF of dissuasive and persuasive measures intended to eliminate destabilising imports into Western Europe. The Commission was therefore justified in finding in Article 4(1) of the contested decision that CBR had taken part in the agreement setting up the ETF (see, to that effect, the case-law cited in paragraph 1353 above).

2604 However, since there is nothing in the contested decision to support the conclusion that CBR acceded to the agreement constituting the ETF before it took part in the meeting held in Stockholm on 9 June 1986, Article 4(1) of the contested decision must be annulled in so far as it finds that CBR took part in that agreement before that date.

2605 CBR also disputes various items of evidence on which the Commission relies in recital 24, paragraph 3, of the contested decision in submitting that the coalition intended to tackle the 'Greek threat' was formed within Cembureau.

2606 However, there is no need to consider whether that line of argument is well founded; it suffices to point out that it cannot refute the findings made in paragraphs 2597 to 2602 above regarding CBR's participation in the meeting in Stockholm on 9 June 1986, the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 and the meeting in Brussels on 6 November 1986. It is not therefore of such a nature as to invalidate the conclusion reached in paragraph 2603 above as to the correctness of the Commission's decision finding that CBR took part in the agreement setting up the ETF.

3. Cembureau

2607 Cembureau denies any involvement in the setting-up and running of the ETF. It claims that its two directors, Mr Dutron and Mr Collis, who were present at the meeting in Rome on 28 May 1986 and the meeting held in Zurich on 3 June 1986 respectively, carried out tasks which were merely secretarial (Mr Dutron) or consisted of lawful assistance (Mr Collis), which could not have turned those two meetings into Cembureau meetings. It adds that, as is apparent from reply 7b of 7 May 1990 by Holderbank to a request for information from the Commission (contested decision, recital 25, paragraph 2; document 33.126/18756), Mr Collis was present only at the start of the meeting in Zurich on 3 June 1986. He then left the meeting on account of the conflict of interests on his part created by the raising of the question of public aid granted to Greek producers.

2608 Nevertheless, it should be pointed out that, in the words of the record of the meeting held in Rome on 28 May 1986, drafted by Mr Dutron ('informal meeting on problems raised by Greece, Rome, 28 May 1986'; contested decision, recital 25, paragraph 1; document 33.126/18771), the object of that meeting was to respond, rapidly and in common, to the decision of the Greek cement industry to export cement (two million tonnes per year) into Western Europe, by combining defensive measures ('the stick') and supportive measures ('the carrot'). The participants at that meeting agreed to meet again in Stockholm on 9 June 1986. With a view to that new meeting, a working group of four members was appointed with the task of preparing in Zurich the following week, with the assistance of Mr Collis, 'detailed documentation on all the matters dealing with possible defensive measures'. It was also agreed at that meeting that Holderbank was to prepare a 'position paper' including some proposed supportive measures. Thus, at the meeting in Rome on 28 May 1986 the idea arose of a common response to destabilising imports, primarily those from Greece, by means of dissuasive and persuasive measures. That meeting gave rise to the 'ETF' initiative.

2609 By taking part in the meeting on 28 May 1986, in the person of Mr Dutron, who was responsible for drafting the record of that meeting, and by offering Mr Collis' assistance in order to prepare detailed documentation on feasible dissuasive measures for the purposes of the meeting in Stockholm on 9 June 1986, Cembureau indicated its support, from the very start, for the setting-up of the ETF and for the evaluation by the ETF of dissuasive and persuasive measures.

2610 Cembureau's participation in the agreement setting up the ETF is also shown by the presence, even if of short duration, of Mr Collis at the meeting on 3 June 1986, during which the Zurich/Céligny document, 'the framework document' of the ETF's studies for the evaluation of dissuasive and persuasive measures, began to be finalised. The argument put forward by Cembureau with regard to the alleged reason for Mr Collis' hasty departure from the meeting on 3 June 1986 is not supported by any specific evidence and cannot be accepted. Mr Dutron took part in the entire meeting in Rome on 28 May 1986, without at any time having perceived a real or potential conflict of interests for Cembureau, even though that meeting was exclusively dedicated to the need for a joint reaction to imports of cement from Greece into Western Europe.

2611 In conclusion, the Commission was entitled to find in Article 4(1) of the contested decision that Cembureau participated in the agreement setting up the ETF as from 28 May 1986.

2612 Cembureau then challenges the various pieces of evidence put forward by the Commission in recital 24, paragraph 3, of the contested decision to show that the ETF was formed within Cembureau.

2613 There is, however, no need to consider whether those criticisms are well founded, becasue they cannot refute the findings, set out above in paragraphs 2608 to 2610, that Cembureau participated in the meetings in Rome on 28 May 1986 and in Zurich on 3 June 1986. Accordingly, they are not of such a nature as to affect the conclusion reached in paragraph 2611 above as to the correctness of the Commission's decision finding that Cembureau took part in the agreement setting up the ETF.

4. Dyckerhoff

2614 Dyckerhoff points out that, of all the meetings described in recital 25 of the contested decision, it took part only in the meetings in Rome on 28 May 1986, in Stockholm on 9 June 1986, of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, and of the representatives of the European cement industry in Brussels on 6 November 1986.

2615 It maintains that it participated in those four meetings for the sole purpose of making national and Community authorities aware of the problems created by State aid granted to Greek cement producers. That corresponded with one of the two objectives pursued by the ETF. It claims to have shown its lack of interest in and lack of support for the unlawful activities of the ETF by not appointing any representative within the ETF, by ceasing to take part in any meeting after having had the interview with Mr Sutherland, a member of the Commission, in Brussels on

6 November 1986, and by not taking part in any dissuasive measure. In its view, those various aspects of its conduct clearly showed the other producers concerned that its sole interest lay in making the Commission take action in respect of breaches of Community law committed by the Hellenic Republic.

2616 Finally, Dyckerhoff claims that, as is shown by the documents relied on by the Commission in recital 25 of the contested decision, all the discussions in which it took part were subject to the condition that they should be compatible with the provisions of the Treaty relating to competition. It therefore assumed that the decisions and measures adopted at those meetings did not infringe Community law.

2617 That line of argument cannot be accepted.

2618 As it acknowledges, Dyckerhoff took part in the meetings held in Rome on 28 May 1986 and in Stockholm on 9 June 1986, in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 and in the meeting held in Brussels on 6 November 1986.

2619 In the light of the facts set out in paragraphs 2598, 2600, 2602 and 2608 above, and in the absence of any evidence submitted by Dyckerhoff to show that, at those meetings, it openly distanced itself from the manifestly anti-competitive objective which was apparent upon the setting-up of the ETF, or had clearly informed the other participants that it was taking part in those meetings with different objects in mind, namely, solely for the purpose of preparing actions to make national and Community authorities aware of the 'Greek problem', it must be found that Dyckerhoff subscribed to, or at least gave the other participants the impression that it subscribed to, the setting-up of the ETF and its anti-competitive objective (see, to this effect, the case-law cited in paragraph 1353 above).

2620 Having regard to the findings in paragraphs 2507 to 2511 above, there is no need to assess at this juncture whether Dyckerhoff's argument denying that it took part in dissuasive measures against Greek producers is well founded, and it must therefore be concluded that the Commission was fully entitled to hold that Dyckerhoff took part from 28 May 1986 in the agreement setting up the ETF.

5. SFIC

2621 SFIC maintains that the evidence put forward by the Commission does not prove that it was involved in the agreement setting up the ETF. There is no evidence of any decision of an

association of undertakings, and the Commission has not demonstrated how the conduct of the persons carrying out duties within it could have had anti-competitive object.

2622 It should be pointed out that, before a trade association can be considered to have participated in an agreement contrary to Article 85(1) of the Treaty alongside the undertakings which are its members, the Commission must establish conduct by the association, in connection with the infringement, that is separate from that of its members (see to that effect, the case-law cited in paragraph 1325 above).

2623 In the present case, it is common ground that Mr Laplace took part in the meetings in Rome on 28 May 1986, in Stockholm on 9 June 1986 and in Brussels on 6 November 1986 (contested decision, recital 25, paragraph 9) and that Mr Kasriel took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 23; document 33.126/18857). Mr Laplace, the chairman of Ciments Français (contested decision, recital 25, paragraph 9), was also chairman of the SFIC (see documents 33.126/14834, 14846 and 14855, cited at recital 29, paragraph 4, of the contested decision), and Mr Kasriel, a Lafarge employee (contested decision, recital 25, paragraph 23; document 33.126/18857), was also a member of the SFIC bureau (see documents 33.126/14834, 14846 and 14855, referred to above).

2624 Furthermore, as the Commission points out in recital 29, paragraph 4, of the contested decision, 'item 3 of the agenda of the meetings of the SFIC bureau on 8 July 1986, 9 September 1986 and 7 October 1986 deals with the problem of exports of cement from Greece' and 'the members of the bureau present [at those meetings] always included Mr Laplace, chairman and, at one meeting [that of 7 October 1986], Mr Kasriel ...'.

2625 It is thus apparent that Mr Laplace and Mr Kasriel were present, at the very least as representatives of the SFIC, at the four meetings mentioned in paragraph 2623 above, at which on each occasion a concurrence of wills was expressed concerning the setting-up of the ETF (see paragraphs 2598, 2600, 2602 and 2608 above), and that the SFIC, by relaying to its market the discussions held at those meetings on the question of exports from Greece, adopted, in connection with the infringement found to exist by Article 4(1) of the contested decision, an individual course of conduct, separate from that of the French undertakings referred to in that provision. The Commission was therefore fully entitled to consider that as from 28 May 1986 the SFIC participated in the agreement setting up the ETF, as found in Article 4(1) of the contested decision.

6. Ciments Français

2626 Ciments Français observes that Mr Laplace, its chairman, took part in only three of the fourteen meetings at issue described in recital 25 of the contested decision, namely, that held in Rome on 28 May 1986, that held in Stockholm on 9 June 1986 and that held in Brussels on 6 November 1986. It claims that Mr Laplace took part in those meetings only as chairman of the SFIC and as member of the CLC, and solely in connection with actions taken to make national and Community authorities aware of the 'Greek problem'. It states that neither it nor Mr Laplace ever took part in meetings with the ETF, that it did not participate in the running of Interciment or in the latter's executive committee, that it was not involved in purchases of cement and clinker from Greek producers and that it did not have the facilities necessary to take part in the alleged dissuasive and persuasive measures. It adds that, on account of its limited export and trading activity, and the fact that it has no factory by the sea, it had no real interest in committing itself.

2627 It considers that, as it was not represented at the meetings of the ETF and did not take part in any specific measure, it cannot be regarded as a party to the alleged agreement concerning unfair imports from Greece. Furthermore, it states that the function of the ETF was to prepare the decisions of the Head Delegates in the Greek matter. Since the Head Delegates were not bound by the conclusions of the ETF, they could not be held responsible for the work done by the ETF.

2628 It must, however, be pointed out that, according to the record of the meeting held in Rome on 28 May 1986 (contested decision, recital 25, paragraph 1; document 33.126/18771), a representative of 'Ciments Français' was present at that meeting. According to that same record, the representatives of the 'companies' who had met in Rome decided to meet again in Stockholm on 9 June 1986. By letter of 22 September 1986 (recital 25, paragraph 33 of the contested decision; document 33.126/19022), Holderbank requested Lafarge to give 'Ciments Français' a copy of the minutes of the meeting of Head Delegates and members of the ETF held in Baden-Baden on 9 September 1986.

2629 Whether or not the meetings in Rome on 28 May 1986, Stockholm on 9 June 1986 and Brussels on 6 November 1986 were official meetings of the Head Delegates of Cembureau, it is therefore apparent that Mr Laplace was present at those meetings in his capacity as high representative of Ciments Français as well as of SFIC.

2630 In that connection, the Commission correctly states in the contested decision (recital 53, paragraph 13):

'Even if Mr Laplace did, like other representatives, participate [in those meetings] in his capacity as President of an Association or chairman of a committee, he could not, in attending

the meetings, disregard the fact that he was chairman of Ciments Français ... His presence therefore ensured that SFIC and the Committee, together with the company of which he was chairman, had a role within the Task Force.'

2631 In the light of the facts set out in paragraphs 2598, 2602 and 2608 above, and in the absence of any evidence adduced by Ciments Français showing that, at those meetings, it informed the other participants that it was taking part in the meetings solely in connection with actions to make the public authorities aware of the 'Greek problem', it must be found that Ciments Français approved or at least gave the other participants to understand, that it approved the setting-up of the ETF and its anti-competitive object (see, to that effect, the case-law cited in paragraph 1353 above).

2632 Having regard to the findings in paragraphs 2507 to 2511 above, there is no need to assess at this juncture whether Ciments Français' argument denying that it took part in the management of Interciment and in dissuasive and persuasive measures against Greek producers is well founded, and it must therefore be concluded that the Commission was fully entitled to hold that Ciments Français took part from 28 May 1986 in the agreement setting up the ETF.

7. Heidelberger

2633 Heidelberger claims first of all not to have been a member of the ETF. It is alleged to have taken part in only one of the meetings described in recital 25 of the contested decision in relation to the ETF, namely that held in Rome on 28 May 1986. That meeting took place before the ETF was set up. Moreover, Heidelberger was not even invited to take part. Mr Brenke, who was in Rome for other reasons, was spontaneously invited to participate. None the less, his participation was not active.

2634 In its view, it is apparent from the record of the meeting that the purpose of the meeting was simply to consider in a general manner possible measures against cheap imports from Greece. The meeting merely led to the setting-up of a limited working group, composed of the producers affected by those imports (United Kingdom, Spain, France and Italy). That group was instructed to prepare documentation on the legal aspects of any defensive measures. At the meeting, only lawful responses were considered. No unlawful action or measure was either contemplated or adopted.

2635 Heidelberger states that it did not participate in the Zurich/Céligny meeting of the working group from 3 to 5 June 1986, in the course of which no measure was in any event adopted. It neither approved nor supported the setting-up of the ETF. It had distanced itself from the measures contemplated against Greek producers at a time when it could not yet foresee the possibility of infringements of the rules on competition. Nor did it play any part in the

application of the measures adopted in connection with the ETF. It acknowledges that the name of Mr Brenke is mentioned in the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 amongst the members of the subgroup 'exchange of defensive experiences', created at that meeting (contested decision, recital 25, paragraph 24; document 33.126/18862). It claims, however, that it was only through the SO that it was informed of the existence of that subgroup and that it never took part in its meetings. Nor did it take part in the meetings of the Head Delegates at which ETF proposals were adopted.

2636 Heidelberger observes that the Commission concludes that there existed a common objective in connection with the ETF, on the basis of the record of the meeting of the ETF held in Geneva on 19 August 1986 (contested decision, recital 25, paragraph 15). It was not present at that meeting. It therefore did not participate in establishing the common objective in question.

2637 Furthermore, it claims to have had no interest in participating in the ETF, inasmuch as it was not affected by imports from Greece on its market in the south of Germany.

2638 That argument cannot be accepted.

2639 Heidelberger acknowledges that it was present at the meeting in Rome on 28 May 1986. At that meeting, it was agreed to respond rapidly and in common, through dissuasive and persuasive measures, to the decision of the Greek industry to export cement to Western Europe, a decision which threatened the stability of all European markets (see paragraph 2608 above). The 'ETF' initiative was thus taken at that meeting.

2640 Since Heidelberger has not adduced any evidence to show that it openly distanced itself at that meeting from the — manifestly — anti-competitive objective pursued at it, it must be held that Heidelberger indicated, from the start, its support for the setting-up of the ETF and its anti-competitive object or at least gave the other participants to believe that it supported that unlawful initiative (see, to that effect, the case-law cited in paragraph 1353 above).

2641 The fact that, on the one hand, the name of Mr Brenke of Heidelberger was put forward, even if unknown to him, at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 as a member of the ETF subgroup 'exchange of defensive experiences' and that, on the other hand, Holderbank asked Dyckerhoff to send a copy of the minutes of that meeting of 9 September 1986 to Mr Schuhmacher, the then chairman of Heidelberger (contested decision, recital 25, paragraph 33; document 33.126/19020), shows

moreover that, contrary to what Heidelberger would now have the Court believe, it never gave the other participants the impression that it had no interest in the problem of imports of Greek cement into European markets.

2642 In those circumstances, it is immaterial that, in order to illustrate the unlawful objective pursued by the setting-up of the ETF, the Commission relied, *inter alia* on a document which related to a meeting subsequent to that held in Rome on 28 May 1986, namely the ETF meeting held in Geneva on 19 August 1986, at which Heidelberger was not present.

2643 There being no need, in the light of what has been found in paragraphs 2507 to 2511, to evaluate at this juncture whether Heidelberger's argument denying any participation in the application of the measures adopted in connection with the ETF is well founded, it must therefore be concluded that the Commission was fully entitled to consider that, as from 28 May 1986, Heidelberger participated in the agreement setting up the ETF.

2644 Next, Heidelberger challenges the relevance of the evidence relied on by the Commission in recital 24, paragraph 3, of the contested decision in order to establish a structural link between Cembureau and the ETF. It adds that the existence of such a link is belied by the fact that Cembureau is the European cement industry organisation, of which the association of Greek cement producers is a part and therefore, indirectly, the Greek producers themselves. It must therefore be be ruled out that Cembureau would have adopted measures against the Greek industry. In consequence, Heidelberger cannot be held indirectly responsible for the ETF through Cembureau.

2645 There being no need to examine whether that argument is well founded, it is sufficient to point out that it cannot override the finding in paragraph 2639 above concerning Heidelberger's participation in the meeting in Rome on 28 May 1986. Therefore, that argument does not invalidate the conclusion set out in paragraph 2643 above with regard to the validity of the Commission's finding that Heidelberger took part in the agreement setting up the ETF.

2646 Finally, Heidelberger points out that the Spanish undertaking Hornos Ibéricos, found by the Commission, in recital 25 of the contested decision, to have participated in various meetings of or relating to the ETF, has not been charged with the infringement referred to in Article 4(1).

2647 That argument cannot be accepted. The fact that the infringement mentioned in Article 4(1) of the contested decision was not found to have been committed by Hornos Ibéricos cannot make it in any way possible to disregard that infringement found to have been committed by Heidelberger, provided that it has been properly established (*Woodpulp II*, cited in paragraph 106 above, paragraph 146). The foregoing grounds have enabled the Court to find that in the contested decision the Commission was fully entitled to conclude that Heidelberger participated in the agreement setting up the ETF.

8. Lafarge

2648 Lafarge claims that the Commission has not proved that there is a link between the ETF and Cembureau. It challenges the evidence cited in recital 24, paragraph 3, and recital 53, paragraph 1, of the contested decision. The fact that the ETF was created after Cembureau cannot reveal any link between those two organisations. In its view, the organisation of a general assembly of Cembureau and a meeting of the ETF in Stockholm on the same day, namely 9 June 1986, can be explained on practical grounds. According to Lafarge, it does not reveal that there is any link between the two cases. The Cembureau documents in fact establish the total independence of those two bodies, since there is in them no allusion to the ETF in 1986 or 1987. Finally, it claims that the ETF could never have pursued its objective within Cembureau, the role of which is more general, and of which Greek cement producers are members.

2649 There is no need to consider whether that line of argument is well founded, as it cannot refute the findings made by the Commission in recital 25 of the contested decision, which Lafarge does not challenge, namely, that Lafarge took part in the following meetings:

— meeting in Rome on 28 May 1986 (contested decision, recital 25, paragraph 1; document 33.126/18771);

— meetings of the Zurich/Céligny working group on 3 and 5 June 1986 (contested decision, recital 25, paragraph 2; document 33.126/18756);

— meeting in Stockholm on 9 June 1986 (contested decision, recital 25, paragraph 9);

— meeting of the ETF in London on 17 June 1986 (contested decision, recital 25, paragraph 11; document 33.126/18756);

— meeting of the ETF in Milan on 2 July 1986 (contested decision, recital 25, paragraph 12; documents 33.126/18756, 18757 and 18793);

— meeting of the ETF in Geneva on 8 July 1986 (contested decision, recital 25, paragraph 13; documents 33.126/18757 and 18795);

— meeting of the ETF in Geneva on 19 August 1986 (contested decision, recital 25, paragraph 14; documents 33.126/18757 and 18758, and Annex 15 to the reply to the SO by Aker and EUROC);

— meeting of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 21; document 33.126/18848);

— meeting of the Head Delegates and representatives of the ETF at Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 23; document 33.126/18857);

— meeting of the ETF in Geneva on 21 October 1986 (contested decision, recital 25, paragraph 34; documents 33.126/18758, 18895, 18896 and 18899);

— meeting of the ETF on 9 January 1987 (contested decision, recital 25, paragraph 44; document 33.126/18759);

— meeting of the ETF in Geneva on 11 February 1987 (contested decision, recital 25, paragraph 45; documents 33.126/18760 and 18929, 18930, 18934 and 18936);

— meeting of the subgroup 'stick actions' of 17 March 1987 (contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4861).

2650 Having regard to what has been set out in paragraphs 2598, 2600 and 2608 above and in view of Lafarge's participation in the meetings in Rome on 28 May 1986 and in Stockholm on 9 June 1986 and the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, together with, on the one hand, its contribution to the finalisation of the Zurich/Céligny document and, on the other, its capacity as a direct member of the ETF, the Commission was fully entitled to consider that Lafarge had, from the start, approved the setting-up of the ETF and its anti-competitive objective. The Commission was thus correct in finding, in Article 4(1) of the contested decision, that Lafarge had participated in the agreement setting up the ETF as from 28 May 1986.

9. Aalborg

2651 Aalborg claims not to have been informed in the SO of the importance, in regard to it, which the Commission attached to the meeting in Rome held on 28 May 1986, a meeting in which it did not participate. Moreover, it contends that the Commission infringed Article 190 of the Treaty, in that it did not explain in the contested decision how Aalborg could be held to be responsible for the setting-up of the ETF at that meeting, to which it was not invited and of which it was never aware.

2652 Aalborg asserts that the ETF was set up by eight European cement producers at the meeting in Stockholm on 9 June 1986, in which it did not participate.

2653 Aalborg submits that its participation in the meeting held in Baden-Baden on 9 September 1986 formed a part of the lobbying efforts of the European cement industry vis-à-vis the Community institutions, in order that appropriate measures should be adopted to end State aid unlawfully received by the Greek industry. For Aalborg, the sole purpose of that meeting was therefore to prepare for the next day's meeting with members of the European Parliament. The applicant claims to have received a fax on 3 September 1986 informing it that the ETF was to report on its activities at that meeting in Baden-Baden. It supposed that report could be useful in lobbying the Community institutions. In any event, that point was entered into the agenda after the agenda had already been drawn up. It was, therefore, purely as a result of a coincidence that Aalborg was informed of the activities of the ETF. In the meeting, the members of the ETF made known their thoughts as to feasible activities. According to Aalborg, none of them was presented as being appropriate, or as having been adopted or implemented. Nor was any decision prepared or adopted at Baden-Baden in which Aalborg could have regarded itself as a participant. In the light of information communicated at that meeting, Aalborg also understood that no activity contemplated by the ETF was to be implemented without previous legal advice.

2654 The applicant acknowledges having participated in a meeting in Brussels on 5 November 1986, with a view to the next day's meeting with Mr Sutherland, a member of the Commission. It did not take part in any other meeting connected with the ETF.

2655 It must, however, be pointed out that Aalborg admits having participated in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986.

2656 Having regard to the matters set out in paragraph 2600 above, and in the absence of any evidence put forward by Aalborg to demonstrate that it had distanced itself, for example, on being informed at the beginning of the meeting about the anti-competitive purpose assigned to the ETF, from the unlawful content of the discussions which were to be held at that meeting, or that it had indicated to the other participants that it intended to attend it with different objects in mind, namely to prepare for the next day's meeting with members of the European

Parliament, it must be held that Aalborg demonstrated its support for the creation of the ETF and its anti-competitive objective or at least gave the other participants to believe that it supported such a measure. The Commission was therefore fully entitled to find in Article 4(1) of the contested decision that Aalborg had taken part in the agreement setting up the ETF (see, to that effect, the case-law cited in paragraph 1353 above).

2657 Nevertheless, the contested decision does not contain any evidence supporting the conclusion that Aalborg had taken part in the agreement constituting the ETF before it participated in the Baden-Baden meeting. Even if it were well founded, the fact on which the Commission relies in its pleadings, namely that the ETF was conceived and brought into being in the framework of Cembureau, of which Aalborg was a direct member, could not entitle it to take the view that Aalborg had acceded to the agreement setting up the ETF with effect from 28 May 1986, the date of the Rome meeting referred to in recital 25, paragraph 1, of the contested decision, in which Cembureau took part. Article 4(1) of the decision must therefore be annulled, in so far as it finds that Aalborg participated in that agreement before 9 September 1986.

2658 In those circumstances, the Court need not consider Aalborg's arguments alleging lack of precision in the SO and failure to state reasons for the contested decision in so far as concerns the Commission's finding that Aalborg participated in the infringement referred to in Article 4(1), as from 28 May 1986, the date of the Rome meeting.

2659 Aalborg also denies that there was ever any link between Cembureau and the ETF. It states that most of the documents referring to the ETF use the expression 'group of eight' to designate the ETF. It also denies that the Head Delegates called upon to ratify the ETF's proposals were the official Head Delegates of Cembureau.

2660 However, there is no need to consider whether that line of argument is well founded. It suffices to point out that it cannot alter the finding in paragraph 2655 above that Aalborg participated in the meeting held in Baden-Baden on 9 September 1986, as described in recital 25, paragraphs 22 to 32, of the contested decision. Accordingly, that argument is not of such a nature as to undermine the conclusion reached in paragraph 2656 above as to the validity of the Commission's finding that Aalborg participated in the agreement setting up the ETF.

10. BDZ

2661 BDZ states that, according to the contested decision, the exports from Greece which triggered the measures alleged by the Commission concern Germany only incidentally. Moreover, BDZ

was not represented in the ETF, which involved producers. Furthermore, none of the documents cited by the Commission in recital 25 of the contested decision comes from its files.

2662 It argues that the meetings in Rome on 28 May 1986 and in Zurich/Céligny from 3 to 5 June 1986 were meetings of representatives of undertakings, in which it was inconceivable that an association should take part. Nor did the BDZ take part in the alleged meeting of Head Delegates in Stockholm on 9 June 1986. In addition, Dyckerhoff had informed the Commission that, at that meeting, its representative had not acted in the capacity of Head Delegate of BDZ. While Mr Steinbach, the managing director of BDZ, was in Baden-Baden on 9 September 1986, he did not, on the other hand, participate either at the meeting of the ETF or at the meeting of the Head Delegates of Cembureau, organised in the same place on the same date. BDZ asserts that he merely took part in a meeting organised on the fringes of the meeting of the Head Delegates intended to prepare for the meeting the next day in Strasbourg with members of the European Parliament in order to obtain their support for complaints against State aid received by certain Greek cement producers. The minutes of the meeting of Head Delegates in Baden-Baden on 9 September 1986, which were never sent to BDZ, are therefore wrong in so far as they refer to the presence of Mr Steinbach. Mr Steinbach also took part in a meeting on 17 March 1987, again in connection with lawful actions intended to raise the awareness of the Community authorities concerning the 'Greek problem'. BDZ's activities connected with that question were therefore lawful and legitimate, having regard to the *AITEC* v *Commission* judgment, referred to in paragraph 2554 above.

2663 Last, BDZ submits that none of the documents quoted by the Commission with regard to the ETF demonstrates that the BDZ informed its members of unlawful measures adopted in connection with the ETF.

2664 It must be noted that the BDZ acknowledged at the hearing that a member of Dyckerhoff's staff took part in the meeting in Stockholm on 9 June 1986.

2665 That meeting is described as a 'Head Delegates meeting' in the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Moreover, it is not disputed that that meeting was held on the fringes of annual general assembly of Cembureau (contested decision, recital 25, paragraph 8).

2666 In the light of those facts, it must be concluded that participants in the Stockholm meeting who represented an undertaking which was a member of the trade association had been given, if not the official title of Head Delegate within the meaning used in Cembureau, at the very least power to represent the trade association in question. The Commission was therefore justified in considering that the German participant at that meeting had taken part in it also in his capacity as representative of the BDZ, of which Dyckerhoff was a member.

2667 Moreover, although Mr Steinbach, then general manager of the BDZ, was able to participate at Baden-Baden on 9 September 1986 in a meeting to prepare for the political encounter the next day with members of the European Parliament in Strasbourg, the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 nevertheless mention, among the participants, 'Dr B. Steinbach, Bdv Deutschen Zementindustrie, W. Germany' and that, by letter of 22 September 1986, Holderbank asked Mr Lose, of Dyckerhoff, who the abovementioned minutes state was present at the meeting in question together with Mr Steinbach, to send a copy of those minutes to Mr Steinbach (contested decision, recital 25, paragraph 33; document 33.126/19020).

2668 In the light of those factors, and in the absence of any evidence adduced by BDZ to support its argument that the reference to Mr Steinbach's participation in the meeting of the Head Delegates and members of the ETF in Baden-Baden on 9 September 1986 was an error, it must be concluded that the Commission was justified in considering that BDZ had, in the person of Mr Steinbach, taken part in that meeting.

2669 Having regard to what has been set out in paragraphs 2598 and 2600 above, and in the absence of evidence from BDZ to show that at the meetings referred to in paragraphs 2664 to 2668 above it distanced itself from the agreement setting up the ETF, it must be held that the BDZ indicated its support for that agreement or at least gave the other participants to believe that it supported it (see, to that effect, the case-law cited in paragraph 1353 above).

2670 Further confirmation of BDZ's accession to the agreement setting up the ETF is to be found in Mr Steinbach's participation in the meeting of the subgroup on 'stick actions' on 17 March 1987 (see record of that meeting drawn up by Mr Marichal (Lafarge), entitled 'Menaces d'invasion chez les cimentiers européens: le point sur la situation au 15 mars 1987 (the threat of European cement producers being overrun: overview of the situation as at 15 March 1987)'; contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4861), a subgroup which it had been decided at a meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986 to set up in order to assist the ETF, which could not on its own investigate the various dissuasive and persuasive measures contemplated in order to counter the arrival of cheap cement on European markets (contested decision, recital 25, paragraph 24; documents 33.126/18858 and 18862).

2671 In those circumstances, it is immaterial that none of the documents referred to in the contested decision with regard to the ETF was discovered at the BDZ. Similarly, it is immaterial that none of the documents demonstrates that BDZ informed its members of the unlawful measures adopted in connection with the ETF.

2672 In conclusion, the Commission was fully entitled to consider, in Article 4(1) of the contested decision, that the BDZ had taken part in the agreement setting up the ETF.

2673 However, since the contested decision does not contain any evidence that the BDZ had acceded to the agreement setting up the ETF before the meeting in Stockholm on 9 June 1986, Article 4(1) must be annulled in so far as it finds that BDZ participated in that agreement before that date.

11. Unicem

2674 Unicem claims to have participated only in the meeting of the subgroup 'stick actions' of 17 March 1987. In its view, the fact that it took part in that meeting alone, during which it played only a marginal role, means that it cannot be held responsible for the setting-up and activities of the ETF. In any event, the object of that meeting, the agenda of which was not sent to Unicem, was lawful, as is evidenced by the minutes drawn up by Mr Marichal of Lafarge. The cement producers who had attended the ETF meeting on 11 February 1987, where the subject of relations between Italian producers and the Ferruzzi/Calcestruzzi group was broached, merely profited from the presence of Unicem to ask it to update the position. Unicem merely informed them that the contract in question had not yet been concluded and that the Italian cement producers were contemplating relying on the provisions of Council Regulation (EEC) No 288/82 of 5 February 1982 on common rules for imports (OJ 1982 L 35, p. 1). Such information cannot be considered to constitute an infringement of Article 85(1) of the Treaty.

2675 Unicem considers that its membership of Cembureau does not make it responsible for the setting-up and activities of the ETF either, in so far as the various committees meeting within the ETF were not Cembureau bodies. The participants in the meetings in Rome on 28 May 1986 and in Zurich/Céligny from 3 to 5 June 1986 were, essentially, major undertakings which represented only their own special interests and whose unlawful conduct could not, therefore, be attributed to Unicem. The alleged meetings of Head Delegates organised within the ETF were outside the institutional role of the official Head Delegates of Cembureau.

2676 Unicem claims to have been unaware that a meeting was being held in Rome on 28 May 1986 and never to have known what had been prepared and decided at that meeting, or at those of Zurich/Céligny and the alleged meetings of Head Delegates described in recital 25 of the contested decision. Accordingly, the Zurich/Céligny document, which recommended solidarity between the cement producers, had been finalised at a meeting at which Unicem was not present, with a view to another meeting, that in Stockholm on 9 June 1986 at which it was not present either. In those circumstances, that document cannot constitute evidence against it.

2677 Last, Unicem claims not to have participated in any of the actions undertaken in connection with the ETF.

2678 It must, however, be pointed out that, according to the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, it was agreed that Mr Albert, of Unicem, was to be a member of two of the five working subgroups, namely the subgroup 'exchange of defensive experiences' and the subgroup 'threats from other countries', set up at that meeting in order to assist the ETF in its anti-competitive task.

2679 Mr Albert then took part in the meeting of the subgroup on 'stick actions' on 17 March 1987, the record of which states (recital 25, paragraph 47 of the contested decision; document 33.126/4860):

'[Mr Albert] summarised what had already been said at the task force meetings (see note JM of 12 February 1987), pointing out however that the agreement with Ferruzzi was not yet finalised.'

2680 According to the 'note JM of 12 February 1987' referred to in that extract from the record (contested decision, recital 25, paragraph 46; documents 33.126/4911 to 4913, particularly 4912), concerning the meeting of the ETF in Geneva on 11 February 1987, the Italian participant had claimed, in particular, at that meeting that 'the agreement between the cement producers and Ferruzzi has been signed, thus avoiding the threat of imports by the latter group of 1.5 [million tonnes] through 10 ports, which would have been disastrous for prices'.

2681 In the light of the various pieces of information, the Commission was justified in considering that Unicem had agreed to the setting-up of the ETF and to the anti-competitive purpose entrusted to it, because of the interests of Italy, 'where small associations formed by consumers and small import/export companies had taken the step of importing Greek cement' (contested decision, recital 24, paragraph 1).

2682 In the light of what is stated in paragraphs 2507 to 2511 above, there is no need to assess at this point whether Unicem's argument denying all involvement in the actions undertaken in connection with the ETF is well founded and it must be concluded that the Commission was justified in considering that Unicem participated in the agreement setting up the ETF.

2683 However, the contested decision contains no evidence to support the conclusion that Unicem acceded to that agreement before 9 September 1986, the date of the meeting of the Head Delegates and representatives of the ETF in Baden-Baden at which Mr Albert was appointed member of two working subgroups of the ETF, an appointment which he had accepted, at least as regards the subgroup 'exchange of defensive experiences', as is shown by his participation in the meeting of the subgroup 'stick actions' on 17 March 1987. Even if it were well founded, the fact on which the Commission relies in its pleadings, namely that the agreement relating to the

setting-up of the ETF was conceived and brought into being in the framework of Cembureau, of which Unicem was a direct member, could not hide the lack of evidence that Unicem itself had acceded to the agreement before 9 September 1986. The Court must also reject the Commission's argument that Unicem was represented at earlier meetings of, or relating to, the ETF by Italcementi, the Italian Head Delegate, which took part in those meetings: first, Unicem had its own Head Delegate (see paragraph 1409 above) and, second, the Commission cannot adduce any evidence to show that Unicem mandated Italcementi to represent it at those meetings. Article 4(1) of the contested decision must therefore be annulled in so far as it finds that Unicem took part in that agreement before 9 September 1986.

12. Asland

2684 Asland maintains that it took no part either in setting up the ETF or in the actions allegedly decided within the ETF. The only evidence of its involvement in the ETF, advanced by the Commission in the contested decision, is its participation in the meeting in Rome on 28 May 1986. However, Asland did not infringe Article 85(1) of the Treaty merely by being present at that meeting, since it was nothing more than a preliminary meeting for information and general consideration of the actual problems likely to be of interest to all European producers, in this case, the artificial support granted by the Hellenic Republic to its cement producers.

2685 Asland claims that, contrary to the Commission's submissions in recital 25, paragraph 9, of the contested decision, it was not represented at the meeting of Head Delegates in Stockholm on 9 June 1986. Furthermore, the Commission did not put forward in the SO, at the hearing or in the contested decision, any evidence of its presence at that meeting. Asland maintains that the minutes of its board meeting of 26 June 1986 (document 33.322/1562), which the Commission now cites in its defence in order to try to establish Asland's presence at the meeting in Stockholm, are inadmissible, as they were not referred to by the Commission either during the administrative procedure or in the contested decision. In any event, they do not prove that Asland took part in the ETF. Asland also challenges the various arguments used by the Commission in the contested decision in attempting to establish its presence at the Stockholm meeting.

2686 Last, Asland observes that no member of its staff appears on the list of persons who were members of the various sub committees of the ETF and that two of the Spaniards who did appear on that list belong to undertakings which were not fined in the contested decision.

2687 The Court points out that Asland acknowledges having participated in the meeting in Rome on 28 May 1986.

2688 As has been stated (see paragraph 2608 above), the object of that meeting was to settle a common response to the Greek industry's decision to export cement to Western Europe. The ETF was thus conceived at that meeting.

2689 Consequently, there is no need rule on whether Asland's arguments denying its participation in the meeting in Stockholm on 9 June 1986 are well founded or, in the light of what has been stated in paragraphs 2507 to 2511, to examine the relevance of its arguments denying any involvement in the actions decided upon in connection with the ETF, and it must be held that, in the absence of any evidence showing that Asland indictated otherwise at the meeting of 28 May 1986 in Rome, Asland expressed its support, from the beginning, for the setting-up of the ETF and its anti-competitive object, or at least gave the other applicants the impression that it supported such a measure.

2690 The Commission was therefore fully entitled to find in Article 4(1) of the contested decision that Asland had participated in the agreement setting up the ETF as from 28 May 1986 (see, to that effect, the case-law cited in paragraph 1353 above).

2691 The fact that some undertakings, whose members appear in the lists of the working subgroups of the ETF set up at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, were not found by the Commission, in Article 4(1) of the contested decision, to have committed any infringement cannot make it possible to disregard the infringement which Asland is found to have committed, provided that it has been properly established (see, to this effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 146). For the foregoing reasons, the Court concludes that the Commission was fully entitled to find in the contested decision that Asland participated in the agreement setting up the ETF.

13. Uniland

2692 Uniland denies having taken part in the meetings of Head Delegates of the ETF. It claims that, as it told the Commission during the investigation, Mr Rumeu was present in his personal capacity, as an expert and not as representative of Uniland, at the meetings in Baden-Baden on 9 September 1986 and in Brussels on 6 November 1986. Accordingly, it denies that the reference to 'Mr Rumeu, Cementos Uniland', which appears in the minutes of the meeting in Baden-Baden on 9 September 1986, can prove that it participated it that meeting.

2693 Mr Rumeu's presence at those two meetings was, in any event, marginal and sporadic. The statements made on behalf of Spain during the meeting on 9 September 1986 were made by the two Spanish members of the ETF who were present, Messrs Félix and Bruguera. In any event, those statements merely alluded briefly to imports into Spain of cement from Tunisia. Furthermore, Mr Rumeu neither asked for nor received the minutes of that meeting. With regard to the meeting in Brussels on 6 November 1986, Mr Rumeu's participation consisted merely of some vague general observation concerning the situation in Spain.

2694 Uniland asserts that Mr Rumeu did not take part in any meeting of the ETF after the meeting on 6 November 1986, nor did he take part in the meeting of the ETF in Geneva on 21 October 1986. Therefore, it argues, the statements in the minutes of that meeting concerning a discussion which allegedly took place between Mr Félix and Mr Rumeu cannot be relied upon as against Mr Rumeu nor, *a fortiori*, against Uniland.

2695 It must, however, be pointed out that the minutes of the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 refers to the participation of 'Mr P. Rumeu, Cementos Uniland, Spain'. In the light of that fact, and in the absence of any evidence to show that Mr Rumeu had told the other participants that he was taking part in that meeting in a personal capacity, the Commission was justified in considering that the person concerned, even if he did attend that meeting on account of his special experience in the field, did represent Uniland at that meeting.

2696 It is clear from the notes of the meeting on 6 November 1986 that it was a meeting of 'EEC cement industry representatives' (contested decision, recital 25, paragraph 39; document 33.126/19007). The Commission was therefore entitled to conclude that Mr Rumeu had taken part in that meeting not in his personal capacity, but in his capacity as representative of the European cement industry and, therefore, in particular, of Uniland, which at that time employed him.

2697 Having regard to what has been set out in paragraphs 2600 and 2602 above, and since Uniland merely states that at the two meetings concerned Mr Rumeu played a marginal role, but does not adduce the slightest evidence showing that he had openly distanced himself from the anti-competitive purpose pursued, the Commission was justified in considering that Uniland had shown its support for the setting-up of the ETF and for its anti-competitive object or at least that it had given the other participants the impression that it supported that measure.

2698 The Commission was therefore fully entitled to find in Article 4(1) of the contested decision that Uniland participated in the agreement on the setting-up of the ETF (see, to that effect, the case-law cited in paragraph 1353 above).

2699 However, there is no evidence in the contested decision to support the conclusion that Uniland had acceded to the agreement setting up the ETF before taking part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Even if, as the Commission submits in its pleadings, Uniland was represented by the Spanish participants in meetings preceding or relating to the ETF, it is nevertheless the case that the first tangible sign of its own accession to the agreement on the setting-up of the ETF was on 9 September 1986. Article 4(1) of the contested decision must therefore be annulled, in so far as it finds that Uniland participated in that agreement before that date.

2700 Uniland goes on to observe that, in stating that Mr Rumeu represented both Hispacement and Oficemen, the Commission's reasoning became confused and contradictory, using the same fact, namely, the presence of Mr Rumeu in two meetings concerning the ETF, to impose penalties on different undertakings.

2701 It must, however, be observed that, with regard to Hispacement, the Commission notes the presence of Mr Fernandez, a member of that company, at the meetings of 3 to 5 June 1986, at which the Zurich/Céligny document was finalised. This fact was obviously crucial in determining whether Hispacement participated in an infringement found to exist by Article 4(1) of the contested decision. With regard to Oficemen, the Commission relies not only on the presence of Mr Rumeu 'at the Head Delegates meeting ... of 9 September 1986 and 6 November 1986', but also on the presence of a 'Spanish Head Delegate' at the meeting in Stockholm on 9 June 1986, and also on 'the fact that Mr Andia [Oficemen] was appointed member of this subgroup [stick measures] at the Head Delegates meeting of 9 September 1986 ... and above all by the fact that the record of the meeting [17 March 1987 of that subgroup] states that Mr Andia was present ...' (contested decision, recital 29, paragraph 3).

2702 In any event Uniland's assertions cannot undermine the analysis in paragraphs 2695 to 2698 concerning the validity of the Commission's finding that Uniland participated in the infringement referred to in Article 4(1) of the contested decision.

2703 Finally, Uniland maintains that the Commission discriminated against it by finding that in the meetings of 9 September and 6 November 1986 Mr Rumeu represented both it and Oficemen, whereas, when it examined the contacts which the representatives of the Spanish and Portuguese industries had had (contested decision, recital 49, paragraph 1), Oficemen alone was described as representing the Spanish industry as a whole, and there was no finding of participation by the undertakings with which the participants in those contacts were associated.

2704 However, Uniland's argument cannot invalidate the finding of an infringement in Article 4(1) of the contested decision, since its participation in that infringement was properly established by the Commission (see, to that effect, *Woodpulp II*, cited in paragraph 106 above paragraph 146).

14. Oficemen

2705 Oficemen states that, according to the contested decision (recital 29, paragraph 3), the Commission deduces its involvement in the ETF, first, from the participation of a Spanish Head Delegate at the meetings of 9 June, 9 September and 6 November 1986 and, second, from the participation of Mr Andia, then chairman of Oficemen, at the meeting of the 'defensive measures' subgroup on 17 March 1987.

2706 Oficemen denies, however, having been present or represented at the meeting in Stockholm on 9 June 1986. With regard to the meetings on 9 September and 6 November 1986, it asserts that Mr Rumeu, who was present at those meetings, was appointed Spanish Head Delegate to Cembureau only in November 1988.

2707 So far as concerns the meeting of the 'defensive measures' subgroup on 17 March 1987, Oficemen claims that, according to a statement sworn by Mr Andia, the proposal to appoint him as a member of that subgroup at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 was made without his knowledge and against his will. Moreover, Mr Andia never knew that the meeting of 17 March 1987 was part of the activities of the ETF, of whose existence he was indeed unaware. Finally, he did not attend that meeting, his flight having been delayed. Therefore, neither he nor Oficemen could have known about the matters debated at that meeting and thus, indirectly, about the existence of the ETF. The fact that Mr Andia is mentioned among those taking part in that meeting might be due to confusion between persons taking part and persons invited. Similarly, the fact that the record of that meeting contains certain information concerning imports of cement into Spain does not, according to Oficemen, suffice to prove that Mr Andia participated in that meeting, since that information was practically identical to the information in a handwritten note by the same writer (Mr Marichal) concerning the meeting of the ETF of 11 February 1987. In addition, the record of the meeting of 17 March 1987 does not relate any spoken contribution made by Mr Andia, whereas it does report the speeches of other participants.

2708 Concerning those various points, the Court points out that Oficemen does not deny that a Spanish participant took part in the meeting in Stockholm on 9 June 1986.

2709 In the light of the findings made in paragraph 2665 above, it must be concluded that participants who represented an undertaking which was a member of a trade association were given, if not the official title of Head Delegate within the meaning of that term in Cembureau, then at least power to represent the association in question.

2710 The Commission was therefore justified in considering that the Spanish participant, whoever he was, represented Oficemen also (contested decision, recital 29, paragraph 3). Having regard to what has been set out in paragraph 2598 above, the Commission was therefore able to find that Oficemen had, through the participation of the Spanish representative at the Stockholm meeting, manifested its approval of the setting-up of the ETF and its anti-competitive object, or at least gave that impression to the other participants through lack of any indication to the contrary (see, to that effect, the case-law cited in paragraph 1353 above).

2711 So far as concerns the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, it is clear from the minutes of that meeting that three Spanish representatives (Messrs Rumeu, Félix and Bruguera) were present and that the name of Mr Andia, who, according to the information supplied by Oficemen at the hearing, was the general manager of the association, was proposed as a member of one of the working subgroups, called 'exchange of defensive experiences', which it had been decided to set up in order to assist the ETF in its anti-competitive task.

2712 It was not possible to put forward Mr Andia's name because, among the three Spanish participants in the meeting, there was at least one person performing functions within the Spanish association which, in his opinion, authorised him to put forward the name of the general manager of Oficemen when the ETF working subgroups were being set up. Even if none of the three Spanish participants had, at that time, the official title of Spanish Head Delegate of Cembureau, Oficemen was therefore represented at that meeting, which dealt in turn with the setting-up of the ETF, its anti-competitive purpose, its composition, the organisation of its work, and the various dissuasive and persuasive measures entrusted to its consideration (see paragraph 2600 above). In the absence of evidence to the contrary, the Commission was entitled to find that Oficemen had once again expressed its support for the setting-up of the ETF or at least given that impression to the other participants (see to that effect the case-law cited in paragraph 1353 above).

2713 The meeting in Brussels on 6 November 1986 was a meeting of 'EEC cement industry representatives', at which Mr Rumeu reported on developments in Spain (see the notes concerning that meeting; contested decision, recital 25, paragraph 39; document 33.126/19007). The Commission was therefore justified in considering that Mr Rumeu, even though he did not attend the meeting in his capacity as Spanish Head Delegate in the official sense of that term, had represented, in addition to Uniland, his then employer, the entire Spanish market, that is to say Oficemen also. In the light of what has been set out in paragraph 2602 above, the Commission was thus entitled to consider that Oficemen, through Mr Rumeu's participation in that meeting, had again expressed its support for the setting-up of the ETF, or at least given that impression to the other participants (see, to that effect, the case-law cited in paragraph 1353 above).

2714 The Court cannot accept the various arguments put forward by Oficemen to deny that Mr Andia took part in the meeting of 17 March 1987 of the subgroup 'stick actions'.

2715 The record, drawn up on 25 March 1987 by Mr Marichal, the coordinator of that subgroup, mentions the participation of 'Mr Andia (Spain)', as the sole Spanish representative, and it attributes very specific statements to him, in particular on the question of Greek exports ('invasion threats to European cement producers: overview of the situation at 15 March 1987'; contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4860):

'New threat posed by the smallest Greek producer, Xalips. At the moment the other Greek producers show no wish to offload in Spain. It is thought that they intend thus to avoid provoking the only cement producers capable of routing them in the near East and North Africa (their principal markets) ...'

2716 Contrary to Oficemen's submissions, those statements differ fundamentally from the information about imports into Spain contained in the handwritten note by Mr Marichal concerning the meeting of the ETF on 11 February 1987 (contested decision, recital 25, paragraph 46; document 33.126/4911).

2717 In the light of that evidence, the Commission was entitled to find in recital 29, paragraph 3, of the contested decision that Mr Andia took part in the meeting on 17 March 1987 of the working subgroup 'stick actions'.

2718 The remarks made at that meeting by Mr Andia on the problem of Greek exports show that he was perfectly aware of the objective assigned to that subgroup, and also of the overall strategy to combat destabilising imports into Western Europe, primarily those of Greece.

2719 In conclusion, the Commission was fully entitled to find in Article 4(1) of the contested decision that Oficemen participated in the agreement setting up the ETF.

2720 However, since Oficemen's accession to that agreement is established only as from 9 June 1986, the date of the Stockholm meeting, Article 4(1) must be annulled in so far as it finds that Oficemen participated in the infringement before that date.

2721 Oficemen goes on to observe that the Commission did not take the view that presence on the list of participants in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 was sufficient evidence to conclude that the undertakings listed in that document took part in the ETF's activities, since many of those undertakings were not referred to in Article 4(1) of the contested decision.

2722 However, the fact that the Commission did not find that some of the undertakings identified among the participants in the meeting concerned were involved in the infringement found in Article 4(1) of the contested decision does not relieve Oficemen of responsibility for that infringement, since it was properly established by the Commission (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 146). For the foregoing reasons, the Commsiion was fully entitled to find in the contested decision that Oficemen participated in the agreement setting up the ETF.

2723 Last, Oficemen claims that only three national associations have been accused of taking part in the agreement setting up the ETF, namely, SFIC, BDZ and itself. Unlike Oficemen, the French and German associations were represented at the ETF meetings, the former by its chairman and the second by its manager. Oficemen's participation was, in reality, based on the presence at the meetings in Stockholm on 9 June 1986, in Baden-Baden on 9 September 1986 and in Brussels on 6 November 1986 of a Spanish Head Delegate. The presence of the Belgian and British Head Delegates was not deemed sufficient to render FIC and BCA liable for participation in the ETF. Oficemen therefore considers itself to have been treated unequally.

2724 Nevertheless, it must be borne in mind that Mr Andia, of Oficemen, attended the meeting of the subgroup 'stick actions' on 17 March 1987 (see paragraphs 2715 and 2716 above). Like SFIC through its chairman, Mr Laplace, and BDZ through its general manager, Mr Steinbach, Oficemen therefore played a direct part in the infringement referred to in Article 4(1) of the contested decision.

2725 The fact that the Commission did not find that that infringement had been established in the cases of the Belgian and British associations does not absolve Oficemen of liability for that infringement, since, as follows from the reasoning set out in paragraphs 2708 to 2719 above, the participation of Oficemen in the agreement setting up the ETF has been properly established (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 146).

15. Irish Cement

2726 Irish Cement (T-60/95) denies any direct involvement in the unlawful activities of the ETF. It states that, according to the evidence presented by the Commission in recital 25 of the contested decision, the ETF was set up and run by a group of eight major European cement producers. Irish Cement claims that it did not participate in any of their meetings. The presence of its representative, Mr Quirke, at the meetings in Baden-Baden on 9 September 1986, in Strasbourg on 10 September 1986 and in Brussels on 6 November 1986 was justified by lawful attempts to lobby members of the Community institutions.

2727 The purpose of the meeting in Baden-Baden on 9 September 1986 was to organise the meeting arranged the next day in Strasbourg with members of the European Parliament on the question of export aids granted by the Hellenic Republic, a meeting in which Irish Cement was particularly involved. Irish Cement states that it did not receive the agenda for that meeting, examined in recital 25, paragraphs 24 to 32, of the contested decision.

2728 The meeting in Brussels on 6 November 1986 prepared for a meeting with Mr Sutherland, the Commissioner responsible for competition policy, and sought to make the Commission change its decision authorising the export aid granted by the Hellenic Republic to its cement producers. The presence of a representative of Irish Cement was due simply to the fact that Mr Sutherland was Irish. Irish Cement claims to have had no reason to suspect that that meeting had any unlawful object, having regard to the statement of Sir John Milne that, 'any restructuring of a European cement industry suffering from chronic overcapacity must be carried out in compliance with the competition rules' (contested decision, recital 25, paragraph 40; document 33.126/19007).

2729 Irish Cement further states that it did not take part in the ETF meeting on 9 June 1986, held on the fringe of the general assembly of Cembureau. Furthermore, various documents [the invitation from Holderbank to the sixth ETF meeting in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 21; document 33.126/18848); Holderbank's letter of 22 September 1986 to Blue Circle (contested decision, recital 25, paragraph 33; document 33.126/19024)] demonstrate that Irish Cement was not a member of 'the group of eight' constituting the ETF.

2730 It must, however, be pointed out that Irish Cement acknowledges having been represented by Mr Quirke at the meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986. While discussions laying the ground for the political meeting the next day with members of the European Parliament may well have taken place in connection with, or on the fringe of, that meeting, the minutes of the meeting are nevertheless exclusively concerned with discussions dedicated to the setting-up and the composition of the ETF, the organisation of its tasks and the consideration of the various dissuasive and persuasive measures entrusted to it (see paragraph 2600 above).

2731 Furthermore, Irish Cement was represented at the meeting in Brussels on 6 November 1986. While the notes of that meeting actually show that discussions were held concerning the meeting with Mr Sutherland, they also make it clear that it was agreed that the ETF was to continue to meet and to examine developments in imports into Western European markets of cement from Greece (see paragraph 2602 above).

2732 As has already been pointed out (see paragraph 2600 above), the objective of the ETF was set out in the following terms at the beginning of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986:

'The ETF was set up in order to examine possible "dissuasive" and "persuasive" measures to counter the arrival of cheap cement on European markets (primarily against Greek imports into the United Kingdom) and to submit recommendations to the Head Delegates.'

2733 Irish Cement could not, therefore, have been unaware that, at the two meetings at which it was present, the discussions in which it took part concerning the ETF and its activities pursued an objective contrary to Article 85(1) of the Treaty.

2734 Moreover, it has put forward no evidence to show that, at those meetings, it openly distanced itself from the anti-competitive objectives of the ETF or informed the other participants that it was taking part in them with different objects in mind, namely the preparation of the political overtures contemplated towards the Community authorities.

2735 In those circumstances, the Commission was justified in taking the view that Irish Cement had shown its support for the setting-up of the ETF and for its anti-competitive object, or at least that it had given that impression to the other participants.

2736 The Commission was therefore fully entitled to find, in Article 4(1) of the contested decision, that Irish Cement had taken part in the agreement setting up the ETF (see, to that effect, the case-law cited in paragraph 1353 above).

2737 However, the decision contains no evidence to support the conclusion that Irish Cement acceded to the agreement setting up the ETF before it took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Even if it were well founded, the fact on which the Commission relies in its pleadings, namely that the agreement relating to the setting-up of the ETF was conceived and brought into being in the framework of Cembureau, of which Irish Cement was a direct member, did not entitle the

Commission to conclude that Irish Cement had acceded to the agreement from 28 May 1986, the date of the Rome meeting, referred to in recital 25, paragraph 1 of the contested decision, in which Cembureau took part. Article 4(1) must therefore be annulled in so far as it finds that Irish Cement participated in that agreement before 9 September 1986.

2738 Irish Cement goes on to challenge the various items cited by the Commission in recital 24, paragraph 3, of the contested decision as evidence that the ETF was part of Cembureau. It also contends that the Commission incorrectly treated the meetings of Head Delegates of the ETF as being the same as meetings of Head Delegates of Cembureau.

2739 However, there is no need to consider whether that line of argument is well founded, as it suffices to point out that it cannot refute the findings in paragraphs 2730 to 2735 regarding Irish Cement's participation in the meetings described in recital 25, paragraphs 22 to 33 and 39 to 43, of the contested decision. Accordingly, that line of argument cannot undermine the conclusion reached in paragraph 2736 above as to the correctness of the Commission's finding that Irish Cement participated in the agreement setting up the ETF.

2740 Last, Irish Cement claims that the contested decision gives no reasons as regards its alleged direct participation in the ETF.

2741 However, in the summary of facts relating to the ETF, the Commission finds that Mr Quirke was present at the 'meeting of Head Delegates' in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 23), and also at the meeting in Brussels on 6 November 1986 (contested decision, recital 25, paragraph 39).

2742 In the Commission's legal assessment of the facts relating to the ETF, it takes into consideration 'the claim made by certain undertakings and associations of undertakings that, not having participated in the task force meetings or subgroup meetings, but only in the meetings of the Head Delegates, they cannot be held responsible for the measures examined' (recital 53, paragraph 4).

2743 The Commission explains (same paragraph):

'Even if they did not participate in the task force meetings, the task force consisting of a restricted group, they did participate in the meetings of the Head Delegates at which the task

force proposals were endorsed and the measures adopted. As stated in recital 44, the fact that the composition of the various bodies may vary from one to another does not mean that all the activities of the parties to such structure are not attributable to all the members, since the structure acts with and is based on the assistance of all the members.'

2744 Sufficient reasons were therefore given in the contested decision for the Commission's finding that Irish Cement infringed the Treaty by participating in the agreement setting up the ETF.

16. Italcementi

2745 Italcementi stresses the autonomous and temporary nature of the ETF. It challenges the various pieces of evidence on which the Commission bases its case, in recitals 24, paragraph 3, and 53, paragraphs 1, 3 and 7, of the contested decision, in establishing a link between the ETF and the Cembureau agreement. It adds that, according to the very terms of the contested decision, a considerable number of the alleged parties to the Cembureau agreement did not participate in the ETF agreement found in Article 4.

2746 There is no need to consider whether that argument is well founded, as it cannot refute the Commission's findings in recital 25 of the contested decision, which are not challenged by Italcementi, namely, that the Italian undertaking took part in the following meetings:

— the meeting in Rome on 28 May 1986 (contested decision, recital 25, paragraph 1: document 33.126/18771);

— the meeting of the Zurich/Céligny working group on 4 June 1986 (contested decision, recital 25, paragraph 2; document 33.126/18756);

— the meeting in Stockholm on 9 June 1986 (contested decision, recital 25, paragraph 9);

— the meeting of the ETF on 17 June 1986 in London (contested decision, recital 25, paragraph 11; document 33.126/18756);

— the meeting of the ETF on 2 July 1986 in Milan (contested decision, recital 25, paragraph 12; documents 33.126/18756, 18757 and 18791 to 18793);

— the meeting of the ETF on 8 July 1986 in Geneva (contested decision, recital 25, paragraph 13; documents 33.126/18757 and 18795);

— the meeting of the ETF on 19 August 1986 in Geneva (contested decision, recital 25, paragraph 17; documents 33.126/18757 and 18758 and Annex 15 to the reply to the SO by Aker and EUROC);

— the meeting of the ETF on 9 September 1986 in Baden-Baden (contested decision, recital 25, paragraph 21; document 33.126/18848);

— the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 23; document 33.126/18857);

— the meeting of the ETF on 21 October 1986 in Geneva (contested decision, recital 25, paragraph 34; documents 33.126/18758, 18895, 18896 and 18900);

— the meeting of EEC cement industry representatives on 6 November 1986 in Brussels (contested decision, recital 25, paragraph 39; document 33.126/19007);

— the meeting of the ETF on 9 January 1987 (contested decision, recital 25, paragraph 44; document 33.126/18759);

— the meeting of the ETF on 11 February 1987 in Geneva (contested decision, recital 25, paragraph 45; documents 33.126/18760, 18929 and 18934).

2747 In the light of what has been set out in paragraphs 2598, 2600, 2602 and 2608 above and having regard to the fact that Italcementi took part in the meetings in Rome on 28 May 1986 and in Stockholm on 9 June 1986, in the meeting of Head Delegates and representatives of the

ETF in Baden-Baden on 9 September 1986 and the meeting in Brussels on 6 November 1986, compounded, first, by its contribution to the finalisation of the Zurich/Céligny document and, secondly, by its capacity of direct member of the ETF, the Commission was fully entitled to consider that Italcementi had approved, from the beginning, the setting-up of the ETF and its anti-competitive objective. The Commission was accordingly justified in finding, at Article 4(1) of the contested decision, that Italcementi acceded to the agreement setting up the ETF as from 28 May 1986.

2748 Next, Italcementi claims to have played a marginal role in the ETF. It alleges that it was never involved in the alleged dissuasive and persuasive measures. On account of its purely regional position on the Italian market, it had no interest in participating in such actions, nor any actual opportunity to do so. It had at its disposal neither harbour facilities, nor means of transport, nor outlets through which to channel the products that it might have bought from Greek cement producers. The only things that could possibly be laid to its account are the drawing up of a report on the possibility of exporting to Greece and the holding of shares in Interciment for 21 months. However, neither of these activities led it to infringe Article 85(1) of the Treaty. Italcementi also denies having taken part in concerted practices and an agreement intended to lure Calcestruzzi, a major Italian customer, away from Greek producers.

2749 In the light of what has been set out in paragraphs 2507 to 2511 above there is no need to assess the merits of Italcementi's submissions, first, denying any unlawful involvement in the actions contemplated by the ETF and, second, defining the scope of its commitment to Interciment, as it must be pointed out that, according to the evidence set out in paragraph 2746 above, Italcementi is one of the undertakings at the origin of the ETF initiative and of the programme of dissuasive and persuasive measures envisaged in order to combat destabilising imports into Western Europe and that it then took part, in its dual capacity as direct member of the ETF and a Head Delegate, in all the meetings of or concerning the ETF organised between 17 June 1986 and 11 February 1987. The argument of the Italian undertaking that its role was marginal must therefore be rejected.

2750 Furthermore, Italcementi, which does not deny that 'at the end of 1985/early 1986, Greek producers looked towards ... Italy, where small associations formed by consumers and small import/export companies had taken the step of importing Greek cement' (contested decision, recital 24, paragraph 1), cannot reasonably claim to have had no interest in participating in the ETF.

2751 Italcementi goes on to allege a lack of reasoning concerning the date used by the Commission as the starting point for participation in the single and continuous ETF agreement, namely, 28 May 1986. The Commission itself finds, in recital 25, paragraph 10, of the contested decision, that it was decided to set up the ETF at the meeting in Stockholm on 9 June 1986.

2752 As regards that question, the Court points out (see paragraphs 2506 to 2511 above) that, while in its legal assessment (recital 53 of the contested decision) the Commission puts forward the various facts described in recitals 25 to 28 of the contested decision as constituting the subject-matter of a single and continuous agreement intended to counter imports into Western Europe (primarily those from Greece), that agreement was referred to in Article 4, not as such, but as constituted by its various components. It is in that context that 28 May 1986 is fixed as the starting point for the infringement found in Article 4(1) of the contested decision in relation to the agreement on the setting-up of the ETF.

2753 The date of 28 May 1986 is the date of the Rome meeting, as regards which the Commission finds in recital 25, paragraph 1, of the contested decision that the representatives of eight major European cement producers, including Italcementi, agreed *inter alia* to 'take rapid stock of the defensive and support measures to counter the decision of the Greek cement industry to export to Western Europe' and to create a working party 'to prepare ... documents on possible defensive measures'. Those are sufficient reasons for the decision of the Commission to find, in Article 4(1), that Italcementi participated in the agreement setting up the ETF as from 28 May 1986. The fact that the Commission finds, in recital 25, paragraph 10, of the contested decision, that it was 'formally' decided to set up the ETF at the meeting in Stockholm on 9 June 1986 cannot, in this regard, be deemed to show inadequate or contradictory reasoning on that point.

2754 Italcementi's argument must therefore be rejected.

17. Aker and EUROC

2755 Aker and EUROC claim that they did not take part in any meeting of the ETF and that Scancem took part in several meetings of or concerning the ETF in order to safeguard its own interests, not to represent those two applicants.

2756 They add that, in any event, Scancem's participation in the ETF discussions did not aim to safeguard its interests in the Community, since at that time it did not have any. Scancem had in fact taken part in ETF discussions with a lawful purpose, namely, to support its international activity outside the Community. For Scancem, the availability of surplus cement and clinker from Greece represented a commercial opportunity and not a threat, Scancem had to satisfy growing demand in its overseas operations. For Scancem, the real threat was the actions contemplated by the ETF to counter imports from Greece and, in particular, the setting-up of Interciment, whose arrival on the international scene posed the risk of higher cement and clinker prices on its national markets, thereby depriving Scancem of an advantageous source. By taking part in the ETF meetings, Scancem did not, therefore, intend to distort competition and

trade on the market, but rather to ensure that its network was supplied at favourable prices and to watch over the situation created by the setting-up of Interciment.

2757 That line of argument cannot be accepted.

2758 It is not disputed that, at the material time, Aker and EUROC controlled Norcem and Cementa respectively. In May 1986, those two groups decided to merge their international activities by creating Scancem, a joint subsidiary in which they have equal shares (contested decision, recital 5, paragraph 2).

2759 At the hearing, Aker and EUROC acknowledged that Cementa, Norcem and Scancem represented them at the meetings in which they took part during the period under consideration. In the person of Mr Linderoth, Cementa took part in the meeting in Stockholm on 9 June 1986 (contested decision, recital 25, paragraph 9). In the person of Mr Rabl, Norcem took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 23; document 33.126/18857). In the person of Mr Ulestig, Scancem took part in the meetings of the ETF of 19 August 1986 (contested decision, recital 25, paragraph 14; Annex 15 to the reply to the SO by Aker and EUROC), of 21 October 1986 (contested decision recital 25, paragraph 34; document 33.126/18895) and of 11 February 1987 (contested decision, recital 25, paragraph 45; document 33.126/18933).

2760 As set out in paragraphs 2598 and 2600 above, a concurrence of wills was expressed regarding the setting-up of the ETF at the meeting in Stockholm on 9 June 1986 and at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Representatives of Aker and EUROC were, moreover, present at meetings of the ETF on 19 August 1986, 21 October 1986 and 11 February 1987 (see the previous paragraph). Since those two applicants have not put forward any evidence to show that, at those various meetings, their representatives openly distanced themselves from the anti-competitive objective pursued by the ETF, even though that objective had been expressly pointed out to them at the meeting in Geneva on 19 August 1986 and at the meeting in Baden-Baden on 9 September 1986, or that they had informed the other participants that they were attending those meetings with different objects in mind, the Commission was justified in considering that Aker and EUROC had indicated their support for the setting-up of the ETF and its anti-competitive object or at least given that impression to the other participants (see, to that effect, the case-law cited in paragraph 1353 above).

2761 The explanations now put forward by Aker and EUROC as to the alleged lawful reasons which led to Scancem taking part in the ETF meetings are not borne out by any evidence to suggest that, at the time, Scancem told the other participants of the special reasons for its presence at those meetings.

2762 On the contrary, they are contradicted by the extract from the record of the meeting of the EPC on 13 May 1987, drafted by Mr Marshall of Blue Circle, and recited in recital 24, paragraph 3, of the contested decision (documents 33.126/11344 and 11345):

'Cembureau Task Force. I was approached on two occasions to try to make sure that the Cembureau Task Force continues in operation as a means of keeping up our pressure on the Greeks. Scancem ... felt that as 80% of the cement to the USA is handled by four European organisations — Blue Circle, Lafarge, Holderbank and Scancem — some pressure could be brought to bear on the Greeks.'

2763 Moreover, as will be found in paragraph 3013 below, Aker and EUROC agreed to take up shares in Interciment, which wholly undermines their argument that their presence at the meetings referred to in paragraph 2759 above was due to their concerns regarding the appearence of Interciment on the scene.

2764 In conclusion, the Commission was justified in finding in Article 4(1) of the contested decision that Aker and EUROC took part in the agreement on the setting-up of the ETF. However, since there is no evidence in the decision to support the conclusion that Aker and EUROC had acceded to the agreement setting up the ETF before the meeting in Stockholm on 9 June 1986, Article 4(1) of the decision must be annulled in so far as it finds that they participated in that agreement before that date.

2765 Aker and EUROC also deny that there was any link between the ETF and Cembureau. They challenge the evidence put forward on this point by the Commission in recital 24, paragraph 3, of the contested decision, stating that there is an almost total absence of correspondence between the meetings of the ETF and the meetings of Cembureau, or between the participants in the ETF meetings and the Head Delegates of Cembureau. They add that if, as the Commission claims, the ETF were an emanation of Cembureau, constituting a breach of Article 85(1) of the Treaty, that breach should have been charged against all the companies represented at Cembureau level.

2766 There is no need to consider whether that line of argument is well founded, as it is sufficient to point out that it cannot alter the findings in paragraphs 2759 to 2763 above concerning the participation of Aker and EUROC in several meetings of or concerning the ETF. Consequently, that argument cannot undermine the conclusion reached in paragraph 2764 above as to the validity of the Commission's finding that Aker and EUROC took part in the agreement setting up the ETF.

18. Cementir

2767 Cementir claims to have been absolutely unconnected with the setting-up and activities of the ETF. It was never invited to the meetings described in recital 25 of the contested decision, never took part in them, and was never informed of their content.

2768 It must be stated that Cementir did not, in fact, take part in any of the meetings of or concerning the ETF, to which the Commission refers in recital 25 of the contested decision.

2769 In recital 53, paragraph 12, of the contested decision, and in its defence in Case T-87/95, the Commission claims that Cementir demonstrated its support for the general ETF agreement by participating in 'one of the most important measures decided on by the [ETF], namely, the measures to defend the Italian market'.

2770 However, as has been stated (see paragraphs 2507 to 2511 above), Article 4(1) of the contested decision refers only to the agreement relating to the setting-up of the ETF, and not to the 'single and continuous agreement relating to the setting-up of the Cembureau Task Force or European Task Force and the various measures adopted at the meetings to eliminate imports into Western Europe and, in particular, to prevent imports of Greek cement into the Member States' (recital 53, paragraph 9). Furthermore, it must be observed that the Commission has not attributed to Rugby, Castle, Titan and Heracles responsibility for that agreement, even though it finds in Article 4(4) that they participated 'within the framework of [the ETF]' [recital 65, paragraph 3(c) of the contested decision] in persuasive measures (carrot actions) contrary to Article 85(1) of the Treaty. In this regard, the Commission (reply of 22 June 1998 to the written question of the Court of 27 May 1998 in Case T-87/95) explains that those four undertakings did not take part in any of the meetings described in recital 25 of the contested decision, so that it considered that it did not have sufficient evidence of their acquiescence in the setting-up or the existence of the ETF itself.

2771 In those circumstances, the Commission was not justified in inferring that the alleged participation of Cementir in measures to defend the Italian market against imports from Greece constituted evidence of participation by Cementir in the infringement found in Article 4(1) of the contested decision.

2772 In its defence in Case T-87/95, the Commission advances various arguments.

2773 First, it claims that an Italian Head Delegate, from Italcementi, was present at the meetings of Head Delegates during which important decisions concerning the ETF were adopted.

2774 However, as has already been pointed out (see paragraph 1409 above), Cementir, as a direct member of Cembureau, had its own Head Delegate. In those circumstances, and in the absence of any evidence to show that Cementir had instructed Italcementi to represent it at one or other of the meetings described in recital 25 of the contested decision, the Commission was not entitled to infer from Italcementi's presence at those meetings that Cementir was represented at them and that Cementir had thus subscribed to the agreement setting up the ETF.

2775 The Commission also relies upon the fact that Cementir was a direct member of Cembureau.

2776 However, even if the ETF were, as the Commission claims (contested decision, recital 24, paragraph 3), an emanation of Cembureau, that would not support the conclusion that Cementir had agreed to the setting-up of the ETF. As set out in paragraph 1553 above, membership of a professional association, in this case Cembureau, does not mean that the member concerned is automatically responsible for the various unlawful acts committed within that association, doing away with the need to show personal participation by the member in those unlawful acts.

2777 The Commission then relies on the fact that the ETF was, in its opinion, an application of the Cembureau agreement, to which Cementir had subscribed.

2778 However, even if that assessment were correct, the Commission would not thereby be relieved of the need to adduce evidence of Cementir's individual participation in the infringement found to exist in Article 4(1) of the contested decision. To follow the Commission's argument would be to take the view that all the undertakings and associations of undertakings which had actually subscribed to the Cembureau agreement should have been held responsible for the infringement concerning the agreement setting up the ETF, without any need for further inquiries as to whether they had really participated individually in that infringement.

2779 Finally, the Commission alleges that Cementir took part in the meeting of Head Delegates held at the same time as the Cembureau general assembly in Luxembourg on 25 to 28 May 1987, at which the destiny and future role of the ETF were discussed (contested decision, recital 25, paragraph 48).

2780 It must, however, be found that, while it is clear from a telex sent by the Italian undertaking Calcestruzzi on 28 May 1987 to the Greek producer Titan (contested decision, recital 27, paragraph 10; document 33.126/19201) that Cementir, as it acknowledges, met Titan in Luxembourg on 27 May 1987, together with the two Italian producers, Italcementi and Unicem, the contested decision contains no evidence to support the conclusion that Cementir took part in the meeting referred to in the previous paragraph.

2781 It follows therefore (see paragraphs 2767 to 2780) that the Commission has not proved that Cementir took part in the agreement setting up the ETF.

2782 It follows that Article 4(1) of the contested decision must be annulled in so far as it finds that Cementir took part in the agreement concerning the setting-up of the ETF.

D — Duration of the infringement found in Article 4(1) of the contested decision

2783 In Article 4(1) of the contested decision, the Commission finds that as from 28 May 1986 there was an infringement relating to the agreement setting up the ETF, but does not indicate the date on which the infringement ended.

2784 It has already been found that, by taking 28 May 1986 as the starting date of that infringement for CBR, Aalborg, BDZ, Unicem, Uniland, Oficemen, Irish Cement, Aker and EUROC, the Commission incorrectly assessed the starting date of their participation in that infringement. That date must thus be set at 9 June 1986 for CBR (see paragraph 2604 above), for BDZ (see paragraph 2673 above), for Oficemen (see paragraph 2720 above), for Aker and EUROC (see paragraph 2764 above), and at 9 September 1986 for Aalborg (see paragraph 2657 above), for Unicem (see paragraph 2683 above), for Uniland (see paragraph 2699 above) and for Irish Cement (see paragraph 2737 above).

2785 The Court must now examine the arguments put forward by some of the applicants referred to in Article 4(1) of the contested decision in order to challenge the Commission's finding that the infringement lasted for an indefinite period.

2786 First, Aalborg alleges that, contrary to Article 190 of the Treaty, the Commission failed to explain why it had found Aalborg to be involved in the ETF after 9 September 1986, the date of the meeting of Head Delegates and representatives of the ETF in Baden-Baden, at which Aalborg could have heard references to the ETF for the last time. Italcementi claims that the

failure to provide reasons affects the date held by the Commission to be the end of the infringement, namely 26 March 1993.

2787 In that regard, it must be pointed out, in connection with Italcementi's assertion, that the Commission does not fix any date for the end of the infringement found in Article 4(1) of the contested decision (see paragraph 2783 above). The date of 26 March 1993 is in fact the date considered to be the end of the infringement found in Article 4(2) of the contested decision, the agreement setting up Interciment.

2788 With regard to a statement of reasons, it should be observed that in recital 53, paragraph 14, of the contested decision, the Commission explains:

'The infringement committed is all the more serious as it lasted a long time, and the Commission is entitled to presume that it is still continuing. Despite Holderbank's statement that the Task Force was dissolved at the end of May 1987, the Lafarge memorandum of 1 June 1987 states that "the mission of the team formed just a year ago will in future be strictly limited to exchanges of information on very specific subjects. The British were in favour of winding it up, but the Swiss finally convinced their colleagues that this would be a mistake: as the tool had been forged it might as well be kept ready for use". It appears therefore that "the tool" was "kept ready for use" after May 1987. This is all the more probable as the measures designed to absorb the "destabilising" cement were implemented up to 1991 (see recital 28) and as the Joint Trading Company was dissolved only on 26 March 1993 (see paragraph 16 of recital 26).'

2789 Subject always to consideration of the arguments disputing the merits of that assessment by the Commission (see paragraphs 2791 to 2815 below), those statements constitute sufficient reasons for the Commission's decision in Article 4(1) of the contested decision to find that the infringement arising from the agreement on the setting-up of the ETF, in particular with respect to Aalborg and Italcementi, lasted for an indefinite period.

2790 The arguments of Aalborg and Italcementi alleging failure to provide reasons for the measure in question must therefore be dismissed.

2791 Second, CBR, Lafarge, Unicem, Uniland, Oficemen, Italcementi and Holderbank maintain that the ETF was wound up at a meeting held at the end of May 1987 at the same time as the Cembureau general assembly, as stated by Holderbank in 1990 in reply to a request by the Commission for information (contested decision, recital 25, paragraph 48; document 33.126/18760). CBR and Holderbank state that that winding up was justified because the ETF's lobbying activities had led to the anticipated results. Holderbank also points out that, since the ETF was an informal group, the Commission could not draw any inference from the

fact that there was no evidence of a formal winding up decision. Blue Circle claims that the ETF never managed to produce any useful ideas, so it disappeared from the scene in March or April 1987.

2792 Oficemen and Holderbank add that the information supplied by Holderbank to the Commission (see the previous paragraph) is not contradicted by the note written by Mr Marichal of Lafarge on 1 June 1987, concerning the meeting of May 1987 in question (contested decision, recital 25, paragraph 48; documents 33.126/4487 to 4490). It is apparent from that note that, since the ETF had attained its initial objective, the participants wound it up and confined themselves to a mere exchange of information. Italcementi claims that Lafarge's statement in that note that 'as the tool had been forged it might as well be kept ready for use', should be read in context: at the end of May 1987 it was decided to dissolve the ETF, which explains why Mr Marichal had not yet been informed of that decision at the time he wrote his note on 1 June 1987.

2793 Lafarge, Unicem, Uniland and Italcementi also allege that the Commission assumed that the infringement continued after May 1987, without putting forward any actual evidence in support of that assessment. Those applicants, followed on this point by Oficemen and Holderbank, dispute that the Commission had the right to rely on the alleged continuation until 1993 of the supposed measures for the application of the ETF so as to extend indefinitely the duration of the infringement found in Article 4(1) of the contested decision.

2794 The Court points out in that regard that, according to the documents put forward by the Commission in recital 25 of the contested decision, the ETF met until February 1987 in order to examine, *inter alia*, the dissuasive and persuasive measures contemplated in order to eliminate imports of cement from Greece into Western Europe (contested decision, recital 25, paragraphs 45 and 46; documents 33.126/18937 to 18944 and 4911 to 4913). The subgroup on 'stick actions' held a meeting on 17 March 1987 at which the participants took stock of the threatened invasion of cement, particularly from Greece, onto their respective markets, setting out where appropriate the measures adopted or contemplated to counter such threats (contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4861).

2795 It is clear from the information supplied by Holderbank in response to a request for information from the Commission (reply 7b of 7 May 1990; contested decision, recital 25, paragraph 48; document 33.126/18760), and from an internal note of Lafarge of 1 June 1987 (same paragraph; documents 33.126/4487 to 4490), that the fate of the ETF was discussed at a meeting held in Luxembourg at the end of May 1987.

2796 Those various facts demonstrate that, until the end of May 1987, the concurrence of wills which led to the setting-up of the ETF continued to exist. On the other hand, it cannot be considered that such a concurrence of wills continued beyond that date.

2797 Admittedly, the internal note of Lafarge on 1 June 1987 states, as quoted by the Commission in recital 53, paragraph 14, of the contested decision;

'European Task Force (ETF) — The mission of the team formed just a year ago will in future be strictly limited to exchanges of information on very specific subjects. The British were in favour of winding it up, but the Swiss finally convinced their colleagues that this would be a mistake: as the tool had been forged, it might as well be kept ready for use.'

2798 In any event, the Commission has not adduced any evidence to show that, after the meeting in Luxembourg at the end of May 1987, the ETF met again with a view to examining the dissuasive and persuasive measures adopted or contemplated.

2799 The duration of the various measures referred to in Article 4(2) to (4) of the contested decision cannot in any event be used to assess the duration of the infringement found in Article 4(1). That infringement, as stated in paragraphs 2507 to 2511, concerns the agreement relating to the setting-up of the ETF, not the single and continuous agreement relating to the setting-up of the ETF and the various measures adopted as a result of the 'Greek problem'.

2800 During the written procedure, the Commission referred to the Opinion of Advocate General Sir Gordon Slynn in Case 100/80 *Musique Diffusion Française and Others* v *Commission* (cited in paragraph 439, p. 1941), according to which 'a conspiracy, once established, is presumed to continue until the contrary is shown'. According to the Commission, it was for the parties to prove that they had formally wound up the ETF.

2801 The Court points out that the case which gave rise to the abovementioned opinion concerned a concerted practice between distributors, whereby imports into France of products from Germany and the United Kingdom were prevented with a view to maintaining a higher price level in the Member State in question. In his Opinion (p. 1941), Sir Gordon Slynn states: '... A concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the practice is sufficiently effective and widely known, it may require no action to secure its implementation. Cases may arise in which the absence of any evidence of measures taken to implement a concerted practice may suggest that the practice has come to an end. That, however, is a matter of evidence, which must depend upon the circumstances of the case ... It is perhaps of interest to observe the decision of the United States Court of Appeals in

US v *Stromberg and Others*, 268 F 2d.256, in which it held that a conspiracy, once established, is presumed to continue until the contrary is shown.'

2802 Sir Gordon Slynn's approach does not therefore amount to an assertion that, once the Commission has proved the existence of an agreement, decision, or concerted practice contrary to Article 85(1) of the Treaty, it is automatically for the parties involved in that agreement, decision or concerted practice to prove that it has come to an end. Such a reversal of the burden of proof is possible only where the case in question possesses particular features. In any event, it is clear from the case-law that it is for the Commission to prove not only the existence of the agreement or concerted practice but also its duration (*Dunlop Slazenger* v *Commission*, cited in paragraph 270, paragraph 79).

2803 In this case, the Commission was right to find that there was an agreement setting up the ETF. The nature of that agreement is fundamentally different from that of the concerted practice analysed by Sir Gordon Slynn in the abovementioned opinion. Whereas the pursuit of that concerted practice did not require any special positive measures, the agreement in question concerned the setting-up of a working group to examine dissuasive and persuasive measures capable of eliminating imports into Western Europe.

2804 In such circumstances, the Commission cannot now assume that that agreement had not ended, when it has not been able to prove that after the end of May 1987 the ETF met again to consider those dissuasive and persuasive measures.

2805 Since the ETF was an informal working group, without statutes or any act creating it, the Commission may not simply use the fact that there is no evidence of its formal dissolution in order to assert that the agreement leading to the setting-up of the ETF was not brought to an end.

2806 In conclusion, the Commission was not entitled to find that the infringement relating to the agreement setting up the ETF continued beyond the end of May 1987. It follows that Article 4(1) of the contested decision must be annulled in so far as it finds that that infringement continued beyond 31 May 1987. That conclusion applies not only to the applicants identified in paragraphs 2791 to 2793 above, but also the to other applicants mentioned in Article 4(1) of the contested decision (except Cementir (see paragraph 2782 above)), since they all in substance challenge the legality of that provision.

2807 With regard to Uniland, Oficemen, Italcementi and Blue Circle, it must be stated that the fact that document 33.126/18950, cited by the Commission in the contested decision, recital 25, paragraph 48, cannot be relied on against them (see paragraph 376 above) in order to demonstrate that attempts were made to hold meetings of the ETF between March and May

1987 cannot undermine the analysis in paragraphs 2794 to 2806 above concerning the duration of the infringement found in Article 4(1) of the contested decision. As explained in paragraph 2795 above, it is apparent from documents 33.126/18760 and 4487 to 4490 that the fate of the ETF was discussed at a meeting held in Luxembourg at the end of May 1987, which proves that the concurrence of wills that emerged on the setting-up of the ETF had continued until that meeting.

2808 Nor, as regards Holderbank, can the fact that Lafarge's internal note of 1 June 1987 (documents 33.126/4487 to 4490), cited in paragraph 2795 above, cannot be relied upon against it (see paragraph 377 above) invalidate the analysis in paragraphs 2794 to 2806 above concerning the duration of the infringement found in Article 4(1) of the contested decision. According to statements made by Holderbank itself to the Commission (contested decision, recital 25, paragraph 48; document 33.126/18760) 'it was decided at an informal meeting taking place at the same time as a Cembureau assembly in Luxembourg to wind up the ETF at the end of May 1987', which demonstrates that the concurrence of wills which had led to the setting-up of the ETF had continued until that date.

2809 Third, Dyckerhoff (T-33/95), Ciments Français (T-39/95), Aalborg (T-44/95) and Uniland (T-58/95) dispute the duration of their participation in the infringement found in Article 4(1) of the contested decision, stating that after a particular date they took no more part in the meetings of or concerning the ETF.

2810 Dyckerhoff claims that it took the view that there was no longer any advantage for it in remaining in contact with its competitors after the highest authorities of the Commission had been informed, on 6 November 1986, of the actions of the Greek Government. After that date, it took no part in any meeting or measure involved in that case. Its participation in the ETF therefore lasted six months at the most, from 28 May to 6 November 1986.

2811 Ciments Français observes that the 'Head Delegates' of the ETF did not meet again to discuss the 'Greek problem' after meeting Mr Sutherland, a member of the Commission, on 6 November 1986.

2812 Aalborg maintains that, after the meeting held on 5 November 1986 to prepare for the next day's meeting with Mr Sutherland, it took no part in any meeting to do with the ETF. Nor was it informed of the ETF's activities. The ETF never asked it to take a position on any matter whatsoever after the meeting in Baden-Baden on 9 September 1986. However the facts described in the contested decision, recital 25, are interpreted, it is therefore impossible for Aalborg to have infringed Article 85(1) of the Treaty after 9 September or 5 November 1986.

2813 Last, Uniland states that there is no evidence to extend its participation in the ETF beyond 6 November 1986, the date of the second and last meeting at which Mr Rumeu took part at that period.

2814 It must, however, be stated that the various applicants have put forward no evidence to show that, after subscribing to the agreement setting up the ETF, they openly made known to the other participants, for example at the last meeting in which they took part at that time, their disapproval of the ETF's continued consideration of dissuasive and persuasive measures intended to eliminate imports of cheap cement into Western Europe.

2815 The Court therefore finds that they supported that measure until its end, as has been assessed in paragraphs 2794 to 2806 above, or at least gave the other participants the impression that they did so (see, to that effect, the case-law cited in paragraph 1353 above).

E — Access to the file

1. Preliminary observations

2816 Cembureau (T-26/95), Dyckerhoff (T-35/95), SFIC (T-36/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), BDZ (T-48/95), Unicem (T-50/95), Asland (T-55/95), Uniland (T-58/95), Oficemen (T-59/95), Irish Cement (T-60/95), Italcementi (T-65/95), Holderbank (T-68/95), Aker (T-70/95), EUROC (T-71/95) and Blue Circle (T-88/95) put forward a series of observations based on the documents which they were able to consult as a result of the measures of 2 October 1996 and 18 and 19 June 1997 concerning access to the file. They maintain that, by granting them only limited access to the SO and to its investigation file during the administrative procedure, the Commission denied them access to exculpatory documents and thus infringed their rights of defence when it found the infringement alleged against them in Article 4(1) of the contested decision.

2817 Cementir (T-87/95) puts forward, following the abovementioned measures, a series of documents which, it claims, would have been useful during the administrative procedure in order to defend itself against the allegation that it had participated in the agreement setting up the ETF. There is, however, no need to assess whether those observations are well founded, since it has already been found that Article 4(1) of the contested decision must be annulled in so far as it finds that Cementir took part in that agreement (see paragraphs 2767 to 2782 above).

2. Case T-26/95 *Cembureau* v *Commission*

2818 In its submissions of 10 February and 28 November 1997, Cembureau claims that in all the documents which it has been able to consult as a result of the measures of organisation of procedure referred to in paragraph 2816 above there is no evidence to connect it to the ETF other than, first, the expression 'Head Delegates' used sporadically and imprecisely in certain documents and, second, the very limited role played by two members of its staff in the first two meetings preparatory to the ETF. On the contrary, the evidence contained in the file relating to the United Kingdom support the conclusion that the 'Greek problem' in no way involved Cembureau, since it was dealt with by the CMF and individual undertakings (documents 33.126/17160 to 17172, 17178 and 17179), through contacts at the highest political level with the United Kingdom Government, and through the intervention of the latter (33.126/17157 to 17165, 17180 to 17184, 17191 to 17194, 17219 to 17225, 17624, 17625, 17631 to 17633, 17635 to 17638, 17641 to 17654, 10827 and 10828). Those documents, and numerous others (33.126/11188, 11189, 10842 to 10844, 11072, 10827, 10828, 11123 to 11127, 11130, 11131, 11165 to 11169, 11171 to 11175, 11178, 11179, 11000, 11001, 11243, 11244, 7725 to 7740, 15351 to 15353, 15363, 15355, 15388, 15364 to 15367, 16087, 16088, 16091 to 16110 and 16122 to 16126) further illustrate importance of the awareness campaign and pressure brought to bear on the British authorities (government and parliament) and on members of the European Parliament, as well as contacts with the Commission, in response to the Greek problem. The file concerning the United Kingdom also shows that the Greek Government had recommended to its cement industry that it should make contact with its British counterpart in order to resolve the Greek problem (documents 33.126/17178 and 17179). The solution of that problem was not therefore the result of a measure implementing the Cembureau agreement. In Cembureau's view, it is also significant that France, when confronted with the problem raised by imports from Greece, made contact not with Cembureau, but with the Government of the United Kingdom and the DTI (see paragraph 416 above) (documents 33.126/17219 to 17225). Cembureau considers that if all those documents had been made available to it during the administrative procedure it would have been able to point to the complete absence of any proof of its participation, through its staff, its managers, committees or representative bodies, in the above actions and political pressures and to disprove the Commission's allegations that Cembureau played a central role in the organisation and activities of the ETF.

2819 However, the Court points out that the Commission has never denied that the appearance of the problems caused by imports from Greece gave rise to a huge awareness campaign and to pressure brought to bear on the national authorities (in particular the British and Greek) and Community authorities (Commission, European Parliament) concerning the effect of cheap exports from Greece (SO, paragraphs 16; contested decision, recital 24, paragraph 2, and recital 25, paragraphs 12, 19, 36, 42, 43, 44, 45 and 47). Nevertheless, in the contested decision, the Commission was interested only in the measures which went beyond those actions (contested decision, footnote 115). The observations which Cembureau might have made during the administrative procedure in order to emphasise the political steps to which the question of Greek exports gave rise could therefore only have illustrated one aspect of that file, which had been duly noted by the Commission. They would not, however, have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the

Commission rightly found, in recital 53, that the threatened imports into Western Europe of cement from Greece had given rise, concurrently with the political actions, to the setting-up of the ETF for the purpose of considering dissuasive and persuasive measures capable of eliminating imports of cheap cement (primarily those from Greece) onto European markets.

2820 Nor could those observations, even if they could have been presented during the administrative procedure, have refuted the findings made by the Commission in the contested decision, recital 24, paragraph 2, and recital 25, paragraphs 1 and 2, concerning the participation of Mr Dutron, director of Cembureau, in the meeting in Rome on 28 May 1986 and of Mr Collis, another Cembureau director, in part of the meeting in Zurich on 3 June 1986. They would not, therefore, have provided a basis for ruling out Cembureau's participation in the agreement setting up the ETF.

2821 To conclude, they would not have had even a small chance of altering the outcome of the administrative procedure. Cembureau has, therefore, not proved that there was an infringement of its rights of defence in this regard during the administrative procedure.

3. Case T-35/95 *Dyckerhoff* v *Commission*

2822 Dyckerhoff claims that the documents that it was able to consult following the measures of organisation of procedure referred to in paragraph 2816 above would have supported its case, during the administrative procedure, as to the lawfulness of the ETF's activities and the role which it played in them.

2823 It puts forward nine arguments in that regard.

2824 First, it states, in its observations of 7 February 1997, that there is no mention of its name in the detailed report regarding the ETF in minutes drawn up by Heracles (documents 33.126/19875 to 19887), which goes to show that it was not involved in the ETF.

2825 It must, however, be pointed out that the observations which Dyckerhoff might have presented during the administrative procedure on the basis of those documents could not have refuted the findings made by the Commission in recital 25 of the contested decision, paragraphs 1, 9, 23 and 39, concerning its participation in the meeting in Rome on 28 May 1986, in the meeting in Stockholm on 9 June 1986, in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, or in the meeting of representatives of the European cement

industry in Brussels on 6 November 1986. Accordingly, they would not have given grounds for ruling out Dyckerhoff's participation in the agreement setting up the ETF.

2826 Second, Dyckerhoff claims, in its observations of 7 February 1997, that some documents in the Italian and Spanish files (documents 33.126/12060, 12061 and 12063, and 33.332/1390 to 1394) show that, like Dyckerhoff, other cement producers and national associations had regarded the discussions and measures adopted in connection with the ETF as a lawful attempt to have anti-dumping measures adopted against imports from Greece.

2827 However, it is apparent that the documents relied upon contain Unicem's answer to questions put by the Commission in the procedure which led to the adoption of the SO and the contested decision, and Oficemen's replies to questions put by the Tribunal de Defensa de la Competencia. In those replies, Unicem and Oficemen deny that any actions were taken against Greek producers on the basis of the ETF meetings. It is quite plain that such denials would not have been capable of refuting either the extracts from the documents referred to in recital 25 of the contested decision, paragraphs 15 and 24, and recital 53, paragraph 7, on which the Commission rightly relied in order to establish the anti-competitive purpose of the ETF, or the findings referred to in paragraph 2825, which prompted the Commission to find that Dyckerhoff took part in the infringement concerning the agreement setting up the ETF.

2828 Third, Dyckerhoff, in its observations of 7 February 1997, puts forward the agenda of a meeting of the SFIC (document 33.126/14828), which, it claims, shows that, at the time of the Greek export problem, there were individual and independent initiatives by producers and national associations. Those facts therefore contradict the existence at that time of any European collusion against imports from Greece.

2829 Dyckerhoff adds that such individual and independent initiatives were also aimed at imports from markets other than the Greek market, which shows that it was not necessary to organise any concerted European action to counter imports from Greece. First it quotes documents concerning the French market (documents 33.126/5695 to 5698, 5637 to 5640, 5651 to 5656, 5657 to 5659, 5709 to 5713 and 5714 to 5724). It questions why it should have been necessary to combat imports from Greece with the aid of the ETF's considerable resources, whereas similar imports from other markets were discussed only at national level. It then refers to documents concerning the Spanish market, namely, minutes of Oficemen (documents 33.322/1311 to 1318) and minutes of Asland's board meeting (documents 33.322/1604, 1607 and 1608), in which only national measures to counter imports were contemplated.

2830 It must however be pointed out that Dyckerhoff's observations, even if they could have been put forward during the administrative procedure, could not have refuted the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found, in recital 53, that the appearance of the 'Greek problem' had given rise, over and above the individual initiatives on certain markets, to the birth of a multilateral agreement between various undertakings, including Dyckerhoff, and of associations of European undertakings concerning the setting-up of the ETF for the purposes of considering dissuasive and persuasive measures capable of eliminating imports of cheap cement into Western Europe, primarily those from Greece.

2831 Fourth, in its observations of 7 February 1997 Dyckerhoff refers to extracts from an internal Italcementi note concerning imports from Greece (documents 33.126/2950, 2951 and 2954), which contain no direct mention of the ETF or of other undertakings or associations which are members of the ETF. In its view, it follows from those extracts that, in Italy, the 'Greek problem' was treated in conjunction with the problems raised by exports from Yugoslavia. Even though those extracts contain a direct reference to the activities of the ETF with regard to an assault on the Greek market, they do not refer to any measure decided on or coordinated by the ETF.

2832 However, it must be pointed out that Dyckerhoff puts forward two contradictory interpretations of the Italcementi note in question. First, it claims that the content of that note does not display any direct relationship to the ETF and, secondly, that it refers specifically to the ETF's activities. In fact, the author of that note dedicates a special section to the ETF's activities (document 33.126/2950), under paragraph '2. Task Force Activity'.

2833 Moreover, Dyckerhoff does not explain how the observations that it might have been able to put forward during the administrative procedure to show that the Greek and Yugoslav 'problems' were treated jointly in Italy could have been relevant to its defence against the objections relating to the ETF.

2834 In any event, the observations that it might have been able to put forward during the administrative procedure on the basis of that Italcementi note could not have refuted the various findings referred to in paragraphs 2825 and 2830 on the basis of which the Commission rightly concluded that Dyckerhoff took part in the agreement setting up the ETF, which aimed to eliminate imports of cheap cement into Western Europe.

2835 Fifth, in its observations of 7 February 1997, Dyckerhoff refers to a series of documents (documents 33.126/14832, 17129, 17140, 17171, 17176, 17187, 17193, 17196, 17071, 17158 and 19875 to 19887) to demonstrate that the national associations, in particular the French and the British, had made representations to their State authorities to make known their concern with regard to imports from Greece. In that connection, it points out that it has always claimed (reply to the SO, p. 60, and application, p. 92) that the activities of the ETF in which it

participated related exclusively to the lodging of an anti-dumping complaint with the Commission. Moreover, it refers to, but does not append to its observations, Oficemen's minutes dealing with imports from Tunisia, giving an account of steps to be taken with reference to national and Community public authorities.

2836 In its observations of 5 January 1998, Dyckerhoff claims that an internal note of Blue Circle of 2 September 1986 demonstrates the intention of the European cement producers to ask the Commission to take measures against cement imports from Greece, which were judged to be incompatible with Community law (documents 33.126/11023 to 11025). It also cites two handwritten notes of Blue Circle concerning the preparation for the ETF meeting at the beginning of September 1986, which show that that preparation related only to the political measures in respect of the European Parliament and the Commission (documents 33.126/11028 to 11034), and also a fax of 17 September 1986 from Sir John Milne of Blue Circle, which shows that exclusively political concerns were at the centre of the discussions at the meeting in Baden-Baden on 9 September 1986 (document 33.126/11079). Dyckerhoff also mentions several documents which, it claims, demonstrate the lawfulness of the ETF's activities, in that they give an account of the representations made by the cement producers and their national associations to national authorities (documents 33.126/16494, 16495, 16467, 16469 to 16471, 16473 to 16487, 15364 to 15366, 11125, 11126 and 11127). Finally, it puts forward the content of a Blue Circle internal note of 5 September 1986, concerning the meeting in Strasbourg with members of the European Parliament on 9 and 10 September 1986, to show that the initiative for those representations was not taken by the German producers (documents 33.126/11052 and 11053).

2837 However, it must be pointed out that, contrary to what Dyckerhoff contends, documents 33.126/11028 to 11034 do not shed a different light on the content of the two meetings in Baden-Baden on 9 September 1986, described in contested decision, recital 25, paragraphs 21 to 33. The handwritten notes contained in those documents simply refer to the fact that a meeting was held in Baden-Baden on 9 September 1986, without specifying the subject-matter, and that a meeting was held in Strasbourg the next day with members of the European Parliament. That information does not therefore contradict the findings based on the documents referred to in recital 25 of the contested decision, paragraphs 21 to 33, namely, that in Baden-Baden on 9 September 1986 there was first a meeting at midday of the ETF devoted to the preparation of the meeting of Head Delegates and of the representatives of the ETF and then, at the end of the afternoon, the later meeting, during which the setting-up of the ETF, its anti-competitive object, its composition and organisation of its work, and the various dissuasive and persuasive measures entrusted to its consideration were in turn examined.

2838 The same assessment holds for the Blue Circle fax of 17 September 1986 (document no 33.126/11079): the fact that that document refers only to political considerations following the meeting held in Baden-Baden the previous week cannot refute the findings referred to in the previous paragraph.

2839 For the rest, it has already been pointed out (see paragraph 2819 above) that the Commission has never denied that the appearance of the Greek export problem gave rise to a huge awareness campaign and pressure on the national authorities. However, in the contested decision it was interested only in the measures which went beyond those actions (contested decision, p. 56, footnote 115). The observations which Dyckerhoff might have been able to put forward during the administrative procedure in order to stress the political dimension of the Greek file could therefore only have illustrated an aspect of that file duly noted by the Commission. On the other hand, they would not have been able to prevail over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found, in recital 53, that the threat of imports into Western European of cement from Greece had given rise, alongside political actions, to the setting-up of the ETF for the purpose of examining dissuasive and persuasive measures to eliminate cheap imports of cement (primarily those from Greece) onto European markets. Nor could those observations have precluded the findings referred to in paragraph 2825 above as to Dyckerhoff's participation in the various meetings devoted to the ETF and its unlawful activities.

2840 Sixth, in its observations of 7 February 1997 Dyckerhoff claims that the Commission did not mention, in the summary of facts which the SO devotes to the Greek market (chapter 7), the anti-dumping procedure contemplated by the European producers and the State measures in favour of Greek producers, whereas various documents refer to the latter (documents 33.126/19882 and 19884).

2841 However, in the contested decision, the Commission states in footnote 113 that '[w]hen Greece joined the Community, its cement industry was receiving a considerable amount of State aid', before referring to a number of decisions which it took in relation to that aid, during and after the period in which the ETF was operational. In the contested decision, recital 53, paragraph 8, it discusses in detail the argument put forward by Lafarge at the hearing on 12 March 1993 that 'Article 85(1) [of the Treaty] was not applicable to the members of the ETF because they were acting in legitimate self-defence against exports by the Greek producers, who were receiving unlawful aid from the government of their country'. The Commission had therefore correctly understood, during the administrative procedure, the economic background to the reactions of the European producers to imports from Greece. Accordingly, any observations that Dyckerhoff might have been able to formulate then on the basis of documents 33.126/19882 and 19884 could only have repeated observations already duly taken into account in the contested decision.

2842 Seventh, Dyckerhoff puts forward, in its observations of 5 January 1998, several Blue Circle telexes concerning the planning of the ETF meeting of 10 September 1986. Dyckerhoff is not mentioned in any of those telexes, which, in its view, shows that it did not take part in the planning and preparation of the alleged activities of the ETF (documents 33.126/11010 to 11012). Dyckerhoff raises the same argument on the basis of the telexes relating to the ETF meetings on 21 October 1986, January, March and May 1987 (documents 33.126/15343 to 15347, 18874 to 18894, 18901 to 18918, 18950, 18951, 18953 to 18955 and 18956 to 18960).

2843 However, the Commission has never claimed that a meeting of the ETF took place on 10 September 1986. In the contested decision, recital 25, paragraph 21, it points out that the ETF met in Baden-Baden at midday on 9 September 1986, but does not allege that Dyckerhoff was present at that meeting. Nor does it maintain in the contested decision that Dyckerhoff participated in the ETF meetings of 21 October 1986 and 9 January 1987, a meeting of its subgroup on 'Stick actions' on 17 March 1987 or the meeting at the end of May 1987 at which the fate of the ETF was discussed. As pointed out in paragraph 2825 above, the Commission found that Dyckerhoff took part in the meeting in Rome on 28 May 1986, the meeting in Stockholm on 9 June 1986, the meeting of Head Delegates' representatives of the ETF in Baden-Baden on 9 September 1986 and the meeting of European cement industry representatives in Brussels on 6 November 1986. Those findings of fact, which led the Commission to find that Dyckerhoff took part in the infringement relating to the setting-up of the ETF, could not have been refuted by the observations that Dyckerhoff might have put forward in the course of the administrative procedure on the basis of the documents referred to in the previous paragraph.

2844 It must be added that in the contested decision, recital 53, paragraph 4, the Commission adopts a position on 'the claim made by certain undertakings and associations of undertakings that, not having participated in the Task Force meetings or subgroup meetings, but only in the meetings of the Head Delegates, they cannot be held responsible for the measures examined'. Observations like those now put forward by Dyckerhoff were therefore fully taken into consideration by the Commission in the contested decision.

2845 Eighth, in its observations of 5 January 1998 Dyckerhoff mentions an internal Blue Circle note of 28 August 1986 (document 33.126/11013), which relates Blue Circle's unsuccessful efforts to meet imports from Greece on a European front. It claims that those statements show that, apart from its political initiatives, Dyckerhoff did not participate in the adoption of collective measures with other European producers.

2846 However, contrary to Dyckerhoff's submissions, the document in question does not relate a failure by Blue Circle in its attempt to create a common European front to counter imports from Greece. It merely refers to the great difficulties, on the one hand, of proving 'collusion between the Greek producers' and, on the other hand, reaching a collective agreement with the Greek industry.

2847 In any event, the observations that Dyckerhoff might have put forward during the administrative procedure on the basis of that document could not have precluded the findings, referred to in paragraphs 2825 and 2830 above concerning the setting-up of the ETF in mid-1986 in order to respond with a common front to the imports threatening the stability of the various Western European markets, and Dyckerhoff's participation in that agreement.

2848 Ninth, in its observations of 5 January 1998 Dyckerhoff claims that, according to a Holderbank letter addressed to members of the ETF, it did not collaborate in the follow-up and implementation measures of the Baden-Baden meeting, in which it had taken part solely in order to prepare for the meeting with the members of the European Parliament. Its name is not mentioned on the list of recipients of that letter (documents 33.126/18870 to 18873).

2849 However, that fact, even if it could have been raised by Dyckerhoff during the administrative procedure, could not have cast doubt on the contents of the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, which mentions the presence of Mr Lose, from Dyckerhoff, at that meeting, during which the setting-up of the ETF, its anti-competitive object, its composition, its working methods and the various measures entrusted to it for consideration were examined in turn (contested decision, recital 25, paragraphs 22 to 32; documents 33.126/18857 to 18862). Any observations which Dyckerhoff might have made during the administrative procedure on the basis of the Holderbank letter mentioned in the previous paragraph to show that it had taken part in that meeting solely for the purpose of the political actions contemplated in relation to members of the European Parliament could not have offset the complete absence of any evidence to show that, at that meeting, Dyckerhoff expressly told the other participants that it was attending it with different objects in mind.

2850 In conclusion, there was not even a small chance that any of Dyckerhoff's observations could have altered the outcome of the administrative procedure. Dyckerhoff has not therefore established the existence of an infringement of its rights of defence in that regard during the administrative procedure.

4. Case T-36/95 *SFIC* v *Commission*

2851 SFIC claims in its observations of 10 February 1997 that a number of documents in the British file (documents 33.126/17157 to 17159, 17163, 17164, 17171, 17172, 17182 and 17193) show that the CMF had undertaken numerous representations to its national administration in order to bring about the adoption of measures to deal with imports from third countries into the Community or from Greece. The CMF thus made contact with the Minister for Trade and the OFT (see paragraph 1147 above) in order to consider governmental action and the support that it could offer for such action, by informing the DTI in particular (see paragraph 416 above) of the market situation with respect to imports from Eastern Europe (documents 33.126/17220, 17623 to 17625, 17628 to 17630, 17635 to 17638 and 17641 to 17653). With regard to the question of imports from Greece, several documents in the United Kingdom file, in particular the minutes of the meeting of the CMF on 8 October 1986 (documents 33.126/17168 and 17178), mention direct contacts between the United Kingdom Government and the Greek Government, which goes to support SFIC's argument that that question was likely to create a bilateral 'lobbying' response, rather than the implementation of agreements or concerted practices. In addition, those documents tend to support the evidence of the size of the 'Greek problem' at the economic level. Among the documents in the United Kingdom file, the SFIC refers to the minutes of the meeting of the CMF on 3 June 1987, which reports contacts entered

into by the French administration with its British counterpart, when the threats arose of imports of Greek cement into France through the port of Rouen. Finally, several documents in the file relating to Spain (documents 33.322/1319 to 1323, 1604, 1607 and 1608) show that those steps were taken by Oficemen in relation to its government authorities in connection with lobbying activity on various matters, for example the certification of the quality of the cement. All those documents would have been particularly useful to the SFIC in order to support its argument concerning the lawfulness of the actions it took, individually or through Cembureau, during the period in question. The SFIC considers that, if the Cembureau agreement had existed, the steps taken by the various national associations to counter imports (particularly those from Greece) would have been fundamentally different.

2852 In its observations of 7 January 1998, the SFIC cites a series of documents (documents 33.126/2088 to 2096, 2122 to 2125, 7717 to 7722, 11003, 11004, 11021, 11022, 11052, 11053, 11066 to 11068, 11077 to 11079, 11122 to 11124, 11130, 11131, 11180, 11181, 15388, 16436, 16437, 16467, 16468, 16469, 16470, 16471, 16472 to 16474, 16488, 16489, 16490, 16508 and 16509) to support its explanations supplied during the administrative procedure, that its actions and those of the other European associations and undertakings to deal at European level with the unlawful exports from Greece, had consisted in political initiatives made to the government and Community authorities, with the particular support of members of the European Parliament, initiatives which were moreover successful. The SFIC then refers again to the minutes of the CBR's management committee meeting of 29 March 1988 (documents 33.126/7635 to 7637), which reflect the relative passiveness of the Commission with regard to the question of the Greek cement industry, in spite of the fact that some of that industry's practices were not compatible with Community rules. That document would have helped the SFIC to have a better understanding of the question of imports into Europe of cement from Greece and to justify the necessity of the lobbying activities subsequently carried out, both by trade associations and by various cement producers. Finally, the SFIC refers to the extract from a document sent by Blue Circle to the Commission on 8 December 1989 (documents 33.126/13633 to 13648), which shows that the documents concerning imports from Greece, seized by the Commission's agents at Blue Circle, 'entirely support Blue Circle's contention that although there were discussions about a variety of possible solutions to the problem of the Greek policy of exporting heavily subsidised cement to the United Kingdom, no agreement or arrangement with other cement producers was ever concluded or implemented' (document 33.126/13643). According to the SFIC, the information in that statement ought, in order to observe its rights of defence, have been made available to it during the administrative procedure as it constituted exculpatory evidence.

2853 It has, however, already been pointed out on various occasions (see, in particular, paragraph 2819 above) that the Commission has never denied that the problem of imports into Western Europe, especially from Greece, had given rise to a campaign of awareness-raising and of pressure on the national and Community authorities concerning the effects of those cheap imports. However, in the contested decision it was interested only in the measures which went beyond those political initiatives (footnote 115). The observations which the SFIC might have put forward during the administrative procedure in order to emphasise the political initiatives to which the Greek problem gave rise could therefore only have illustrated one aspect of that file duly noted and not challenged by the Commission. They could not, however, have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found, in recital 53, that the threatened imports into Western

Europe of cement from Greece had prompted, in addition to political actions, the setting-up of the ETF for the purpose of considering the dissuasive and persuasive measures intended to eliminate cheap imports of cement (principally those from Greece) onto European markets.

2854 Furthermore, those observations could not have refuted the various findings made by the Commission in the contested decision, recital 29, paragraph 4, on the basis of which it rightly found that the SFIC had taken part in the infringement relating to the agreement setting up the ETF.

2855 Any observations that the SFIC might have made during the administrative procedure on the basis of the CBR document (documents 33.126/7635 to 7637) would, like the observations put forward by Lafarge at the hearing on 12 March 1993, have attempted to justify, on the grounds of an alleged state of legitimate self-defence, the collective measures adopted by the European producers against imports from Greece, observations on which the Commission expressed its view in the contested decision, recital 53, paragraph 8.

2856 Finally, the observations which the SFIC might have put forward during the administrative procedure on the basis of Blue Circle's denials (documents 33.126/13633 to 13648), an undertaking directly involved in the ETF, could quite plainly not have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly concluded that there was an 'ETF' coalition and that the SFIC was involved in that anti-competitive agreement.

2857 In conclusion, there was not even a small chance that the SFIC's various observations could have altered the outcome of the administrative procedure. SFIC has not therefore established the existence of an infringement of its rights of defence in that regard during the administrative procedure.

5. Case T-35/95 *Ciments Français* v *Commission*

2858 In its observations of 10 February 1997, Ciments Français claims that certain documents relating to the chapters of the SO concerning Greece, the United Kingdom and Italy would have enabled it to establish that, contrary to the claims of the Commission, the actions taken to counter imports from Greece had not been taken by the ETF or by the Head Delegates or on the basis of an agreement between Cembureau and several European producers.

2859 It refers to various documents (Italcementi's internal notes of 15 and 26 October 1987 (documents 33.126/2945 to 2951) and a record of the meeting of a working group in Rome on 12 January 1988 (documents 33.126/19871 to 19873)) referring to measures relating to imports into Italy of cement from Greece, which make no reference at all to any agreement whatsoever concluded between Italian and other European producers at Cembureau or ETF level.

2860 It claims further that the measures concerning imports into the United Kingdom of cement from Greece were not the work of the Head Delegates nor of the ETF and that they had no connection with Cembureau. It mentions a series of documents, the dates of which coincide with those of the meetings of the ETF or of the Head Delegates referred to by the Commission, which in its view indicates that the British producers alone attempted, at national and Community level, to find a legal and political solution to the problems raised by imports from Greece, without any reference ever being made to concerted actions with the ETF or the Head Delegates (documents 33.126/10827, 10828, 17157 to 17159, 17166 to 17170, 17178, 17179 and 19881 to 19887).

2861 In its observations of 21 November 1997 Ciments Français mentions several documents which show that the ETF and the meetings of the European cement industry representatives had the sole purpose of organising lobbying activities at national and Community level, at the prompting of the British producers, in order that the subsidies for exports from Greece to the rest of the Community might be brought to an end (documents 33.126/18961, 16494, 16495, 16493, 16508, 16489, 16490, 16469, 18962, 18963, 16463, 11021, 11022, 11052, 11053, 18972, 16443, 11079, 16436, 16437, 11123 to 11126, 11165 to 11167, 11171 to 11175 and 19014 to 19016). Furthermore, some of those documents confirm that the only role played by Mr Laplace, the president of Ciments Français and, at the time, president of the SFIC, was to represent the French industry in those political initiatives (documents 33.126/18962, 18963, 11021, 11022, 11052 and 11053).

2862 It must however be found that all those observations, even if they could have been made by Ciments Français during the administrative procedure, could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found in recital 53 that, beside the individual responses of the markets most directly threatened by imports from Greece (the United Kingdom and Italy, in particular) and the political actions to raise the awareness of the national and Community authorities and to bring pressure to bear upon them, the 'Greek problem' had given rise to the setting-up of the ETF on the initiative of a number of larger undertakings, including Ciments Français, for the purposes of considering, with a view to making recommendations to the Head Delegates, dissuasive and persuasive measures intended to eliminate destabilising imports (principally those from Greece) onto European markets.

2863 It must then be pointed out that, at the hearing on 12 March 1993, Ciments Français, after stating that its president, Mr Laplace, then also president of the ETF, had been present at the meetings in Rome, Stockholm and Brussels, had claimed that Mr Laplace's presence 'at these

meetings of the Head Delegates related to his role in the Syndicat and on the Liaison Committee' (contested decision, recital 25, paragraph 9).

2864 Notwithstanding those assertions, the Commission considered (contested decision, recital 53, paragraph 13):

'Even if Mr Laplace did, like other representatives, participate in his capacity as President of an Association or chairman of a committee, he could not, in attending the meetings, disregard the fact that he was the chairman of Ciments Français. His presence therefore ensured that SFIC and the Committee, together with the company of which he was chairman, had a role within the task force.'

2865 The observations of Ciments Français set out in paragraph 2861, stressing that the only role played by Mr Laplace was to represent the French industry in the political actions taken in connection with the Greek question, would not have added anything new to the debate. They could not therefore have provided a basis for excluding the responsibility of Ciments Français in the infringement found in Article 4(1) of the contested decision.

2866 In conclusion, there was not even a small chance that Ciments Français' observations could have altered the outcome of the administrative procedure. Ciments Français has therefore not established an infringement of its rights of defence in that regard during the administrative procedure.

6. Case T-42/95 *Heidelberger* v *Commission*

2867 In its observations of 20 February 1998, Heidelberger claims that several documents show that it had no financial interest in taking part in dissuasive measures against Greek producers, inasmuch as, for reasons of geography, southern Germany could not be affected by Greek deliveries. It refers first to documents 33.126/19902, 19910, 19918 and 19935 as showing that Heracles had not made any cement deliveries in Germany during 1985 and 1986, second, page 8 of the 32-page document reproduced in loose-leaf binder L, pages which include documents 33.126/19411 and 19418, the content of which demonstrates also that, from 1985 to 1989, there were no deliveries in Germany of cement from Greece and, third, documents 33.126/19397 and 19401, the content of which shows that in 1990 also there were no such deliveries in Germany, at a time when, according to the findings of the Commission (contested decision, recital 25, paragraph 48), the ETF no longer existed. Heidelberger then points out that, with the exception of the documents referred to in the contested decision, its name is not mentioned in any of the files relating to the ETF. By way of example it cites the numerous

documents concerning the setting-up of Interciment, and mentions in particular documents 33.126/7639 to 7641, 7643, 7644, 7657 and 7658.

2868 The Court points out, however, that the observations which Heidelberger could have made during the administrative procedure on the basis of those various documents in order to establish its alleged lack of interest in the measures to counter imports from Greece could not have refuted the finding made by the Commission in the contested decision, recital 25, paragraph 1, concerning its participation in the meeting in Rome on 28 May 1986, at which it was agreed to respond rapidly and collectively to the decision of the Greek cement industry to export 2 million tonnes of cement to Western Europe, a decision felt to be a 'very serious problem' for 'all the markets' (document 33.126/18771). Those observations could not therefore have provided a basis for excluding the responsibility of Heidelberger in the infringement found in Article 4(1) of the contested decision.

2869 In conclusion, there was not even a small chance that any of Heidelberger's observations could have altered the outcome of the administrative procedure. Heidelberger has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

7. Case T-43/95 *Lafarge* v *Commission*

2870 Lafarge claims that access to the whole of the SO and to the Commission's investigation file would have enabled it successfully to substantiate its case during the administrative procedure on four specific points concerning the head of claim relating to the setting-up of the ETF: the fact that there was no European cartel to combat imports from Greece; the economic background and the political dimension to the 'Greek problem'; the role played by the ETF in that matter; the Commission's information concerning the discussions within the ETF.

2871 First, in its observations of 10 February 1997 and 28 January 1998 Lafarge relies on the complete absence of any reference, in the documents made available to it as a result of the measures of organisation of procedure referred to in paragraph 2816, to the existence of any European cartel with responsibility for combatting cement imports from Greece.

2872 The Court points out, however, that any observations that Lafarge might have been able to put forward on the basis of that alleged circumstance would not have been capable of overriding the bundle of documents referred to in recital 25 of the contested decision, on the basis of which the Commission correctly found, in recital 53, that there was a multilateral agreement between various undertakings — including Lafarge — and associations of European undertakings

concerning the setting-up of the ETF for the purpose of considering dissuasive and persuasive measures to eliminate destabilising imports into Western Europe, principally those from Greece.

2873 Second, in its observations of 10 February 1997 and 28 January 1998, Lafarge puts forward a large number of documents which in its view would have been useful to it during the administrative procedure in order to illustrate the economic background and the political dimension of the Greek problem.

2874 In its observations of 10 February 1997, it refers first to minutes of the CMF meeting on 17 July 1986 (document 33.126/17158), illustrating the political dimension of the Greek problem; second, documents showing the actions undertaken in vain by the British public authorities with regard to the Commission in order to combat the Greek problem (documents 33.126/17163, 17171 and 19880); third, documents referring to the measures taken by the British public authorities with regard to the Greek Government in order to prevent imports of cement from Greece, and which recall in particular the conclusion of an inter-governmental quota agreement (documents 33.126/17168, 17178 and 19878); and, fourth, documents concerning the intervention of the British competition authority, which reveal involvement of the British public administration in their cement industry's manoeuverings in order to counter the threat of subsidised imports from Greece (documents 33.126/17133, 17171, 17169, 17168 and 17176). Lafarge then produces two sets of minutes of CMF meetings (documents 33.126/17191 to 17196, in particular 17193), to show that the ETF saw its efforts overtaken by political action, namely the conclusion in December 1986 of an agreement between the Greek and United Kingdom Governments to limit imports into the United Kingdom of Greek cement.

2875 In its observations of 28 January 1998, Lafarge refers first to documents which do not mention the existence of a European cartel and which therefore show the unilateral character of the actions undertaken by the British industry (documents 33.126/10825, 10827 to 10829, 11007 to 11009, 10837, 11015 to 11020, 11074, 11075, 11110, 11116 and 11000); secondly, to documents illustrating the political support given to the British industry in that file (documents 33.126/16473 and 16474); thirdly, to documents demonstrating that the only actions undertaken to resolve the 'Greek problem' were those of the public authorities which intended to put an end to the unlawful aid granted to the Greek cement industry (documents 33.126/11119 to 11131, 11165, 10840 to 10844, 11164 to 11169, 11171, 11172, 111777 and 11190 to 11191); fourthly, to documents demonstrating that political actions were taken by the German, Belgian and Italian industries (documents 33.126/18961, 16494, 16495, 16465 to 16468, 16472, 16508, 16436, 16442, 2088 to 2090, 2122 to 2125, 16087, 16088, 16091 to 16104, 16016 to 16110 and 7725 to 7740); and, fifthly, to documents establishing the existence of a Greek cartel with designs on the British market and supported by the Greek Government (documents 33.126/19369, 19370 to 19392, 11004, 11108 and 11109).

2876 The Court has however already pointed out several times (see in particular paragraph 2819 above) that the political dimension of the Greek problem had not escaped the Commission, but that in the contested decision it concentrated solely on the measures which went beyond those political actions (see footnote 115). Moreover, in the contested decision, recital 28, paragraph 13, the Commission refers to the conclusion in December 1986 of an inter-governmental agreement between Greece and the United Kingdom to limit the imports into the United Kingdom of cement from Greece, emphasising that the record of the meeting of the ETF defensive measures subgroup on 17 March 1987 mentions that 'high policy' agreement.

2877 The Commission had also correctly perceived the State aid elements which prompted the response of the European producers to imports from Greece (see paragraph 2841 above; contested decision, footnote 113). In the contested decision, recital 53, paragraph 8, it rejects the observations put forward specifically by Lafarge at the hearing in March 1993 to justify those responses by alleging lawful self-defence. For the reasons set out in the fifth and sixth paragraphs of recital 53, paragraph 8, namely, that according to various documents the ETF's purpose was broader than merely to counter imports from Greece, the same fate would necessarily have met Lafarge's argument concerning the existence of a Greek export cartel at the time of the ETF.

2878 The observations which Lafarge might have presented during the administrative procedure on the basis of the various documents referred to in paragraphs 2874 and 2875 above could therefore only have repeated considerations duly taken into account by the Commission in the contested decision. They could not have refuted the objective findings referred to in paragraph 2872 above concerning the setting-up of the ETF by a series of producers and associations of European producers — including Lafarge — for the purposes of considering dissuasive and persuasive measures intended to eliminate cheap imports of cement (primarily from Greece) into Western Europe.

2879 Third, in its observations of 10 February 1997 and 28 January 1998, Lafarge refers to a series of documents to demonstrate that the ETF's true role in the Greek affair consisted of lobbying and deliberation.

2880 In its observations of 10 February 1997, Lafarge cites in this connection documents 33.126/17168, 17176, 17163, 17646, 17648, 17178 and 19878 to 19888.

2881 In its observations of 28 January 1998, it claims that documents show that the British cement industry at the material time exhorted the European industry as a whole to join in its campaign to raise public awareness of the Greek problem (documents 33.126/18961, 18962, 18972 and 19011). It then puts forward documents relating to the ETF meeting in Baden-Baden on 9 September 1986 which show that the object of that meeting was to enable the British producers to inform the other European industry representatives of the content of the

presentation of the 'Greek problem' which it had planned for the following day to members of the European Parliament (documents 33.126/11021, 11022, 11033 to 11039, 11052, 11066 to 11068, 11072 and 11077). Lastly, it refers to documents relating to the meeting of the ETF in Brussels on 6 November 1986, which show that the object of that meeting was to prepare for the interview to be held the same day with Mr Sutherland, a member of the Commission, on the subject of the Greek problem (documents 33.126/11077, 11078, 18991, 18992 and 19003).

2882 As regards, first, documents 33.126/11021, 11022, 11033 to 11039, 11052, 11066 to 11068, 11072 and 11077, which Lafarge tries to link to the content of the ETF meeting in Baden-Baden on 9 September 1986 referred to in the contested decision, recital 25, paragraph 21, those documents show at most that several meetings took place in Baden-Baden on 9 September 1986 and in Strasbourg on 10 September 1986. According to document 33.126/11038, on 9 September 1986 there took place at midday a meeting of the 'working group', the purpose of which was not specified, and then at 19.00 hours, a meeting of the 'trading group' and also 'strategy discussion for meetings on 10 September', and finally at 21.00 hours, 'dinner for all industry participants'. On 10 September 1986 there took place between 10.30 and 15.00 hours a 'briefing meeting with UK MEPs', then 'lunch with 12 to 15 members of the Economic Monetary Affairs and Industry Policy Committee of the European Parliament'. Neither document 33.126/11038 nor the other documents referred to above contradict the content of the documents referred to by the Commission in the contested decision, recital 25, paragraphs 21 to 33, which show, first, that the meeting in Baden-Baden at midday on 9 September 1986 was an ETF meeting which 'was essentially aimed at preparing a briefing for each subject for the Head Delegate the same day after 18.00' (contested decision, recital 25, paragraph 21; document 33.126/18848) and, second, that in the late afternoon of the same day, again in Baden-Baden, there was a meeting of the 'Head Delegates and representatives of the ETF', at which the setting-up of the ETF, its anti-competitive purpose, its composition, organisation of its tasks and the various dissuasive and persuasive measures which it had been given to it to consider were referred to in turn (contested decision, recital 25, paragraphs 22 to 32; documents 33.126/18849 to 18862).

2883 With regard to the meeting in Brussels on 6 November 1986, described in the contested decision, recital 25, paragraphs 39 to 43, the Commission has never denied that its purpose was, *inter alia*, to prepare for the interview arranged with Mr Sutherland (see contested decision, recital 25, paragraph 43). Any observations which Lafarge might have presented during the administrative procedure on the basis of documents 33.126/11077, 11078, 18991, 18992 and 19003 could therefore only have corroborated the findings duly made by the Commission. They could not, on the other hand, have altered the fact that, as is clear from the notes concerning that meeting, referred to in the contested decision, recital 25, paragraphs 39 to 43 (documents 33.126/19007 and 19008), it was also agreed then that the ETF should continue to meet in order to follow up developments in the threat of imports of cement from Greece into Western European markets.

2884 As to the remainder, the various observations which Lafarge might have put forward during the administrative procedure to emphasise the ETF's political activities could not have prevailed over the documents referred to in recital 25 of the contested decision on the basis of which the

Commission rightly found in recital 53 that the ETF had pursued another, unlawful objective, namely the consideration of dissuasive and persuasive measures to eliminate destabilising imports (primarily those from Greece) into Western European markets.

2885 Fourth, in its observations of 28 January 1998, Lafarge refers to documents 33.126/11086, 11130 and 11131, in order to show that the Commission had been informed of the discussions of the Greek problem at ETF level. Those documents show that the discussions between the British and Greek industries were linked with the more general discussions of the way in which to resolve the 'Greek problem' and that they had been openly entered into in connection with actions taken to lobby the Commission.

2886 However, the documents in question at most show that the Commission was informed at the time of bilateral discussions between British and Greek cement producers in connection with the Greek problem. None of them shows that the Commission had been informed of the setting-up of the ETF with a view to examining the dissuasive and persuasive measures capable of eliminating imports (particularly those from Greece) into Western Europe. Therefore, the observations which Lafarge could have presented during the administrative procedure on the basis of those documents could not have refuted the Commission's finding in recital 25, paragraph 7, of the contested decision that 'none of the firms indicated whether and which Commission officials were informed of the collective actions proposed [at ETF level]'.

2887 In conclusion, there was not even a small chance that any of Lafarge's observations could have altered the outcome of the administrative procedure. Lafarge has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

8. Case T-44/95 *Aalborg* v *Commission*

2888 First, in its observations of 10 February 1997 Aalborg refers to a series of documents in the file concerning the United Kingdom (documents 33.126/17627, 17629, 17630 and 17641 to 17653, in particular 17641 and 17646) concerning the examination by the Commission of an anti-dumping complaint lodged by the European cement producers, and of action by the trade objecting to the aid granted by Greece to its own industry and not, as the Commission would have it in paragraph 15 of the SO, action to sanction some infringement or other of the Cembureau agreement by the Greek producers. In its view, those documents would have enabled Aalborg to disprove the Commission's argument that the ETF was set up in 1986 in order to ensure that the Cembureau agreement, adopted in 1983, was applied. Several extracts from minutes of CMF meetings held between July and September 1986 (documents 33.126/17158, 17163, 17164, 17168) would in their turn have enabled it to show that the

presence of its manager, Mr Larsen, at a preparatory meeting in Baden-Baden on 9 September 1986 was explained not by its involvement in any Cembureau task force, but by its participation in Strasbourg on 10 September 1986 in action to raise the awareness of members of the European Parliament of the problem of unlawful subsidies granted by the Hellenic Republic to its cement industry. Those minutes of meetings, which also show developments in the anti-dumping file, would also have been useful to Aalborg in order to support its argument concerning the lawfulness of the cement industry's actions. Finally, Aalborg refers to an internal note concerning the meeting of the Blue Circle 'Management Group' on 19 June 1986 (documents 33.126/10822 and 10823), which reports the threat posed by the imports, in connection with an anti-dumping proceeding, of cement from Greece, and also the proposed lobbying of the British authorities with a view to trying to confine that threat. That note, which relates to the period immediately preceding Blue Circle's invitation to Aalborg to make contact with its national authorities and with the Danish members of the European Parliament in order to obtain action on the unlawful Greek aid, would have been particularly useful to it in showing the legitimate reasons which led it to participate in the preparatory meeting in Baden-Baden on 9 September 1986.

2889 In its observations of 12 January 1998, Aalborg refers to a series of documents (documents 33.126/16469, 11000, 11001, 11007 to 11009, 11074, 11075, 18961, 18962, 18963, 11004, 11021, 11022, 11062 to 11064, 11054 to 11060, 16183, 11028 to 11031, 11033 to 11038, 7723, 11072, 17173, 17174, 11126, 11130, 11131, 11138 to 11141, 11116, 11117, 18892 to 18997 and 15388, and 33.322/1319 to 1323). It claims that those documents demonstrate that although from 1986 onwards the European cement industry showed that it was worried by intra-Community trade, their concerns related only to imports from Greece, subsidised by the national authority. They also show that these concerns gave rise, on the one hand, to the setting-up of the ETF consisting solely of several large European cement producers (the 'Group of Eight'), excluding Aalborg and, on the other hand, to measures, quite lawful and in essence instigated by Blue Circle, to make the national and Community authorities aware of the matter. Those measures, which were partly successful, were the only action in which Aalborg took part. They explain its participation on 9 September 1986 in Baden-Baden in a meeting preparatory to the next day's interview in Strasbourg with members of the European Parliament, a meeting from which the Commission drew the erroneous conclusion that Aalborg was involved in the unlawful ETF agreement.

2890 The Court has, however, already pointed out several times (see in particular paragraphs 2819 and 2841 above) that the Commission had correctly perceived the political dimension and the economic background of the problem connected with imports from Greece (see footnotes 113 and 115 of the contested decision). Any observations that Aalborg might have made on those various aspects of the Greek file could therefore only have reiterated considerations duly taken into account by the Commission in the contested decision. They could not have prevailed over the documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found, in recital 53, that, alongside action to make the national and Community public authorities aware of the matter and to bring pressure to bear upon them, the appearance of the Greek export issue had given rise to the setting-up of the ETF for the purposes of considering dissuasive and persuasive measures capable of eliminating cheap imports of cement (principally those from Greece) into Western Europe.

2891 Nor could those observations have precluded the finding made by the Commission in the contested decision, recital 25, paragraph 23, with regard to the participation of Aalborg's Mr Larsen in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which the setting-up of the ETF, its anti-competitive purpose, its composition, the organisation of its tasks and the various measures which it was given to consider, were in turn discussed (contested decision, recital 25, paragraphs 22 to 32; documents 33.126/18849 to 18862). The observations that Aalborg might have formulated during the administrative procedure on the basis of the documents referred to in paragraphs 2888 and 2889 above in order to show that it had taken part in that meeting solely for the purpose of the political action envisaged vis-à-vis members of the European Parliament could not have disguised the total lack of evidence to show that at that meeting Aalborg expressly informed the other participants that it was attending it with quite different objects in mind.

2892 As to the particular stress that Aalborg might have put during the administrative procedure on the fact that it had not been a member of the 'Group of Eight' constituting the ETF, it must be pointed out, first, that the Commission has never maintained that the applicant was part of that group (see its findings in the contested decision, recital 25, paragraph 24, concerning the composition of the ETF) and, second, that in the contested decision, recital 53, paragraph 4, it sets out the grounds which led it to the conclusion that 'the claim made by certain undertakings and associations of undertakings that, not having participated in the task force meetings or subgroup meetings, but only in the meetings of Head Delegates they cannot be held responsible for the measures examined, is without any foundation'.

2893 In short, Aalborg's observations could not have provided a basis for excluding its responsibility in the infringement found in Article 4(1) of the contested decision.

2894 Second, Aalborg points out in its observations of 10 February 1997, that the internal Blue Circle note mentioned in paragraph 2888 above (documents 33.126/10822 and 10823) emphasised the need to consult a lawyer in connection with the measures to be taken concerning the unlawful imports from Greece.

2895 The Court points out in that regard that in the contested decision, recital 25, paragraphs 1 and 7, the Commission notes that the members of the ETF had contemplated seeking the advice of an expert in Community law on the legality of the actions they had in mind. Any observations that Aalborg might have made on this point during the administrative procedure could therefore only have corroborated the evidence already duly taken into account by the Commission in the contested decision. On the other hand, they could not have refuted the finding that follows from the documents referred to in recital 25 of the contested decision namely, that notwithstanding its declared intention, the ETF was set up and charged with considering the dissuasive and persuasive measures intended to eliminate cheap imports of cement into Western Europe, an objective manifestly contrary to Article 85(1) of the Treaty.

2896 Third, in its observations of 12 January 1998, Aalborg refers to an internal Italcementi note of 15 October 1987 (documents 33.126/2945 to 2948), which states that the name 'ETF' was also used in Italy to designate a form of ad hoc regional cooperation, intended to counter dumped imports of cement from Greece onto the Italian market. This document therefore shows that the ETF did not have the institutionalised character attributed to it by the Commission in the contested decision, and was not the embodiment of the Cembureau agreement.

2897 However, even if that evidence could have been put forward by Aalborg during the administrative procedure, it could not have prevailed over the voluminous bundle of documents referred to by the Commission in the contested decision, recital 25, paragraphs 10 to 48, from which it is clear that the name 'ETF' was also given to the working group set up in the middle of 1986 at European level in order to consider, with a view to making recommendations to the Head Delegates, the dissuasive and persuasive measures intended to eliminate cheap imports of cement into Western Europe.

2898 In conclusion, none of Lafarge's observations had even a small chance of altering the outcome of the administrative procedure. Lafarge has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

9. Case T-48/95 *BDZ* v *Commission*

2899 The BDZ claims, in its observations of 10 February 1997, that several documents in the files concerning France, the United Kingdom and Greece (documents 33.126/14832, 17129, 17141, 17171, 17176, 17187, 17193, 17196, 17071, 17158, 19882 and 19884) show that the activities undertaken by the European producers to counter imports of cement from Greece, actions in which it admits having taken part in order to represent the interests of the German cement industry, were confined to lawful initiatives vis-à-vis the national and Community authorities.

2900 Nevertheless, even if BDZ could have made those observations during the administrative procedure, they could have done no more than confirm the reality of the political initiatives to which the Greek export problem gave rise, initiatives which are not disputed by the Commission. On the other hand, they could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission has rightly found in recital 53 that the threat of imports into Western Europe of cement from Greece had given rise to the setting-up of the ETF for the purpose of examining dissuasive and persuasive measures to eliminate cheap imports of cement (primarily those from Greece) into Western Europe.

2901 There was thus not even a small chance that any of BDZ's observations could have altered the outcome of the administrative procedure. BDZ has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

10. Case T-50/95 *Unicem* v *Commission*

2902 In its observations of 7 February 1997, Unicem claimed, *inter alia*, that consultation of the file as a result of the measures of 2 October 1996 revealed that the documents examined did not contain the slightest evidence of general collusion at European level when the problem of imports from Greece arose.

2903 In support of that line of argument, Unicem put forward a series of documents from national files, which it identified by reference, where appropriate, to the pagination used by the Commission in drawing up the measure of 2 October 1996 or to the pagination/numbering of the SO. None of these documents, however, was enclosed with its observations.

2904 In its memorandum lodged at the Registry of the Court on 28 November 1997 following its inspection of the rest of the Commission's file in connection with the measure of 18 and 19 June 1997, Unicem made good that omission by including all the comments it had made in its observations of 7 February 1997 and enclosing as annexes the various documents on which it had relied in those observations.

2905 In its observations of 28 November 1997, Unicem maintains that the national documents setting out the concerns caused by imports of cement from Greece onto European markets and the reactions thereto (documents 33.126/7720, 7725, 7740, 7635 to 7638 — in particular 7637 —, 17163, 17157 to 17160, 17172, 17193, 17219 to 17225, 17624, 17625, 17631 to 17633, 17635 to 17638, 17641 to 17653, 10827, 10828, 17178, 17179, 10842, 10843, 15354, 15363, 11077, 11086, 15364 to 15367, 15368, 11087, 11166, 11188, 11189, 15386, 15387, 6881, 6882, 15351 to 15353, 15355, 15363 to 15367, 15388 and 2088 to 2097 — in particular 2094) show that the 'Greek problem' was treated quite independently on each market by measures adapted to the type of attack on each market, without the slightest collusion at European level. In its view, all those documents contradict the Commission's argument, based on an alleged single design drawn up in advance by Cembureau intended to punish the Greek producers for their infringement of the rule that there should be no transhipment to home markets. Those documents should therefore have led the Commission to assess the responsibility of each national industry, rather than holding the entire European industry liable for isolated action taken to counter imports from Greece. Unicem also states that the British documents do not contain any reference to the involvement of Cembureau, the ETF or

the ECEC in that matter, or any mention of the support which the Commission alleges that the Italian producers gave to the British producers in their campaign against imports from Greece, or any reference to Unicem. The French documents (in particular documents 33.126/17219 to 17225) show that, when France was threatened with imports from Greece, the French Government turned directly to its United Kingdom counterpart. It claims that those facts prove the utterly marginal role played by Cembureau in the resolution of those problems. A good number of documents dealing with imports from Greece, in particular the British documents, show that the lobbying activities undertaken on the initiative of the British producers (in particular Blue Circle) vis-à-vis the political and institutional authorities, and the individual negotiations between certain European producers and the Greek producers, were far and away the most important in resolving the 'Greek problem', which confirms the purely marginal role of the ETF, a body which acted purely as a 'sounding box' for the unilateral initiatives of the British producers. Finally, in the files concerning Spain, Portugal and Germany, Unicem found no document indicating that the imports from Greece had received concerted attention and reaction at European level.

2906 Unicem further claims that the national files confirm that the discussions on changes in imports and actions to deal with them were held in isolation on each market, without any involvement of the members of Cembureau, the ETF or the ECEC. In its view, those files also show that Unicem was not a party to attempts to 'lock up' the markets, which were of absolutely no interest to it since it did not export. In the file relating to France, Unicem refers in particular to documents 33.126/14806, 14807, 14938, 15025, 15026, 15040, 14809 to 14826, 14938 to 14976, 5688, 1394, 1395, 5648, 5747, 5748, 5695, 5696, 5751 and 5674, and also to paragraphs 78 and 81 of the SO. In the file concerning the United Kingdom, it refers to paragraph 74 (p. 199) and 77 (p. 202) of the SO, and to documents 33.126/17641 to 17654; it submits that the latter documents also contradict the conclusions drawn by the Commission in paragraph 16 of the SO that British prices were the highest in Europe. From the files relating to Spain and Portugal, Unicem extracts chapters 18 and 19 — in particular paragraph 89 — of the SO. Amongst the documents in the file relating to Germany, it refers in particular to paragraphs 47 (p. 126) and 84 (pp. 213 and 214), and paragraph 86 (p. 218) among those relating to Greece.

2907 Even if those various comments could have been put forward by Unicem during the administrative procedure, they would not, however, have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found in recital 53 that the emergence of the issue of imports into Western European of cement from Greece had given rise — besides political actions, isolated actions on some markets, and bilateral contacts between the national authorities of some Community countries — to the setting-up at European level of the ETF for the purpose of examining dissuasive and persuasive measures to eliminate destabilising imports of cement (primarily those from Greece) into Western Europe, in particular into Italy, one of the countries most threatened by such imports.

2908 Nor could those comments have precluded the findings set out by the Commission in the contested decision, recital 25, paragraphs 24 and 47, concerning the participation of Unicem's Mr Albert in the meeting of the ETF subgroup on 'stick actions' on 17 March 1987 (documents

33.126/4858 to 4861), in accordance with what had been agreed at the setting-up, at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, of working subgroups to assist the ETF, which was no longer able to deal on its own with the burden of work created by the task entrusted to it (contested decision, recital 25, paragraph 24; documents 33.126/18858 and 18862). Accordingly, they could not have provided a basis for excluding Unicem's responsibility in the infringement found in Article 4(1) of the contested decision.

2909 The Court also points out that, contrary to what Unicem appears to claim, the Commission has never maintained either in the SO or in the contested decision that the ECEC took part in the measures to combat the imports into Western Europe of cement from Greece. The comments that Unicem might have been able to make during the administrative procedure in order to deny all involvement of the ECEC in the resolution of the Greek problem would therefore have been totally irrelevant.

2910 In conclusion, Unicem's comments would not have had even a small chance of altering the outcome of the administrative procedure. Unicem has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

11. Case T-55/95 *Asland* v *Commission*

2911 In its observations of 10 February 1997, Asland states that in the numerous documents in the national files there is not the least evidence of any participation or intervention on its part in the activities and implementation measures of the ETF. On the contrary, it is clear from the letter of 25 November 1986 sent by the director of the CMF to the director of the OFT (documents 33.126/17641 to 17653) that Spain represented a serious threat to the application of the principle of non-transhipment to home markets, to such an extent that, before it joined the Community, the European cement industry had brought anti-dumping proceedings against it. Those considerations make it difficult for the Commission to sustain its argument that the Spanish undertakings, and Asland in particular, should have taken part, only five months after their country joined the Community, in collusive practices and agreements intended to ensure non-transhipment to home markets. Asland then states that the minutes of the CMF meetings held between 9 January 1985 and 1 June 1988 (documents 33.126/17056 to 17259) do not contain any reference to any responsibility or participation on Asland's part in anti-competitive actions on the British or European market. On the other hand, those various documents mention other European undertakings, such as Titan, and report discussions on the aid granted by the Hellenic Republic to its cement industry, negotiations held by the United Kingdom Government and the Greek Government with the Commission, and contacts between the trade and the European Parliament on that matter (see documents 33.126/17166 to 17170, in particular 17168). For Asland, it is logical to suppose that the same wish to comply with the law inspired the discussions which were held in Rome on 28 May 1986 concerning the Greek question.

2912 In its observations of 5 February 1998, Asland states that it was not one of the 'members of the "European Task Force" which were to take up shares in Interciment SA', to which Holderbank wrote on 22 September 1986 (document 33.126/18328). Asland submits that this proves that it did not in any way participate in the ETF.

2913 It must nevertheless be stated that those comments, even if they could have been made by Asland during the administrative procedure, could not have refuted the finding by the Commission in the contested decision, recital 25, paragraph 1, concerning Asland's participation in the meeting on 28 May 1986 in Rome, at which the European producers for the first time agreed to respond rapidly, through a common front, with dissuasive and persuasive measures to the decision of the Greek industry to export 2 million tonnes of cement into Western Europe (document 33.126/18771). They could not therefore have provided a basis for excluding the responsibility of Asland in the infringement found in Article 4(1) of the contested decision.

2914 With regard to the particular emphasis that Asland might have been able to place on the fact that it was not a member of the ETF and that Holderbank had not requested that it pay for a proportion of the shares in Interciment, it must be stated, first, that the Commission has never taken the view that Asland was a direct member of the ETF (see, in particular, its findings in the contested decision, recital 25, paragraph 24, concerning the composition of the ETF) and, second, that in the contested decision, recital 26, paragraph 6, it finds that the Spanish undertaking which received the letter of 22 September 1986 by which Holderbank requested payment of the Spanish proportion of Interciment was Hornos Ibéricos. The comments that Asland might have been able to formulate on the basis of document 33.126/18328, referred to in paragraph 2912 above could therefore at most have corroborated points which the Commission has not disputed.

2915 Finally, it has already been repeated many times (see in particular paragraphs 2819 and 2841 above) that the Commission correctly perceived the political dimension and economic background of the Greek file (see footnotes 113 and 115 of the contested decision). The comments which Asland might have put forward in the course of the administrative procedure to reflect those two aspects of the file could therefore only have repeated considerations duly raised and not disputed by the Commission in the contested decision.

2916 In conclusion, Asland's various observations could not have had even a small chance of altering the outcome of the administrative procedure. Asland has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

12. Case T-58/95 *Uniland* v *Commission* and Case T-59/95 *Oficemen* v *Commission*

2917 Uniland and Oficemen claim, in their observations of 10 February 1997 and 3 March 1998, that in the documents to which they had access as a result of the measures of 2 October 1996 and 18 and 19 June 1997 there is no mention or evidence of their participation in the agreement setting up the ETF, as found in Article 4(1) of the contested decision. On the contrary, various documents in the files relating to Greece, the United Kingdom and Italy show that the steps taken to counter imports from Greece arose not from a multilateral agreement in which Uniland and Oficemen took part but from the unilateral reactions by British producers on the one hand and Italian producers on the other.

2918 Among the documents in the file concerning Greece, Uniland and Oficemen refer in their observations of 10 February 1997 and 3 March 1998 to a series of documents reflecting the purely bilateral nature of the contact at the time between Greek and Italian producers on the one hand and between Greek and British producers on the other, and also the strictly local nature of the agreements proposed or concluded by the Italian producers, on the one hand, and by the British producers, on the other, in order to counter the imports onto their markets of cement from Greece. By contrast, none of those documents contains any reference to Uniland or Oficemen or, more generally, to European undertakings other than Greek, British and Italian. In their observations of 10 February 1997, Uniland and Oficemen also refer to a series of minutes of meetings of the board of directors of Heracles held between July and December 1986 (documents 33.126/19878 to 19880, 19881, 19882, 19883, 19884 and 19885 to 19887). In their observations of 3 March 1998, they refer first of all to a letter sent on 2 September 1988 by Titan to its lawyers (documents 33.126/19195 to 19197), which explains (see in particular document 33.126/19196) that the non-performance by the Italian undertaking Calcestruzzi of the cement supply contract concluded with Titan in April 1986 was due to an agreement between the group Calcestruzzi/Ferruzzi and the only Italian cement producers. On that point, they also refer to documents 33.126/19188 to 19193 and 19197 to 19200. They then mention a note relating to a meeting of Italian cement producers at Cementir in Rome on 12 January 1988 (documents 33.126/19871 to 19873) which, to their mind, shows that the reaction to the imports into Italy of cement from Greece was that of the Italian producers alone.

2919 In their observations of 10 February 1997 Uniland and Oficemen cite several documents from the file concerning the United Kingdom [minutes of the CMF meetings in 1986 and 1987 (documents 33.126/17163, 17164, 17168 to 17172, 17173, 17174, 17176, 17177, 17178, 17179, 17187, 17196 and 17215), a letter from the CMF to the OFT (documents 33.126/17646 and 17647) and minutes of a Blue Circle meeting on 19 June 1986 (documents 33.126/10827 and 10828)] which they consider corroborate the strictly bilateral nature of the contacts between the United Kingdom and Greek markets (industries and public authorities) in connection with the 'Greek problem', and also the purely local dimension of the British responses to imports from Greece. The only references in those documents to the other European producers refer to the meetings held with Mr Sutherland, a member of the Commission, and with some members of the European Parliament, with a view to obtaining action by the Commission in the case of the unlawful aid granted by the Hellenic Republic. In their observations of 3 March 1998, Uniland and Oficemen refer to other documents found among the British papers, namely the extract concerning point 1.2 ('Take-off-agreement with

Greek industry') of the minutes of the meeting of Head Delegates and ETF representatives in Baden-Baden of 9 September 1986 (documents 33.126/16150 to 16155, particularly 16151 and 16152), an internal Blue Circle note of 4 September 1986 headed 'Management Briefing Note: Greek Imports' (documents 33.126/11026 and 11027), a letter of 22 September 1986 from Blue Circle to Holderbank (documents 33.126/13108 and 13109), a Blue Circle discussion note 'Cheap Imports — Meeting at 9.30 a.m. on Monday 7th July 1986' (documents 33.126/13104 to 13106), and two internal Blue Circle notes of September 1986 (documents 33.126/11080 to 11084). They claim that all those documents prove that the United Kingdom responses to imports from Greece were strictly local in dimension, to the exclusion of any agreement, response or measure on a European scale, and that the only actions concerning the resolution of the 'Greek problem' in which Uniland and Oficemen were involved were meetings to make the Community authorities (Commission and European Parliament) aware of the subsidies paid by the Hellenic Republic to its cement industry. With regard to the minutes of the meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986 (documents 33.126/16150 to 16155), Oficemen claims that that document rules out once and for all any suspicion of its participation in the ETF, since the list of participants contains no mention of any of its representatives being present (see in particular document 33.126/16150).

2920 In their observations of 10 February 1997 Uniland and Oficemen refer to two documents among the documents in the file on Italy, namely extracts from an Italcementi letter of 26 October 1987 (document 33.126/2950) and, once again, the minutes of the meeting held at Cementir on 12 January 1988 (document 33.126/19872). Those documents do not contain any reference to any participation, whether direct or indirect, by Uniland and Oficemen in the measures taken by the Italian market to counter imports from Greece. On the contrary, they confirm the purely local dimension of those measures. In their observations of 3 March 1998, Uniland and Oficemen rely, among the Italian documents, on an extract from the replies by Unicem to the Commission in October 1989 concerning the ETF's activities (documents 33.126/12060 to 12065, in particular 12063), and also a letter in which Calcestruzzi explains to the Commission that a reduction of its imports from Greece was attributable solely to the fact that the Italian authorities had not issued it with the authorisations necessary to construct a quay for unloading the cement (documents 33.126/16317 to 16321, in particular 16319).

2921 However, it should be recalled (see paragraph 250 above) that several of the documents relied upon by Uniland and Oficemen in their observations of 3 March 1998 had been classified 'A' or 'A: European Producers' for the purposes of consulting the file during the administrative procedure (see documents 33.126/11026, 11027, 11080 to 11084, 19195 and 19196). Furthermore, the following documents were found in the Box (see paragraph 95 above): minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (documents 33.126/16151 to 16155, the content of which is identical to that of documents 33.126/18857 to 18862, which were in the Box), Blue Circle's 'Management Briefing Note' of 4 September 1986 (documents 33.126/11026 and 11027), Blue Circle's letter of 22 September 1986 to Holderbank (documents 33.126/13108 and 13109, the content of which corresponds to that of documents 33.126/11094 and 11095, which were in the Box), Blue Circle's discussion note entitled 'Cheap Imports' (documents 33.126/13104 to 13106, the content of which coincides with that of documents 33.126/10992 to 10994, which were in the Box) and Blue Circle's internal notes of September 1986 (documents 33.126/11080 to 11084).

Uniland and Oficemen could therefore have used all those documents in support of their reply to the SO. In those circumstances, they cannot now rely on them to establish a breach of their rights of defence during the administrative procedure.

2922 In any event, the comments that Uniland and Oficemen might have put forward during the administrative procedure on the basis of the various documents referred to in paragraphs 2918 to 2920 above in order to illustrate the bilateral contacts which took place between the Greek and United Kingdom markets, on the one hand, and the Greek and Italian markets, on the other, when the 'Greek problem' arose, could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision, on the basis of which the Commission rightly found, in recital 53, that, at the same time as the isolated reactions of the United Kingdom and Italian producers, the question of imports from Greece had led to the setting-up of the ETF at European level with a view to examining dissuasive and persuasive measures to eliminate cheap imports of cement (primarily those from Greece) into Western Europe.

2923 Nor could those comments have precluded the findings made by the Commission in the contested decision, recital 25, paragraphs 23 and 39, concerning the participation of Uniland's Mr Rumeu at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 and in the meeting of representatives of the European cement industry in Brussels on 6 November 1986. Nor could they have precluded the findings made concerning Oficemen in the contested decision, recital 29, paragraph 3, with regard to the appointment at that meeting on 9 September 1986 of Mr Andia as a member of the ETF 'defensive measures' subgroup and his participation in the meeting of that subgroup on 17 March 1987, on the one hand, and the presence of a representative of 'the Spanish industry and [who] therefore represented Oficemen ... at the Head Delegates meetings of 9 June 1986, 9 September 1986 and 6 November 1986', on the other. Accordingly, the comments that Uniland and Oficemen might have made during the administrative procedure could not have altered the fact that they had both indicated their support for the setting-up of the ETF and for its anti-competitive object.

2924 In their observations of 3 March 1998, Uniland and Oficemen claim to have found in the Greek file a series of cement supply contracts concluded, during the period of the infringement, between Greek producers and other European producers (documents 33.126/19175 to 19178, 19855 to 10859, 19447 to 19454, 19754 to 19762, 19770 to 19778, 19781 to 19786, 19793 to 19798, 19802 to 19812, 19817 to 19832, 20011 to 20019, 20104 to 20117, 20132 to 20137, 20140 to 20147, 20148 to 20156, 20157 to 20164, 20166, 20167, 20225, 20226, 20229 to 20239, 20240 to 20249 and 20259 to 20267), and between Greek producers and non-member countries, for delivery into the Community (documents 33.126/20065 to 20071). They argue that the existence of those various contracts is evidence that imports into the Community from Greece were as regular during the period of the infringement concerned. Uniland and Oficemen therefore consider that, if they had had access to those various documents during the administrative procedure, they would have had an additional means of disproving the Commission's allegations that the ETF's objective was to limit the imports of cement (in particular cement from Greece) to Western Europe. They add that the annual report on Titan's balance sheet for the year 1988 (document 33.126/19432) reveals a spectacular improvement in

Titan's presence on the Italian market that year, which contradicts the Commission's conclusions, in particular in recital 53 of the contested decision.

2925 It must first be pointed out (see paragraph 250 above) that documents 33.126/19754, 19762, 19770, 19776, 19817, 19819, 19827, 20011, 20019, 20065, 20071 and 20072 had been classified as 'A' or 'A: European Producers' for the purposes of consultation of the file during the administrative procedure. Uniland and Oficemen could therefore have used all those documents in support of their reply to the SO. In those circumstances, they cannot now rely on them in order to demonstrate an infringement of their rights of defence during the administrative procedure.

2926 In any event, those comments could at most have enabled Uniland and Oficemen to argue that the agreement setting up the ETF did not have anti-competitive results. They could not, on the other hand, have prevailed over the documents referred to in the contested decision, recital 25, paragraphs 15 and 24, and recital 53, paragraph 7, on the basis of which the Commission rightly found that agreement had pursued a manifestly anti-competitive object, namely the elimination of imports into Western Europe, which suffices to render it contrary to Article 85(1) of the Treaty (see the case-law cited in paragraph 837 above).

2927 In conclusion, none of Uniland and Oficemen's comments would have had even a small chance of altering the outcome of the administrative procedure. Uniland and Oficemen have therefore not shown that there was an infringement of their rights of defence in that regard during the administrative procedure.

13. Case T-60/95 *Irish Cement* v *Commission*

2928 In its observations of 10 February 1997, Irish Cement claims, first, that the meetings of 9 and 10 September and 6 November 1986 at which it was invited to assist in the lobbying of European politicians and, in particular, Mr Sutherland, a member of the Commission, against Greek State aid, were used by the Commission as evidence that the ETF was a Cembureau body in which Irish Cement was implicated directly and by reason of the fact that it was a direct member of Cembureau. It maintains that the Commission did, however, have evidence in a series of minutes of CMF meetings, showing, first, that the meetings on 9 and 10 September 1986 between the 'European Cement Makers' and members of the European Parliament had been organised and coordinated by Blue Circle (see documents 33.126/17163 and 17168) and, second, that the purpose of the meeting in Brussels on 6 November 1986 was to prepare for the meeting between 'Heads of EEC Cement Industries' or 'Senior representatives of a number of European cement industries' and Mr Sutherland (see documents 33.126/17176 and 17182). Contrary to what the Commission alleges in the contested decision, all those documents show

that none of those meetings was a meeting of 'Head Delegates' of Cembureau, that the ETF was merely an association of major European cement producers created for the purposes of lobbying, that the activities of the ETF could not therefore be imputed to Cembureau, which was not even mentioned in those various documents. It is also clear from those documents that no reference was made at those two meetings to the Cembureau agreement. In its observations of 5 January 1998, Irish Cement alleges that several more documents concerning the meetings on 9 and 10 September 1986 (documents 33.126/11052, 11053, 11056 to 11060, 11061, 11062 and 7717 to 7722) would have been useful to it in order to show that the participation of its representative (Mr Quirke) in those meetings was legitimate and in good faith, since, to Mr Quirke's knowledge, the sole purpose of those meetings was to make the Community authorities aware of the problem posed by Greek State aid.

2929 In its observations of 5 January 1998, Irish Cement cites various minutes of meetings of Cembureau's Executive Committee (documents 33.126/7882 to 7886 and documents 33.322/1423 to 1444), and more specifically the minutes of the meeting of the Executive Committee of Cembureau on 30 May 1983 (documents 33.322/1429 and 1431) and again stresses that the ETF meetings were not meetings of Cembureau 'Head Delegates'. Those documents show that those meetings were always prepared by the Executive Committee, could be convened only by that committee and were always the subject of a subsequent report at committee level. That was not the case for the ETF meetings, which were convened by Blue Circle, and more specifically by Sir John Milne, as shown by documents 33.126/7717 to 7722 (note of Mr Sytor, of CBR, of 11 September 1986, concerning the meetings in Baden-Baden and Strasbourg on 9 and 10 September 1986) for the meetings of 9 and 10 September 1986.

2930 The Court points out, however, that, as regards the meetings of 9 and 10 September 1986, the comments which Irish Cement might have made during the administrative procedure on the basis of the various documents referred to in the two preceding paragraphs could at most have shown that, during those two days, the European producers gave themselves over to political pressure connected with the Greek question. Its comments would not, however, have refuted what was contained in the documents referred to in the contested decision, recital 25, paragraphs 22 to 32, which make it clear that a meeting of 'Head Delegates and representatives of the task force' was held in Baden-Baden towards the end of the afternoon of 9 September 1986, a meeting in which Mr Quirke, the representative of Irish Cement, took part, and which was, after an express reminder of the unlawful purpose of the ETF, exclusively devoted to the composition of the ETF, the organisation of its tasks and the various measures which had been entrusted to it for its consideration (contested decision, recital 25, paragraphs 22 to 32; documents 33.126/18857 to 18862).

2931 It should also be pointed out that, in the CBR note referred to by Irish Cement (see paragraph 2929 above; documents 33.126/7717 to 7722), mention is made of a meeting in Baden-Baden on 9 September 1986 which had 'the essential object [of the] debriefing of the working group (Task Force committee established in Stockholm)'. According to the note, that meeting dealt with the creation of the Joint Trading Company and the 'studies carried out by, or under consideration within, the working group'. Those statements therefore corroborate rather than invalidate the findings made by the Commission in the contested decision, recital 25, paragraphs 22 to 32, on the basis of documents 33.126/18849 to 18862. In addition, the same CBR memorandum makes it clear that at the meeting in question Sir John Milne of Blue Circle 'agreed not to break off contacts with the Greek cement producers, but to redirect those

contacts towards the idea of an undertaking by the other cement producers to take substantial quantities of Greek cement ("Trading Group" idea) [;] the working group is to continue'. Later in that document, under the heading 'other points', it is indicated that 'Mr Quirke has stated that, in his opinion, a "fourth dimension" should be added to the three actions already underway or provided for (namely "Trading Group" — protection measures taken by national governments — lobbying the EEC), namely, action at "Cembureau Liaison Committee" level'. Those extracts reveal that Irish Cement's interest in the action contemplated to counter imports from Greece was not confined to political initiatives but also extended to the private measures contemplated in order to restrain such imports. They would therefore not have helped Irish Cement's defence in the administrative procedure against the objections relating to the setting-up of the ETF.

2932 As regards the meeting in Brussels on 6 November 1986, described in the contested decision, recital 25, paragraphs 39 to 43, the Commission has never denied that the purpose of that meeting was in part to prepare for the meeting with Mr Sutherland (contested decision, recital 25, paragraph 43). Any comments that Irish Cement might have made in the course of the administrative procedure on the basis of the documents referred to in paragraph 2928 above could therefore at most have confirmed the matters duly taken into consideration by the Commission. They could not, on the other hand, have altered the fact, apparent from the notes concerning that meeting and cited in the contested decision, recital 25, paragraphs 39 to 43 (documents 33.126/19007 and 19008), that the participants, including Irish Cement, agreed that the ETF was to continue to meet in order to follow developments in the threat of imports of cement from Greece onto Western European markets.

2933 Finally, the comments that Irish Cement might have made during the administrative procedure in order to show that the meetings in which it participated in September and November 1986 had not been meetings of Head Delegates of Cembureau and that the ETF was not a Cembureau body would not, in any event, have precluded the findings relating to the presence of Mr Quirke at the two meetings referred to in the contested decision, recital 25, paragraphs 22 to 32 and paragraphs 39 to 43, respectively. Accordingly, they would not have provided a basis for excluding the responsibility of Irish Cement in the infringement found in Article 4(1) of the contested decision. It must moreover be pointed out that, during the administrative procedure, the German undertakings had claimed that 'the persons present at the meetings in ... Baden-Baden and Brussels did not have the status of Head Delegates', to which the Commission responded that 'this status was given by the task force and by the records of the meetings and not by the Commission' (contested decision, recital 53, paragraph 6). Observations comparable to those now put forward by Irish Cement were therefore duly considered by the Commission in the contested decision.

2934 Second, in its observations of 5 January 1998, Irish Cement puts forward various documents (documents 33.126/11180 to 11182 and 15386) relating to a letter sent by Blue Circle's Mr Marshall to a series of European cement producers to thank them for their help in resolving the problem raised by Greek State aid. In its view, those documents reveal Mr Marshall's inaccuracy of expression in using the term 'Cembureau people' in referring to the European cement producers. Irish Cement considers that if it had had access to those documents during the administrative procedure, it would have been able to establish that the reference made by Mr Marshall in the records of the EPC meeting of 13 May 1987 to the 'Cembureau Task Force' to

designate the 'European Task Force' was due to the same inaccuracy of expression and that, contrary to what the Commission concluded from it in paragraph 16 of the SO, that reference did not therefore mean that the ETF was a coalition formed at Cembureau level.

2935 However, those comments might equally well have strengthened the Commission's view that the cartel set up by various European cement producers to counter imports into Western Europe of cement, from Greece in particular, was attributable to 'Cembureau people' and, therefore, that it had been created at the level of that European association. In any event, they could not have refuted the finding made in the contested decision, recital 24, paragraph 3, that Mr Marshall 'held a position giving him a good knowledge of the structures of Cembureau and its activities', a finding which led the Commission to consider that the reference to the 'Cembureau Task Force' in the memorandum concerning the EPC meeting on 13 May 1987, drawn up by Mr Marshall, 'effectively establish[ed] a link between Cembureau and the task force, a link resulting from the actual terms chosen by Mr Marshall'.

2936 In any event, Irish Cement's comments on that point would not have precluded the findings, referred to in paragraphs 2930 and 2932 above, on the basis of which the Commission rightly concluded that Irish Cement participated in the agreement setting up the ETF.

2937 In conclusion, none of Irish Cement's observations had even a small chance of altering the outcome of the administrative procedure. Irish Cement has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

14. Case T-65/95 *Italcementi* v *Commission*

2938 First, in its observations of 10 February 1997, Italcementi maintains that Chapters 7 and 17 of the SO, concerning the Greek market, confirm that the Commission committed a serious error of assessment when it failed to accord the necessary importance to the obvious illegality of the export activities of the Greek producers, who not only received subsidies from their government that were incompatible with Article 92 of the EC Treaty (now, after amendment, Article 87 EC) but had also entered into a 'gentlemen's agreement' in respect of their exports to the Community, an agreement whose actual existence and potentially anti-competitive nature the Commission had itself recognised in the chapters of the SO concerning Greece. According to the applicant, those facts would have been particularly useful to it in order to stress the purely defensive nature of the ETF.

2939 In its observations of 26 November 1997, Italcementi refers to a further series of documents (documents 33.126/19369 to 19377) as evidence of the existence since 1962 of specific agreements between Greek cement producers concerning their exports. Those agreements were intended to prevent any excess capacity disturbing the internal equilibrium of their home market.

2940 However, the Court points out in that regard that at the hearing on 12 March 1993 Lafarge stressed that it was legitimate self-defence which had allegedly inspired the setting-up of the ETF (contested decision, recital 53, paragraph 8, first subparagraph). In recital 53, paragraph 8, second to sixth subparagraphs, the Commission sets out the reasons which prompted it to reject that argument. In the light of the reasons thus given by the Commission, in particular in the fifth and sixth subparagraphs, namely that various documents relating to the ETF indicate that its objective was broader than merely countering imports from Greece, the same fate would necessarily have awaited Italcementi's argument alleging that at the time of the ETF there was a Greek export cartel.

2941 Second, in its observations of 10 February 1997, Italcementi claims that the national chapters of the SO (in particular Chapters 7 and 17, concerning Greece, and 4 and 14, concerning the United Kingdom) and the documents relating to those chapters (documents 33.126/10827, 10828, 17157, 17158, 19879, 19880, 17163, 17164, 17169, 17171, 17172, 17176, 17168, 17178, 19884, 19886, 17193 and 17220, and 33.322/1321 and 1322) demonstrate the purely marginal role of the ETF's activities in the solution of the 'Greek problem', a solution which essentially arose out of bilateral negotiations, under the aegis of the Commission, between the industries, the United Kingdom Government and the Greek Government. None of those documents mentions the ETF, which shows that it was helpless and powerless to resolve the difficulties created by the imports of cement from Greece onto Western European markets. Those documents prove that, in actual fact, the ETF, far from being a pan-European decision-making centre of anti-competitive activities designed to counter imports from Greece, was at most an 'information terminal' through which the cement producers in the various Member States confronting the Greek threat kept one another informed of the measures adopted or contemplated in that regard, on the one hand, and a study and pressure group intended to make the Community authorities aware of that problem, on the other. The absence of a European agreement to counter the imports from Greece can be explained by the fact that the avowed objective of the Greek producers in their search for new outlets for exports was initially the United Kingdom market (document 33.126/19882). It was only after the tripartite (Commission/Greek Government/United Kingdom Government) fixing of quotas for exports from Greece to the United Kingdom that the Greek cement industry turned towards the Italian market. Documents 33.322/1321 and 1322 (extract from the minutes of the meeting of Oficemen's steering committee), which relate the steps taken by the British producers so that their Spanish counterparts would request the support of the Spanish members of the Commission in resolving the 'Greek problem', again go to show the absence of any planned initiative at ETF level in order to deal with that problem. Italcementi then refers to document 33.126/17220 (extract of the minutes of the meeting of the CMF of 3 June 1987), which shows that, when the French market was confronted with the problem of imports from Greece, strictly bilateral discussions were held between the French and the British governmental authorities.

2942 In its observations of 26 November 1997, Italcementi refers to a series of documents (documents 33.126/16484 to 16487, 16478, 16473, 16474, 16469, 11062 to 11064, 16489, 16490, 16488, 16470, 16471, 16491 to 16493, 16463, 16464, 16459, 16498 to 16501, 16494, 16495, 16465 to 16468, 11182, 16436 to 16441 and 16508) to show the pressure brought to bear by Blue Circle and the other European cement producers, particularly the German producers, in order that they should support the lobbying efforts carried out by the British industry to persuade the Community authorities to challenge the unlawful imports from Greece. Those documents confirm the lawfulness of the ETF's activities and the decisive role played by the British industry in the resolution of the 'Greek problem'. Other documents (documents 33.126/18868, 18869 and 11086) show the independence of Blue Circle's commercial policy, since Blue Circle, while seeking to rally its European colleagues to the lobbying activities of the ETF, continued to manage its commercial relations with the Greek cement producers in total freedom, buying Greek cement for its operations in the United States. Those documents confirm therefore that the ETF, beside its lobbying function, was simply a forum for the exchange of information *a posteriori* concerning political action and commercial activity taking place on the various markets.

2943 In its observations of 26 November 1997, Italcementi also produces several documents (documents 33.126/19014 to 19016 and 11165) as evidence that the actual results of the negotiations concerning the Greek question were achieved by the British cement producers, quite independently of the ETF; the sole effect of those lobbying activities, which was moreover indirect and long term, was the Commission's revision in December 1986 of its decision concerning Greek State aid. Those documents support Italcementi's argument as to the purely marginal role of the ETF, which was in fact used by the British producers, while they at the same time took a much more effective approach in order to find a solution to their own problem.

2944 It must, however, be found that even if Italcementi could have put forward those comments during the administrative procedure they would not have precluded the findings made by the Commission in the contested decision, recitals 24 and 25, that is to say, that the threatened exports by Greek producers which 'at the end of 1985/early 1986, ... looked towards Western Europe, especially ... Italy, where small associations formed by consumers and small import/export companies had taken the step of importing Greek cement' (contested decision, recital 24, paragraph 1), had given rise to the setting-up of the ETF on the initiative of a series of major European producers, including Italcementi, for the purposes of examining, with a view to submitting recommendations to the Head Delegates, the dissuasive and persuasive measures capable of eliminating imports of cheap cement (primarily from Greece) into Western Europe.

2945 Any particular emphasis which Italcementi might, during the administrative procedure, have been able to place on the ETF's marginal contribution to the solution of the 'Greek problem' could not have prevailed over the documents referred to in the contested decision, recital 25, paragraphs 15 and 24, and recital 53, paragraph 7, on the basis of which the Commission found that the object pursued through the agreement setting up the ETF was manifestly anti-competitive, which sufficed to make that agreement contrary to Article 85(1) of the Treaty (see the case-law cited in paragraph 837 above).

2946 Third, Italcementi maintains that, even on the assumption that the ETF's activities may have been unlawful, if the various national documents to which it refers in its observations of 10 February 1997 in order to show the nature of the reactions to the imports from Greece could have been presented during the administrative procedure, they would of necessity have prompted the Commission to draw a distinction, in its assessment of the gravity of the individual responsibility of the various participating undertakings, between, on the one hand, the United Kingdom producers which brought all sorts of pressure to bear in order to block imports from Greece and which eventually managed to reduce them to a minimum thanks to the tripartite agreement mentioned in paragraph 2941 above and, on the other, the other European producers, including Italcementi and the other Italian producers, which watched the arrival of considerable quantities of Greek products onto their market and even had to grant Calcestruzzi, their biggest customer in Italy, a significant price reduction upon the conclusion of the supply contract in April 1987.

2947 However, even if Italcementi could have made those comments during the administrative procedure, they would not have been of such a nature as to invalidate the general conclusion adduced by the Commission from the various factual evidence in recital 25 of the contested decision as to the prominent part played by Italcementi in the setting-up of the ETF, of which it was one of the instigators, through its participation in the meetings in Rome on 28 May 1986, in Zurich on 4 June 1986 and in Stockholm on 9 June 1986, before taking part, in its two-fold capacity as direct member of the ETF and Head Delegate, at the series of meetings of or relating to the ETF organised between 17 June 1986 and 11 February 1987.

2948 In conclusion, none of Italcementi's observations would have had even a small chance of altering the outcome of the administrative procedure. Italcementi has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

15. Case T-68/95 *Holderbank* v *Commission*

2949 First, in its observations of 8 February 1997, Holderbank puts forward, among the documents in the file concerning the United Kingdom, a series of documents (documents 33.126/17157 to 17159, 17160, 17180, 17181, 17184, 17182, 17183, 17191 to 17194, 17219 to 17225, 17624, 17625, 17631 to 17633, 17635 to 17637, 17638, 17641 to 17653 and 17654) to show that, at the time of the ETF, the CMF, in agreement with the United Kingdom Government and authorities, had had contacts and discussions with the Commission in order to resolve the problem raised by imports of subsidised cement from Greece. Holderbank considers that if it had known of those documents it would have been able to make use of them to supplement its defence concerning the charges relating to the ETF.

2950 It has, however, already been stated several times (see in particular in paragraph 2819 above) that the Commission had perfectly understood that the emergence of the problems connected

with the imports of cement from Greece had given rise to actions to make the national and Community authorities aware of the problems and to bring pressure to bear upon them, on the initiative of the United Kingdom producers, but that the Commission was not concerned with that kind of action in the contested decision (see footnote 115). Any comments that Holderbank might have put forward during the administrative procedure to demonstrate the political activities brought into being by the appearance of the Greek export problem could therefore only have illustrated one aspect of the file noted by the Commission in the contested decision. They would not, on the other hand, have prevailed over the bundle of documents referred to in the contested decision, recital 25, on the basis of which the Commission rightly found, in recital 53, that alongside those political actions, the Greek issue had led to the setting-up of the ETF, on the initiative of a group of major European producers, including Holderbank, with a view to considering the dissuasive and persuasive measures likely to eliminate cheap imports of cement (primarily from Greece) into Western Europe.

2951 Second, in its observations of 8 February 1997, Holderbank refers to a note of Heracles' board of directors of 29 September 1986 (documents 33.126/19881 and 19882) as evidence that the imports into the United Kingdom of cement from Greece were prevented by the United Kingdom agreement alone, not by international agreements, such as the ETF, in which Holderbank took part. While recognising that the 'Greek problem' was tackled at ETF level, Holderbank claims that that note convincingly demonstrates that the ETF was a mere discussion forum and possessed no means of taking action.

2952 The Court points out, however, that the note in question states that 'until now, in England, the agreement has "terrorised" the market and has prevented the major undertakings in the ready-for-use cement ... sector from buying Greek cement for fear of reprisals'. Contrary to what Holderbank would appear to maintain, it does not state that the 'agreement' in question was the United Kingdom agreement.

2953 In any event, the comments which Holderbank might have been able to make during the administrative procedure on the basis of that note could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision, on the basis of which the Commission has rightly found in recital 53 that, alongside the local reactions of the most directly threatened markets (in particular, the United Kingdom market), the emergence of the problem of imports from Greece had led to the setting-up of the ETF, on the initiative of a series of major undertakings, including Holderbank, for the purpose of examining dissuasive and persuasive measures to eliminate destabilising imports of cement (primarily those from Greece) onto Western European markets.

2954 Third, in its observations of 8 February 1997, Holderbank maintains that it is apparent from Chapters 7 and 17 of the SO — particularly from Chapter 17, paragraph 86, subparagraphs 1, 2 and 3, page 218 — concerning the Greek market, that the Commission itself had considered that the effect of the Greek cement producers' agreements restricting competition was to eliminate competition both on the local market and also at the level of export transactions

towards other Member States. Holderbank considers that if those findings of the Commission had been made available to it at the administrative procedure stage, they would have been useful to it then, inasmuch as they show that the Greek cement producers not only received subsidies from their national authorities, but also carried on their local and export activities under the cover of agreements and concerted practices. Holderbank considers that that fact, while it might not have excused the collective defensive response organised through the ETF, would nevertheless have been held by the Commission to be an exonerating circumstance when it assessed the amount of the fine. In addition, the Greek agreement explains why Holderbank could not have launched the counter offensive in Greece alleged by the Commission, or that it could have done so only with considerable difficulty.

2955 However, as has already been stated on several occasions (see in particular paragraph 2841 above), at the hearing on 12 March 1993 Lafarge had insisted that it was legitimate self-defence which had inspired the setting-up of the ETF (contested decision, recital 53, paragraph 8, first subparagraph). In recital 53, paragraph 8, second to sixth subparagraphs, the Commission sets out the reasons why it rejected that line of argument. In the light of the considerations thus set out by the Commission, in particular in the fifth and sixth subparagraphs, namely that various documents concerning the ETF show that its objective was more general than simply to counter imports from Greece, the same fate must necessarily have awaited Holderbank's argument alleging that, at the time of the ETF, there was a Greek export cartel. For the same reason, that fact could obviously not have been held to be a mitigating circumstance for the purposes of setting the fine, which was, moreover, imposed on account of the infringement referred to in Article 1 of the contested decision.

2956 Next the Court points out that in the contested decision the Commission confined itself to stating, first, that the 'reprisal' measures taken by the European producers on the Greek market (in the form of exports to Greece) had appeared among the stick actions envisaged in the Zurich/Céligny document (see contested decision, recital 25, paragraph 4, fourth indent; document 33.126/18774) and that, second, the possibility and economic feasibility of such a counter attack had been studied at the various meetings of or relating to the ETF (contested decision, recital 25, paragraphs 11, 12, 17, 24, 26 and 45). The Commission has not, however, ever claimed that those measures were actually implemented. On the contrary, it finds in recital 25, paragraph 26, of the contested decision that, at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, 'as regards item 3, exports to Greece, the Task Force was instructed to submit a recommendation to the Head Delegates by the end of September but serious doubts as to economic feasibility were expressed'. In short, those counter-attack measures were not found to be an infringement in Article 4 of the contested decision.

2957 In conclusion, none of Holderbank's observations could have had even a small chance of altering the outcome of the administrative procedure. Holderbank has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

2958 In their observations of 10 February 1997 Aker and EUROC put forward Italcementi's notes of 15 October 1986 (documents 33.126/2945 to 2948), 26 October 1987 (documents 33.126/2949 to 2951) and 13 November 1987 (documents 33.126/2954 to 2960) as evidence that the 'Greek problem' was at the time dealt with on a purely bilateral basis between the principal Italian cement producers and their Greek counterparts. They refer in particular to the Italcementi note of 13 November 1987, referred to above, which states: 'We must consider whom to contact, how to contact the Greeks and to propose a truly viable agreement, which should not last longer than two years, with the intention of subsequently managing the Greek cement industry better with the European producers, either by direct participation in share capital, or by indirect presence.' The statements contained in that document contradict the Commission's argument that there were multilateral arrangements or concerted practices previously decided upon between European producers at Cembureau or ETF level.

2959 It must, however, be observed that the comments which Aker and EUROC might have made during the administrative procedure in order to emphasise that the emergence of the 'Greek problem' had given rise to bilateral contacts, in particular between the Italian and Greek producers, could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision on the basis of which the Commission rightly found in recital 53 that the problem of imports into Western Europe of cement from Greece had given rise, alongside those particular steps, to the setting-up of the ETF at European level for the purpose of examining dissuasive and persuasive measures to eliminate cheap imports of cement (primarily from Greece) into Western Europe.

2960 Nor could those comments have invalidated the findings made by the Commission in recital 25, paragraphs 9, 14, 23, 34 and 45 concerning the participation of Aker and EUROC representatives in the meeting in Stockholm on 9 June 1986, the meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986, and the ETF meetings on 19 August, 21 October 1986 and 11 February 1987. Accordingly, those observations could not therefore have provided a basis for excluding the responsibility of Aker and EUROC in the infringement found in Article 4(1) of the contested decision.

2961 In conclusion, the comments of Aker and EUROC would not have had even a small chance of altering the outcome of the administrative procedure. Aker and EUROC have not therefore established an infringement of their rights of defence in that regard during the administrative procedure.

17. Case T-88/95 *Blue Circle* v *Commission*

2962 In its observations of 10 February 1997, Blue Circle claims that if it had had access to the documents in the Greek file during the administrative procedure, they would have enabled it to show, first, that the exports from Greece, which received public subsidies thus lending themselves to dumping and which formed the subject-matter of a local cartel, owed nothing to fair competition; second, that Blue Circle's coordination of the actions of the other European producers was lawful, since it related exclusively to lobbying the European authorities (European Parliament and Commission); and, third, that the reaction of the United Kingdom producers to imports from Greece took place within a strictly local framework and was unrelated to Cembureau.

2963 The Court finds, however, that the comments which Blue Circle might have made during the administrative procedure on the basis of the Greek file, in order to show that the United Kingdom producers' reactions to exports by Greek undertakings took place within a strictly local framework, and that the coordination by Blue Circle at European level upon the emergence of the problem of Greek imports related exclusively to political action, could not have prevailed over the bundle of documents referred to in recital 25 of the contested decision, on the basis of which the Commission rightly found, in recital 53, that the emergence of the 'Greek problem' had given rise to the setting-up of the ETF at European level, on the initiative of a number of major European producers, including Blue Circle, for the purposes of examining dissuasive and persuasive measures to eliminate destabilising imports (primarily from Greece) onto western European markets.

2964 Next, the Court has already stated on several occasions (see in particular paragraph 2841 above) that the Commission had correctly understood the economic background to the reactions of the European producers to exports by Greek undertakings. Thus, it states in footnote 113 in the contested decision that '[w]hen Greece joined the Community, its cement industry was receiving a considerable amount of State aid', before citing a number of decisions which it had taken concerning that aid, during and after the period in which the ETF was operational. In recital 53, paragraph 8, of the contested decision, the Commission sets out in detail the grounds which led it to reject submissions similar to those now made by Blue Circle, alleging that the setting-up of the ETF was the result of legitimate self-defence against unlawfully subsidised exports from Greece. For the reasons expressed in that part of the contested decision — in particular in the fifth and sixth subparagraphs — namely that, according to certain documents referred to in recital 25 of the contested decision, the ETF had a more general objective than simply countering imports from Greece, the same fate must necessarily have awaited Blue Circle's submission that, at the time of the ETF, there was a Greek export cartel.

2965 In its observations of 12 December 1997, Blue Circle observes that, in the contested decision, recital 25, paragraph 43, the Commission claims that documents 33.126/19009 and 19010 refer to the meeting of Head Delegates in Brussels on 6 November 1986, whereas they are in fact the notes of 10 November 1986 concerning the meeting on 6 November 1986 between Mr

Sutherland, a member of the Commission, and representatives of the European cement industry.

2966 It is correct that the documents in question refer not, as the Commission suggests in the contested decision, recital 25, paragraph 43, to the preparation, at the 'Head Delegates' meeting in Brussels on 6 November 1986, of the document for Mr Sutherland in anticipation of the meeting which had been arranged with him concerning the Greek matter, but rather to the meeting in question, which took place that same day in Brussels. Only documents 33.126/19007 and 19008, cited in the contested decision, recital 25, paragraph 39, record the discussions concerning the preparation of the document intended for the member of the Commission. Blue Circle has not, however, shown how the outcome of the administrative procedure could have differed if, during that procedure, it could have raised that mistake by the Commission, a mistake which relates to an aspect of the ETF's activities which was not subsequently found to be an infringement in the contested decision, namely, that steps were taken to make the Community authorities aware of the concerns caused by imports from Greece (see contested decision, footnote 115).

2967 In conclusion, there was not even a small chance that Blue Circle's observations could have altered the outcome of the administrative procedure. Blue Circle has not therefore established an infringement of its rights of defence in that regard during the administrative procedure.

Agreement on the setting-up of the Joint Trading Company, Interciment (Article 4(2) of the contested decision)

A — Introduction

2968 According to Article 4(2) of the contested decision, Holderbank, Blue Circle, Oficemen, Asland, Uniland, Hispacement, SFIC, Lafarge, Ciments Français, BDZ, Dyckerhoff, Heidelberger, Aker, EUROC, CBR, Italcementi, Unicem and Cementir 'infringed the provisions of Article 85(1) of the EC Treaty from 9 June 1986 to 26 March 1993 by participating 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'.

2969 Except for Hispacement, which has not brought an action for annulment of the contested decision, all the undertakings and associations of undertakings referred to in Article 4(2) put forward arguments seeking annulment of that provision. One line of arguments seeks to deny that the setting-up of Interciment constituted an infringement. The great majority of the

applicants deny any involvement in the infringement found in Article 4(2). Finally, several of them challenge the period for which that infringement was found to exist or, at least, the duration of their own participation in the infringement. The applicants concerned will be identified when the various arguments are considered.

2970 Moreover, Dyckerhoff, SFIC, Heidelberger, Lafarge, Asland, Holderbank, Aker, EUROC and Cementir allege that, when making the finding of the infringement in Article 4(2) of the contested decision, the Commission breached their rights of defence by failing to give them access during the administrative procedure to the whole of the SO and investigation file, thus depriving them of allegedly exculpatory evidence.

2971 Aalborg (T-44/95) also puts forward a line of argument seeking to deny any involvement in the setting-up of Interciment.

2972 However, the infringement found to exist in Article 4(2) of the contested decision has not been alleged against Aalborg. Its argument must therefore be rejected from the outset.

B — The unlawful nature of the setting-up of Interciment

2973 In recital 26, paragraph 1, of the contested decision the Commission refers to various extracts of documents. It states that it is clear from them that 'the decision to set up the Joint Trading Company, Interciment SA, adopted at the meeting of Head Delegates on 9 June 1986 ... constitutes an agreement between undertakings within the meaning of Article 85(1). The purpose of the agreement was to implement the "persuasive" and "dissuasive" measures ("either for 'stick' or 'carrot' measures"), i.e., as specified in the document drawn up at Céligny-Zurich, to purchase and market cement and clinker from the countries threatening the stability of the member countries' markets, and to take away export markets from the countries threatening the stability of the member countries' markets' (recital 54, paragraph 1).

2974 The applicants concerned put forward, in essence, four arguments denying that the setting-up of Interciment constituted an infringement.

2975 First, CBR maintains that the role and activities of Interciment were never defined. Referring to recital 54, paragraph 2, of the contested decision, Blue Circle states that the Zurich/Céligny document there referred to contained mere proposals, suggested by a restricted working group, for the setting-up of a joint trading subsidiary. There was, however, never any agreement as to

the purposes for which that joint subsidiary might be used. The agreement found to exist in Article 4(2) of the contested decision therefore concerned only the performance of purely preparatory acts. That agreement, in so far as it was directed at setting up a company which might have been used for anti-competitive purposes, did not therefore infringe Article 85(1) of the Treaty.

2976 Nevertheless, it is apparent from the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 and 32, and recital 26, paragraph 1; documents 33.126/18858 and 18861) that: '[I]n accordance with the decision of the Head Delegates at their meeting in Stockholm, a Joint Trading Company has been set up and registered at Fribourg, Switzerland, under the company name Interciment SA, Interciment AG, Interciment Ltd ... [That] company can be put immediately into operation either for stick or carrot measures.'

2977 The reference in that extract to 'stick or carrot measures' must refer to the Zurich/Céligny document which, after defining the measures concerned (see paragraph 2539 above), describes the tasks of the Joint Trading Company as follows (contested decision, recital 25, paragraph 6, and recital 26, paragraph 1; documents 33.126/18776 and 18777):

— to capture the orders of the principal export markets supplied by the countries threatening the stability of the member countries' markets;

— to purchase cement and clinker from the countries threatening the stability of the member countries' markets;

— to market the quantities purchased through market intervention;

— to export cement and clinker to the countries threatening the stability of the member countries.

2978 In the light of those various extracts, the Commission was entitled to take the view (contested decision, recital 54, paragraphs 1 and 2) that the objective assigned to the Joint Trading Company Interciment was to implement the dissuasive and persuasive measures recommended in the Zurich/Céligny document against countries threatening the stability of the member countries' markets. Therefore, the Commission was fully entitled to find (same recital,

paragraphs 2 and 7) that the agreement setting-up Interciment constituted an infringement of Article 85(1) of the Treaty, an 'infringement ... serious by its nature ... [whose] object was manifestly restrictive'.

2979 The arguments of CBR and Blue Circle must therefore be rejected.

2980 Second, Ciments Français and Holderbank claim that the Commission cannot infer any anti-competitive purpose from the objects laid down in Interciment's articles of association. Those articles, and in particular the definition of its objects (Article 2), correspond to the standard articles of association proposed by the Law Society of the Swiss canton in question.

2981 In that connection, it is apparent from Article 2 of Interciment's articles of association that 'the object of the company [was] to engage in the international trade in building and construction materials and to take holdings in foreign undertakings engaged in the trade in building and construction materials [and that,] in general, the company [might] carry out all transactions and perform all functions, both for its own account and for the account of third parties, that [were] directly or indirectly related to its goal' (contested decision, recital 26, paragraph 4; document 33.126/18833). However, the documents referred to by the Commission in recital 26, paragraph 1, of the contested decision show (see paragraphs 2976 and 2977 above) that the goal entrusted to Interciment was to implement the dissuasive and persuasive measures recommended by the Zurich/Céligny document as against countries threatening the stability of the member countries' markets.

2982 Under cover of a standard form clause in its articles of association, Interciment was thus given an object that was manifestly contrary to Article 85(1) of the Treaty, as is confirmed by the following extract from the Blue Circle internal memorandum of 10 July 1986 cited in recital 26, paragraph 13, of the contested decision (document 33.126/18842):

'The proposal to set up a Swiss company, the members of which would be major European cement producers, for the purpose of buying specific tonnages of cement produced in Greece for distribution throughout the world clearly infringes Article 85 of the Rome Treaty. Even if it is not expressly stated the implicit object is to influence inter-State trade within the EEC.'

2983 Third, Dyckerhoff, Ciments Français, Lafarge, Italcementi, Holderbank, Aker, EUROC and Blue Circle state that the question whether Interciment was compatible with Article 85(1) of the Treaty was taken into consideration before it was set up, and also on various subsequent occasions. From the start it had even been envisaged that Interciment would be notified to the Commission in order to obtain exemption pursuant to Article 85(3) of the Treaty. Dyckerhoff

refers to the various legal opinions mentioned by the Commission in recital 26, paragraph 13, of the contested decision. It adds that since Interciment was never active it was not necessary to make the recommended notification. Ciments Français refers to the record of the meeting held in Rome on 28 May 1986, which reflects the concern of the participants to ensure the lawfulness of their actions and, in particular, of the proposed setting-up of a Joint Trading Company, in the light of the Community rules on competition (contested decision, recital 25, paragraph 1). Blue Circle cites the recommendation, at the end of the Zurich/Céligny document, that the advice of a Community law expert should be obtained on the various actions contemplated. It adds that Interciment was never notified to the Commission because there was never any agreement as to the purposes for which it might be used. It claims that that company was never operational.

2984 It is apparent from the various documents referred to by the Commission in the contested decision, particularly in recital 26, paragraphs 11 and 13, that both the compatibility of Interciment with Article 85(1) of the Treaty and the advisability of notifying it to the Commission pursuant to Article 85(3) of the Treaty were considered. However, without waiting for the legal opinions proposed, the participants in the meeting in Stockholm on 9 June 1986 decided to set up Interciment and to assign it the objective of implementing the dissuasive and persuasive measures recommended by the Zurich/Céligny document against countries threatening the stability of the member countries' markets. In addition, even though the object of the agreement setting-up Interciment was manifestly contrary to Article 85(1) of the Treaty, notification of that agreement to the Commission, while envisaged, never took place (contested decision, recital 26, paragraph 13).

2985 The arguments of the applicants must therefore be rejected.

2986 CBR states that the amendment to Interciment's articles of association proposed by Mr Van Hove, the Belgian representative at the meeting in Brussels on 6 November 1986, reflects the concern to comply with Community law. CBR refers to the notes concerning that meeting (documents 33.126/19007 and 19008) and to the letter sent by Mr Van Hove on the day of that meeting to Mr Akermann, of Holderbank, which states in particular: 'In order to comply with the provisions of the Treaty of Rome (Article 85) concerning competition, we believe that Article 2 must be amended as follows: "The object of the company is to engage in trade in building materials for export outside the European Economic Community".' (document 33.126/18927).

2987 It must be stated, however, that, while the participants in the meeting in Brussels on 6 November 1986 approved Mr Van Hove's proposed amendment of Article 2 of Interciment's articles of association (contested decision, recitals 25, paragraph 41, and 26, paragraph 4; document 33.126/19007), no undertaking has produced articles of association that incorporate the amendment so approved.

2988 Moreover, a note found at Italcementi concerning the meeting of the ETF in Milan on 9 January 1987 states that 'the opinion of the French on Interciment is, curiously, very cautious' (contested decision, recital 25, paragraph 44; document 33.126/2905).

2989 With that note was enclosed (Annex 4) the 'legal opinion of a French expert on Interciment SA', who considered in particular (contested decision, recitals 25, paragraph 44, and 26, paragraphs 12 and 13; document 33.126/2915):

'Setting up Interciment SA with the proposed shareholders would quite clearly infringe Community legislation, since most of the major European producers will be involved in it. If the shareholders represent more than half of their country's total consumption, it is not inconceivable that the EEC will consider that Interciment is a cartel designed to hinder inter-State trade within the Community. ... Simply to gain a maximum of 12 months, it is possible to notify the Commission at the same time as the start of operations.'

2990 Those statements show that the concerns as to the compatibility of Interciment with Article 85(1) of the Treaty continued after the meeting on 6 November 1986. They therefore demonstrate that the approval during that meeting of the amendment to the articles of association proposed by Mr Van Hove did not have the effect of putting an end to the anti-competitive purpose assigned to Interciment on its setting-up.

2991 CBR's argument must therefore be rejected.

2992 Fourth, CBR, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Italcementi, Holderbank, Aker, EUROC and Blue Circle emphasise the fact that Interciment never became operational. Immediately after the company had been set up, it was decided that it should remain dormant. According to Ciments Français, Italcementi and Holderbank, that decision was based on doubts as to whether the initiative was compatible with Article 85(1) of the Treaty. Blue Circle states that a prerequisite to Interciment's becoming operational was that it would be notified to the Commission. Interciment was at most a legal shell, possessing no staff, executive bodies, working capital, premises or plant, which its sole shareholder, Holderbank, maintained as a dormant company, as one of the many companies which it had set up in form only. Ciments Français adds that that company was created in case it was legally possible for Holderbank to use it, possibly for other purposes than those originally envisaged. Holderbank points out that, although it asked a number of undertakings to settle their contributions and to take up the Interciment shares due to them, only Italcementi and Blue Circle paid for their shares in

Interciment. Blue Circle stated, however, that it did not wish to have such a shareholding on account of its reservations as to the compatibility of Interciment with Community competition law. Italcementi transferred its shares back to Holderbank on 7 November 1988.

2993 The Court notes that it was in fact decided at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 to keep Interciment as a dormant company (contested decision, recitals 25, paragraph 32 and 26, paragraph 14; document 33.126/18861). That decision was confirmed at the meeting of the ETF in Geneva on 21 October 1986 (contested decision, recitals 25, paragraph 37 and 26, paragraph 14; document 33.126/18895), at the meeting in Brussels on 6 November 1986 (contested decision, recitals 25, paragraph 41 and 26, paragraph 14; document 33.126/19007), and at the meeting of the ETF on 9 January 1987 (contested decision, recital 26, paragraph 14; document 33.126/18921).

2994 However, at the meeting on 9 September 1986 mentioned in the previous paragraph, it was considered 'important to ensure that [Interciment was] "ready for operation"' in order to implement 'both persuasive and dissuasive measures' against countries threatening the stability of the member countries' markets (contested decision, recitals 25, paragraph 32, 26, paragraph 15, and 54, paragraph 2; document 33.126/18861).

2995 In any event, the Commission has shown (see above paragraphs 2976 to 2978) that the object of the agreement setting up Interciment was contrary to Article 85(1) of the Treaty, as it has established that Interciment had been assigned the objective of implementing the dissuasive and persuasive measures proposed in the Zurich/Céligny document against countries threatening the stability of the member countries' markets. Since the anti-competitive object of that agreement has thus been proved, it is immaterial, for the purposes of application of Article 85(1) of the Treaty, that the agreement did not in the end lead to any such result (see to that effect the case-law cited at paragraph 837 above). The Commission was therefore fully entitled to take the view that the setting-up of Interciment constituted 'quite apart from the effects ... an infringement of Article 85' (contested decision, recital 54, paragraph 2).

2996 In consequence, the submissions of the applicants must be rejected.

C — The participation in the agreement setting up Interciment of the applicants referred to in Article 4(2) of the contested decision

1. Preliminary observations

2997 In recital 54, paragraph 3, of the contested decision the Commission states:

'In the light of the attendance at the Stockholm meeting, at which it was decided to set up the Joint Trading Company, and at the Baden-Baden meeting, at which the tasks of the Joint Trading Company were confirmed, and the fact that Holderbank requested payment of their quota of shares in Interciment from Blue Circle in respect of its individual holding and from the other addresses of the letter in respect of the holding of their respective countries (see Holderbank's letter of 22 September 1986, referred to in paragraph 6 of recital 26), the Commission considers that the following participated in the agreement to set up Interciment SA: the Holderbank group, Blue Circle, Oficemen, Asland, Uniland, Hispacement, SFIC, Lafarge, Ciments Français, BDZ, Heidelberger, Dyckerhoff, Aker and EUROC, CBR, Italcementi, Unicem and Cementir. Holderbank asked all the undertakings directly or indirectly concerned or concerned as representatives of other companies participating in the Cembureau Task Force to pay their quota.'

2998 With the exception of Holderbank and Blue Circle, which deny solely that the setting-up of Interciment constituted an infringement and, in the alternative, the duration of that infringement (arguments analysed at paragraphs 2975 to 2985 and 2992 to 2996 below and at paragraphs 3084 to 3097), all the applicants concerned put forward arguments seeking to deny their involvement in the infringement found in Article 4(2) of the contested decision.

2. CBR, Dyckerhoff, Lafarge, Italcementi, Aker and EUROC

2999 CBR states that it has never held shares in Interciment. In its view, the Commission cannot dispute that fact by relying on the request for payment of a quota of shares in Interciment addressed to CBR by Holderbank or on Mr Van Hove's proposed amendment of Interciment's articles of association. Holderbank's request for payment was made before the decision of the Belgian and Netherlands undertakings not to take part in Interciment. It does not therefore constitute evidence of their subsequent participation. The notes of the meeting in Brussels on 6 November 1986 show, moreover, that it was decided at that meeting that no Community undertaking would subscribe to Interciment's shares. Mr Van Hove's proposed amendment of Interciment's articles of association demonstrates at most that the undertakings concerned by the Belgian representative's action contemplated participating in Interciment upon certain conditions.

3000 Dyckerhoff claims that it is has not been established that the setting-up of Interciment was decided on at the meeting in Stockholm on 9 June 1986. Interciment is in actual fact the result of an independent initiative by Holderbank. Moreover, it was set up on 24 June 1986 by Swiss lawyers. Dyckerhoff also points out that in Blue Circle's internal memorandum of 10 July 1986, mentioned above at paragraph 2982 (contested decision, recital 26, paragraph 13; documents 33.126/18842 and 18843), the issue was still 'the proposal to set up the Swiss company'. In Stockholm, therefore, it was merely decided to prepare for the setting-up of such a company.

3001 Dyckerhoff claims that it never had any interest in the tasks assigned to Interciment. It sought merely to obtain the Commission's intervention in the Greek case. Furthermore, it did not sign the document setting up Interciment, or subscribe for a quota of its shares, or provide any part of the capital either directly or indirectly.

3002 Lastly, it claims that the Commission cannot infer that it took part in the setting-up of Interciment from the fact that Holderbank requested it to subscribe to Interciment's capital. Shortly after that request, it was decided in Brussels on 6 November 1986 that no Community undertaking would subscribe to Interciment's capital. In addition, it was agreed to leave the company dormant. Dyckerhoff could not possibly think that maintaining a dormant company could infringe Article 85(1) of the Treaty.

3003 As is apparent from the documents referred to by the Commission in recital 26, paragraph 10, of the contested decision, Dyckerhoff was not shown Interciment's balance sheet as at 31 December 1986. Nor did it receive its subsequent balance sheets. Interciment belonged to Holderbank alone, and Holderbank alone decided to wind it up in March 1993. The Commission cannot rely against Dyckerhoff on the discussions which took place at the meetings of the ETF on 9 January and 11 February 1987, since it did not take part in either of those two meetings.

3004 Lafarge maintains that the Commission has not adduced evidence of its participation in Interciment. It claims never to have subscribed to the company's capital and never to have taken any action in response to Holderbank's letter of 22 September 1986 requesting it to do so.

3005 Italcementi claims that the fact that it held shares in Interciment, a dormant company, for 21 months (from February 1987 to November 1988) does not constitute an infringement of Article 85(1) of the Treaty.

3006 Aker and EUROC maintain that although documents 33.126/18821, 18822 and 18857 to 18861, cited in recital 26, paragraph 2, of the contested decision state that it was suggested that they should take a 12.5% share in Interciment, they never committed themselves to that effect,

never made a financial contribution to that company's capital and were never allotted shares in it. They add that, even on the assumption that there was an unconditional undertaking to create and implement Interciment, such an undertaking did not arise out of the meeting in Stockholm on 9 June 1986 and, in any event, did not concern them. They refer to Holderbank's telex of 12 June 1986 to Blue Circle, cited in recital 25, paragraph 11, of the contested decision (document 33.126/18781). They also claim that they had no intention of committing themselves to Interciment until it could be guaranteed that that company was compatible with Article 85(1) of the Treaty.

3007 Those arguments cannot be accepted.

3008 The six undertakings in question took part in the meeting in Stockholm on 9 June 1986 (see paragraphs 2597, 2618, 2649, 2746 and 2759 above).

3009 Although Interciment was in fact set up on 24 June 1986 by three Swiss lawyers (contested decision, recital 26, paragraph 3; documents 33.126/18734 to 18739), the decision to create it was taken at that meeting in Stockholm, as is shown by the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recitals 25, paragraphs 22 and 32, and 26, paragraph 1; documents 33.126/18858 and 18861). Those minutes, like Annex 2 to the agenda of the ETF meeting of 19 August 1986 (contested decision, recitals 25, paragraph 10, and 26, paragraph 2; document 33.126/18821), show in addition that it was agreed at the Stockholm meeting that Interciment shares were to be divided between eight countries and/or companies. The fact that Blue Circle's internal memorandum mentions the 'proposal to set up a Swiss company' does not, in this respect, make it possible to disregard the various findings based on the documents referred to above.

3010 CBR, Dyckerhoff, Lafarge, Italcementi, Aker and EUROC also took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (see paragraphs 2599, 2618, 2649, 2746 and 2759 above).

3011 In connection with point 1.9 in the agenda for that meeting, dealing with Interciment, the participants were first told of the setting-up, pursuant to the decision taken by the Head Delegates at their meeting in Stockholm, of the Joint Trading Company Interciment SA/ Interciment AG/Interciment Ltd, with share capital of CHF 50 000 (wholly paid up by Swiss lawyers acting as trustee and advanced for that purpose by Holderbank on behalf of the companies and/or countries represented at the Stockholm meeting). It was also stated that the company could be immediately ready for operation for both persuasive and dissuasive measures. Mention was made of the division of shares in Interciment, agreed on at Stockholm. As regards organisation, it was pointed out that, since Swiss law required that the majority of the board of directors of the company should be Swiss, Mr Cottier, one of the three lawyers present at the setting-up of the company, was the sole director, but he would act on the

instructions of an executive committee whose functions were yet to be settled and for which the ETF had proposed the following names: Messrs d'Agostino (Italcementi — Italy), Marichal (Lafarge Coppée — France), Félix (Hornos Ibéricos — Spain), Horner (Blue Circle — United Kingdom) and Akermann (Holderbank — Switzerland), the latter acting as coordinator. Finally, it was agreed that the company would remain dormant but ready for operation (contested decision, recitals 25, paragraphs 22 and 32, and 26, paragraph 1; documents 33.126/18858, 18860 and 18861).

3012 Since CBR, Dyckerhoff, Lafarge, Italcementi, Aker and EUROC have not adduced any evidence to show that at those meetings in Stockholm and Baden-Baden they openly distanced themselves from the plainly anti-competitive concurrence of wills expressed there regarding the setting-up of the Joint Trading Company Interciment or that they had informed the other participants that they intended to be present at those meetings with different objects in mind, it must be held that those six undertakings subscribed to the agreement referred to in Article 4(2) of the contested decision, or at least gave that impression to the other participants (see the case-law cited above at paragraph 1353). Aker and EUROC cannot rely on Holderbank's telex to Blue Circle on 12 June 1986 (document 33.126/18781) in order to claim that they were not involved in the undertakings given during the Stockholm meeting with regard to Interciment. The contents of that telex show at most that Holderbank requested Blue Circle to send it its further comments on the setting-up of the Joint Trading Company, in anticipation of the meeting of the ETF on 17 June 1986.

3013 The participation of the six undertakings in the agreement setting up Interciment is, moreover, confirmed by the fact that they were sent the letter of 22 September 1986 in which Holderbank requested payment of quotas of Interciment shares (contested decision, recital 26, paragraph 6; documents 33.126/19019 to 19022 and 19025). Holderbank was able to send such a request to those undertakings only because they had agreed to contribute to the implementing of that agreement by offering, on their own account or on behalf of their market, to take up shares in Interciment. The minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 26, paragraph 2; document 33.126/18861) and Annex 2 to the agenda for the meeting of the ETF on 19 August 1986 (contested decision, recital 26, paragraph 2; document 33.126/18821) also show that 12.5% of Interciment's share capital had been allotted to each of 'Belgium' — more specifically to 'CBR/Cim. d'Obourg' — to 'Germany', to 'France' — more specifically to 'Lafarge (France)', to 'Italy' — more specifically to 'Sogec (Italy)', a subsidiary partly owned by Italcementi — and to 'Norcem/Cementa'.

3014 The claim by CBR, Dyckerhoff, Lafarge, Aker and EUROC that ultimately they never actually financed Interciment, or even subscribed for their quota of the shares in question is irrelevant.

3015 The Commission correctly observed in recital 54, paragraph 4, of the contested decision:

'The actual paying-up of the shares in Interciment SA is of little relevance in establishing the participation of the undertakings in the agreement on the setting-up of the company. The important point is that "the tool" was already set up as a result of an agreement and was ready for operation on behalf of the participants in the agreement.'

3016 Similarly, the fact, emphasised by Dyckerhoff, that it had not signed the deed setting up Interciment and had never received its balance sheets cannot hide the various facts mentioned in paragraphs 3008 to 3013 above, which unambiguously show that Dyckerhoff was a party to the agreement setting up Interciment.

3017 In conclusion, the Commission was fully entitled to find in Article 4(2) of the contested decision that CBR, Dyckerhoff, Lafarge, Italcementi, Aker and EUROC participated in the agreement setting up Interciment as from 9 June 1986.

3018 It must be pointed out that the fact that, for the reasons set out in paragraph 402 above, the extract from Blue Circle's reply to the SO reproduced in recital 26, paragraph 10, of the contested decision cannot be relied on against Aker and EUROC, has, in the light of the analysis in paragraphs 3008 to 3014 above, no bearing on the merits of the Commission's finding that they participated in the agreement setting up Interciment.

3019 Aker and EUROC also claim that in the contested decision (recitals 26, paragraph 9, and 54, paragraph 6) the Commission seems to have withdrawn its allegation in the SO that they held shares in Interciment. They state that the Commission now considers (contested decision, recital 54, paragraph 4) that 'the actual paying-up of the shares in Interciment SA is of little relevance in establishing the participation of the undertakings in the agreement on the setting-up of the company'. They contend that the Commission has thus reformulated its objection concerning participation in the agreement on the setting-up of Interciment.

3020 The Court finds that in the Legal Assessment of the SO, concerning Interciment, the Commission did place particular emphasis on the actual payment for shares in that company by the various undertakings which had received Holderbank's letter of 22 September 1986 [SO, paragraph 61(h)(i), p. 179], which it did not do in the contested decision (recital 54, paragraph 4). Nevertheless, the three factors on which the Commission relied, in recital 54, paragraph 3, of the contested decision (see paragraph 2997 above) in finding that the applicants took part in the agreement setting up Interciment were explicitly referred to in The Facts of the SO (see Chapter 2, section 2, paragraph 18, pp. 43 and 44). Aker and EUROC were thus in a position to

put forward their comments, during the administrative procedure, on the three factors relied upon in the contested decision in charging undertakings with the infringement referred to in Article 4(2). They cannot, therefore, claim that their rights of defence were infringed during the administrative procedure, with regard to the finding of that infringement.

3021 Aker and EUROC's argument must therefore be rejected.

3. SFIC, BDZ and Oficemen

3022 SFIC maintains that the facts put forward in the contested decision do not establish that it was involved in the agreement setting up Interciment. It claims that there is no proof of any decision by an association of undertakings. Nor has the Commission demonstrated how any actions by persons carrying out duties within Interciment could have had an anti-competitive object.

3023 BDZ, in addition to the line of argument presented in paragraphs 2661 to 2663 above, denies any involvement in setting up Interciment. It claims that it was an initiative of certain producers, in which it could not have participated, since it is an association. It never participated in Interciment or even expressed a wish to do so. Furthermore, the Commission found no documents in its files concerning that company.

3024 Oficemen denies any involvement in Interciment. It did not take part in the meeting in Stockholm on 9 June 1986. The fact that several documents mention the allocation of a percentage of Interciment shares to the Spanish market does not support the conclusion that Oficemen took part in that meeting and subscribed to the agreement setting up Interciment. Oficemen never took part in the subsequent meetings of Head Delegates at which the running of Interciment was discussed. It was not mentioned in any document concerning the setting-up and running of Interciment. It was not represented on the executive committee of that company and never paid for any shares, directly or indirectly.

3025 It must nevertheless be borne in mind that SFIC, BDZ and Oficemen were represented at the meeting in Stockholm on 9 June 1986 (see paragraphs 2623 to 2625, 2664 to 2666 and 2708 to 2710 above), at which it was decided to set up Interciment (see above paragraph 3009).

3026 Those three associations were also represented at the meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986 (see paragraphs 2623 to 2625, 2667, 2711 and 2712 above), at which the setting-up of Interciment, its anti-competitive purpose, the details of its running and the structure of its share ownership were discussed and at which it was agreed to ensure that the company would remain ready for operation (see paragraph 3011 above).

3027 In addition, it must be pointed out that the Commission has demonstrated the SFIC's own role in the infringement found in Article 4(2) of the contested decision. In particular, it noted in recital 29, paragraph 4, that SFIC had relayed to its market the discussions held at European level, in particular, at the meetings of 9 June and 9 September 1986 at which it had been represented by Mr Laplace and Mr Kasriel, concerning imports from Greece (see paragraphs 2624 and 2625 above).

3028 In those circumstances and in the absence of any evidence produced by those three applicants to show that at the meetings referred to in paragraphs 3025 and 3026 above they had openly distanced themselves from the concurrence of wills relating to the setting-up of the Joint Trading Company Interciment, it must be held that they adhered to that anti-competitive concurrence of wills or, at least, that they gave that impression to the other participants (see, to that effect, the case-law cited at paragraph 1353 above).

3029 The fact, relied on by the BDZ, that no document relating to Interciment was found in its files is irrelevant in that respect. The same holds for Oficemen's assertions that it was not mentioned in any document concerning the setting-up and running of Interciment, that it was not represented on the executive committee of that company and that it never subscribed to its capital, directly or indirectly.

3030 In conclusion, the Commission was fully entitled to find in Article 4(2) of the contested decision that SFIC, BDZ and Oficemen participated in the agreement setting up Interciment as from 9 June 1986.

3031 Oficemen claims to have suffered discrimination in connection with the finding of the infringement relating to the setting-up of Interciment, inasmuch as the Belgian and United Kingdom associations were not charged with that infringement, even though the Belgian and United Kingdom Head Delegates took part in the Stockholm and Baden-Baden meetings.

3032 However, the fact that associations in a situation comparable to that of Oficemen were not found by the Commission in Article 4(2) of the contested decision to have committed an infringement cannot in any event make it possible to disregard the infringement found to have

been committed by Oficemen, where that infringement has been correctly established (see to that effect *Woodpulp II*, cited above at paragraph 106, paragraph 146). For the reasons set out above, the Commission was fully entitled to conclude in the contested decision that Oficemen had participated in the agreement setting up Interciment.

4. Ciments Français

3033 Ciments Français claims never to have participated in the management, executive committee or capital of Interciment. Contrary to what the Commission states in recital 26, paragraph 6, of the contested decision, there are no grounds for including it in the 'French shareholding' covered by the share quota in Interciment requested from Lafarge by Holderbank. In any event, the Head Delegates present at the meeting in Brussels on 6 November 1986 decided, as a result of various legal opinions, that no Community undertaking would subscribe to Interciment's capital.

3034 Ciments Français maintains that its chairman, Mr Laplace, took part in the meetings of Head Delegates described in recital 26 of the contested decision in his capacity as chairman of the SFIC and member of the CLC, purely in connection with actions taken to make the national and Community authorities aware of the problem.

3035 However, the Court points out that Mr Laplace also represented Ciments Français, whose chairman he was at the time, at the meeting in Stockholm on 9 June 1986 (see paragraphs 2629 and 2630 above).

3036 In the light of what has been stated in paragraph 3009 above, and since Ciments Français has not adduced any evidence to demonstrate that, at that meeting, Mr Laplace openly distanced himself from the decision to set up Interciment or that he informed the other participants that he intended to be present at the meeting with different objects in mind (namely merely to prepare for the political actions called for by the appearance of the 'Greek problem'), it must be held that Ciments Français manifested its support for the setting-up of the Joint Trading Company Interciment or, at the very least, that it gave that impression to the other participants (see, to that effect, the case-law cited in paragraph 1353 above).

3037 In this connection, it is immaterial that Ciments Français did not subsequently participate in the management, executive committee or shares of Interciment.

3038 In conclusion, the Commission was fully entitled to find in Article 4(2) of the contested decision that Ciments Français participated in the agreement setting up Interciment as from 9 June 1986.

5. Heidelberger

3039 Heidelberger claims that it does not meet any of the criteria defined by the Commission in recital 54, paragraph 3, of the contested decision in order to allocate responsibility for the infringement constituted by the agreement setting up Interciment.

3040 The Court points out that Heidelberger did not take part in the meeting in Stockholm on 9 June 1986 or the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Nor was it sent the Holderbank letter of 22 September 1986 in which Holderbank asked a series of undertakings to pay for quotas of shares in Interciment.

3041 Admittedly, that letter, addressed to Mr Lose, of Dyckerhoff, concerning the German market (contested decision, recital 26, paragraph 6; document 33.126/19020), did request payment of the 'German shareholding' in Interciment and requested the German producers to decide between them which of them was to hold those shares. Nevertheless, those facts do not make it possible to conclude that Heidelberger had shown its support for the taking-up of shares in Interciment which had been accepted by Dyckerhoff at the meeting in Stockholm on 9 June 1986. Having regard to the smallness of the sums involved (CHF 6 250), Dyckerhoff was able to accept such a shareholding on behalf of the German market without first receiving the consent of the other undertakings on its market, even though it might have to bear the financial burden of taking up that shareholding by itself if it did not subsequently manage to obtain their contributions.

3042 The Commission claims that the preparation of means to implement the dissuasive and persuasive measures had already been discussed at the meeting in Rome on 28 May 1986, at which Heidelberger was present.

3043 Nevertheless, and without any need to rule on the relevance of that assertion, the Court points out that in the contested decision the Commission makes absolutely no reference to that meeting in the summary of facts relating to the agreement on setting up Interciment (recital 26) or in the legal assessment of those facts, in particular among the factors used in recital 54, paragraph 3, to attribute responsibility for the infringement to the various undertakings and associations referred to in Article 4(2).

3044 The Commission then points to the fact that, in its letter of 22 September 1986 to Dyckerhoff, Holderbank asked Dyckerhoff to send Mr Schuhmacher (of Heidelberger) a copy of the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, in which Interciment was discussed, and also the 'file consisting of the most important documents relating to the setting-up of the company "Interciment AG"'.

3045 None the less, against an undertaking which, like Heidelberger, has not taken part in either of the two meetings referred to in recital 54, paragraph 3, of the contested decision, those facts cannot constitute evidence of its support, even tacit, for the setting-up of Interciment, a necessary precondition for attribution of responsibility for the infringement found in Article 4(2) of the contested decision.

3046 It follows from all the above that the Commission was not entitled to find that Heidelberger participated in the agreement setting up Interciment. It follows that Article 4(2) of the contested decision must be annulled in so far as it finds that Heidelberger participated in that agreement.

6. Unicem

3047 Unicem claims that it did not take part in any meeting relating to the setting-up or activities of Interciment. In addition, Holderbank never asked it to pay for a quota of Interciment's shares. The fact that such a payment was requested of Italcementi in respect of the Italian shareholding, even if it were established, does not make it possible to implicate Unicem.

3048 The Court points out that Unicem was not present at the meeting in Stockholm on 9 June 1986 or at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Nor was it sent the Holderbank letter of 22 September 1986 in which Holderbank asked a number of undertakings to pay for quotas of Interciment's shares.

3049 Admittedly, that letter, which was addressed to Mr d'Agostino of Italcementi, so far as regards the Italian market (contested decision, recital 26, paragraph 6; document 33.126/19019), asked for payment of the 'Italian shareholding' in Interciment's capital. For the reasons set out in paragraph 3041 above, such a fact does not however make it possible to conclude that Unicem had demonstrated its consent to the taking-up of a shareholding in Interciment which had been accepted by Italcementi at the meeting in Stockholm on 9 June 1986.

3050 The Commission states that, according to Annex 2 to the agenda of the meeting of the ETF on 19 August 1986 (contested decision, recital 26, paragraph 2; document 33.126/18821), the Italian quota of shares in Interciment had been allotted to Sogec, a joint subsidiary of Italcementi and Unicem.

3051 However, the fact that at the meeting in Stockholm on 9 June 1986 Italcementi proposed Sogec as an Italian shareholder in Interciment does not prove that Unicem agreed to participate in such a shareholding and, therefore, in the setting-up of the Joint Trading Company Interciment. It must, moreover, be pointed out that in February 1987 the Italian share quota in Interciment was taken up by Italcementi, not by Sogec (contested decision, recital 26, paragraph 8; document 33.126/16220).

3052 The Commission also claims that Unicem was represented by the Italian Head Delegate, namely Italcementi, at the meetings of 9 June and 9 September 1986, referred to in recital 54, paragraph 3, of the contested decision.

3053 However, it has already been stated that in its capacity as a direct member of Cembureau Unicem had its own Head Delegate (see paragraph 1409 above). In those circumstances, and in the absence of any evidence that Unicem had instructed Italcementi to represent it at the two meetings referred to in the previous paragraph, the Commission was not entitled to deduce from the presence of Italcementi at those meetings that Unicem was represented in them and, therefore, that it had participated in the concurrence of wills concerning the setting-up of Interciment and its anti-competitive purpose.

3054 Last, at the hearing in Case T-50/95 the Commission referred to the fact that, in its letter to Italcementi of 22 September 1986, Holderbank requested Italcementi to send Unicem a copy of the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, which mention the Interciment situation.

3055 As has already been stated in paragraph 3045 above, such a fact does not however show that Unicem participated in the agreement concerning the setting-up of Interciment.

3056 It is clear from all the foregoing that the Commission was not entitled to find that Unicem participated in the agreement setting up Interciment. It follows that Article 4(2) of the contested decision must be annulled in so far as it finds that Unicem participated in that agreement.

7. Asland

3057 Asland denies any participation in the setting-up of Interciment. It states that, contrary to what the Commission claims, it was not represented at the meeting in Stockholm on 9 June 1986, at which the decision was taken to set up Interciment. Nor did the Commission adduce in the SO, at the hearing in March 1993 or in the contested decision any evidence of Asland's presence at that meeting. In addition, Asland disputes the various conclusions drawn by the Commission in recital 25, paragraph 9, of the contested decision in order to establish its presence at that meeting. Furthermore, it points out that the Commission has never claimed that it took part in the meeting in Baden-Baden on 9 September 1986, during which Interciment's functions were confirmed. Finally, it is not alleged in the contested decision that Asland was sent the Holderbank letter of 22 September 1986 requesting payment for a quota of Interciment shares.

3058 In its defence, the Commission relies on two documents, namely the minutes of the meeting of Asland's executive committee on 25 June 1986 (documents 33.322/1562 and 1563) and the minutes of the meeting of the Spanish undertaking's board of directors on 26 June 1986 (documents 33.322/1598 to 1603), which irrefutably show Asland's presence at the meeting in Stockholm on 9 June 1986. In its rejoinder, it states that production of those two documents is intended merely to establish definitively for the Court a fact already adequately established in the contested decision.

3059 On that point, the Court points out first of all that in recital 25, paragraph 9, of the contested decision the Commission relies on two points in order to establish Asland's presence at the meeting in Stockholm on 9 June 1986: the fact that Asland's participation in that meeting was foreseen at the meeting in Rome on 28 May 1986; the allotment at the meeting in Stockholm on 9 June 1986 of a Spanish shareholding in Interciment.

3060 So far as regards the first point, while it is true that according to the report of the meeting in Rome on 28 May 1986 the participants in that meeting, including Asland, had agreed to meet again in Stockholm on 9 June 1986 (contested decision, recital 25, paragraph 1; document 33.126/18771), that does not prove that Asland actually took part in the Stockholm meeting.

3061 As regards the second point, it shows at most that a Spanish participant was present at the Stockholm meeting. It does not prove that the representative was a member of Asland. The fact that Holderbank addressed its request for payment of the Spanish shareholding in Interciment to Mr Félix of Hornos Ibéricos (contested decision, recital 26, paragraph 6; document 33.126/19023) casts further doubt on Asland's presence at the Stockholm meeting.

3062 In those circumstances, and having regard to the fact that during the administrative procedure Asland persistently maintained that the only evidence adduced against it in the SO in support of the various charges brought against it was its participation in the meeting in Rome on 28 May 1986 (see Asland's reply to the SO, pp. 41 and 42, and the Report for the Hearing on 11 March 1993, pp. 38 and 39), the Commission cannot here seek to establish that Asland was present at the meeting in Stockholm on 9 June 1986 on the basis of the two sets of minutes of that undertaking referred to in paragraph 3058 above, documents which were not referred to in the SO, were not in the Box (see paragraph 95 above) and on which the Commission never formally requested Asland to submit its observations during the administrative procedure.

3063 It is thus clear from the foregoing that the Commission has not established that Asland was present at the meeting in Stockholm on 9 June 1986.

3064 In addition, Asland did not take part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Nor was it sent the letter of 22 September 1986 in which Holderbank requested a number of undertakings to pay for share quotas in Interciment. Admittedly, that letter, which was sent to Mr Félix, of Hornos Ibéricos, with regard to the Spanish market (see above paragraph 3061), sought payment for the 'Spanish shareholding' in Interciment. For the reasons set out in paragraph 3041 above, that fact does not however make it possible to conclude that Asland demonstrated its consent to the taking-up of a shareholding in Interciment which had been accepted by the Spanish representative at the meeting in Stockholm on 9 June 1986.

3065 In conclusion, the Commission was not entitled to find that Asland participated in the agreement setting up Interciment. It follows that Article 4(2) of the contested decision must be annulled in so far as it finds that Asland participated in that agreement.

8. Uniland

3066 Uniland maintains that the Commission has not cited the evidence on which it relies in order to establish its participation in the agreement concerning the setting-up of Interciment.

3067 It claims not to have been present at the meeting in Stockholm on 9 June 1986. The presence of Mr Rumeu at the meeting in Baden-Baden on 9 September 1986 cannot in itself constitute evidence of its participation in the setting-up of Interciment. With regard to the meeting in Brussels on 6 November 1986, Mr Rumeu did not take part in the discussions and agreements concerning Interciment. In any event, the participants at that meeting merely discussed the, purely formal, possible change to Interciment's objects, a change which was never made in the

end. The complete lack of any connection between Interciment and Uniland is further borne out by the fact that the documents concerning Interciment do not refer either to Uniland or Mr Rumeu. The Commission cannot rely on documents drafted by third parties stating that documents were to be handed to Mr Rumeu (contested decision, recital 25, paragraph 33) in order to establish a connection between Interciment and Uniland.

3068 Last, Uniland claims that it never subscribed, directly or indirectly, to a shareholding in Interciment and that it was never asked to make such a subscription. It adds that the Commission has provided no evidence to that effect. Such a subscription cannot be inferred from the letter sent by Holderbank on 22 September 1986 to Hornos Ibéricos with a view to obtaining payment of the 'Spanish shareholding' in Interciment. Uniland also states that it was never represented in Interciment's administrative bodies.

3069 It must however be pointed out that, in the person of Mr Rumeu, Uniland took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (see paragraph 2695 above).

3070 In the light of what has been set out in paragraph 3011, and without the need to consider whether Uniland's argument concerning its participation in the meeting in Brussels on 6 November 1986 is well founded, that not being a meeting referred to in recital 54, paragraph 3, of the contested decision, the Court finds, in the absence of any evidence produced by Uniland to show that at the meeting referred to in the previous paragraph it had openly distanced itself from the agreement setting up Interciment, that Uniland did subscribe to that initiative or at least gave that impression to the other participants (see, to that effect, the case-law cited above at paragraph 1353).

3071 It is, in that regard, immaterial that there is no mention of Uniland or Mr Rumeu in any document concerning Interciment or that Uniland never made a financial contribution to Interciment or that such a subscription was never requested of it, or even that Uniland was not represented in Interciment's administrative body.

3072 In conclusion, the Commission was entitled to find in Article 4(2) of the contested decision that Uniland participated in the agreement setting up Interciment.

3073 However, the contested decision does not contain any evidence allowing the conclusion that Uniland demonstrated its support for that agreement before taking part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. Even on the assumption that, as the Commission maintains in its pleadings, Uniland was represented by the Spanish participant at the meeting in Stockholm on 9 June 1986, it is nonetheless the case that

the first definite manifestation of Uniland's own participation in the agreement setting up Interciment was on 9 September 1986, the date of its participation in the meeting of Head Delegates and members of the ETF in Baden-Baden. Article 4(2) must therefore be annulled in so far as it finds that Uniland participated in that agreement before that date.

3074 Uniland complains that the Commission has not charged the undertaking to which Mr Félix belonged with participating in the agreement setting up Interciment, even though Mr Félix was a part of Interciment's executive committee.

3075 However, that fact cannot in any event make it possible to disregard the infringement found to have been committed by Uniland, where that infringement has been properly established (see, to that effect, *Woodpulp II*, cited above at paragraph 106, paragraph 146). The grounds set out above show that in the contested decision the Commission was fully entitled to conclude that Uniland participated in the agreement setting up Interciment.

9. Cementir

3076 Cementir claims to have been wholly uninvolved in the setting-up and running of Interciment. It does not meet any of the conditions laid down by the Commission in recital 54, paragraph 3, of the contested decision. The reference to the Italian industry in the letter of 22 September 1986, in which Holderbank requested Italcementi to pay for a quota of shares in Interciment, did not concern Cementir, since only Italcementi and Unicem were involved in the ETF. In any event, that Italian shareholding was wholly paid by Italcementi, which has confirmed that it had not transferred any part to other Italian producers (see Italcementi's reply of 21 March 1990 to a request by the Commission for information).

3077 In that connection, the Court points out that Cementir did not take part in the meeting in Stockholm on 9 June 1986 or in the meeting in Baden-Baden on 9 September 1986. Nor was it sent the letter of 22 September 1986 in which Holderbank asked a number of undertakings to pay for a quota of shares in Interciment. Admittedly, that letter, which was addressed to Mr d'Agostino of Italcementi, regarding the Italian market (see above paragraphs 3013 and 3049), requested payment of the Italian shareholding in Interciment. For the reasons set out in paragraph 3041 above, that reference to the 'Italian shareholding' does not however make it possible to conclude that Cementir agreed to the taking-up of such a shareholding and thus to the agreements setting-up Interciment. Furthermore, the Italian shareholding in Interciment had been allotted to Sogec (Annex 2 to the agenda of the meeting of the ETF on 19 August 1986; contested decision, recital 26, paragraph 2; document 33.126/18821), a company to which Cementir was in no way connected, and it was in the end taken up by Italcementi alone (see above paragraph 3051).

3078 As regards the presence of an Italian Head Delegate at the meetings in Stockholm and Baden-Baden and the fact that Cementir was a direct member of Cembureau, those matters cannot, for the reasons set out above at paragraphs 2774 and 2776, lead to a finding that Cementir participated in the agreement setting up Interciment, contrary to what the Commission submits in its defence.

3079 In conclusion, the Commission was wrong to find that Cementir took part in the agreement concerning the setting-up of Interciment.

3080 It follows that Article 4(2) of the contested decision must be annulled in so far as it finds that Cementir took part in that agreement.

D — The duration of the infringement found in Article 4(2) of the contested decision

3081 In Article 4(2) of the contested decision, the Commission finds that the infringement concerning the agreement setting up Interciment lasted from 9 June 1986 to 26 March 1993. 9 June 1986 is the date of the Stockholm meeting, at which it was decided to set up the Joint Trading Company Interciment (contested decision, recital 26, paragraph 1). 26 March 1993 is the date of the Interciment general assembly at which it was decided to dissolve the company (see the record of that general assembly, sent by Holderbank's lawyer to the Commission on 3 May 1993; contested decision, recital 26, paragraph 16).

3082 It has already been stated that, by taking 9 June 1986 as the starting date of that infringement as regards Uniland, the Commission wrongly assessed the start of its participation in the infringement. That start must therefore be fixed at 9 September 1986 (see paragraph 3073 above).

3083 The Court must now consider the applicants' arguments seeking to challenge the Commission's decision to fix 26 March 1993 as the date on which the infringement ended.

3084 First, CBR, Ciments Français, Lafarge, Uniland, Oficemen, Italcementi, Holderbank and Blue Circle argue that the Commission incorrectly extended the duration of the infringement concerning the setting-up of Interciment until 26 March 1993, when that company was at most an 'empty shell'. It had been decided on 9 September 1986 that Interciment would remain dormant, a decision confirmed on 6 November 1986. Uniland and Oficemen maintain that, in

any event, the agreement setting up Interciment could not have lasted beyond the end of May 1987, the time when the agreement setting up the ETF fell into desuetude.

3085 Lafarge claims that it was by pure oversight that the undertakings concerned, which had lost all interest in Interciment, did not decide formally to dissolve it until 26 March 1993. Holderbank explains that on reading the SO it had not realised the importance which the Commission attached to Interciment. It was only at the hearing in March 1993 that it became aware of the conclusions which the Commission intended to draw from the continued existence of Interciment, which explains its decision to carry out the formal dissolution of that company immediately after the hearing.

3086 Dyckerhoff, Italcementi and Holderbank state that the decision to wind up Interciment in March 1993 was taken by Holderbank alone, which proves that the latter was the sole shareholder in Interciment. Italcementi stresses the fact that it transferred its Interciment shares back to Holderbank on 7 November 1988.

3087 On this point, it must be borne in mind that, while it was agreed on several occasions that Interciment was to remain dormant (see paragraph 2993 above), it was considered important at the meeting in Baden-Baden on 9 September 1986 to ensure that that company was ready for operation in order to implement the dissuasive and persuasive measures recommended by the Zurich/Céligny document against countries threatening the stability of the member countries' markets (contested decision, recitals 25, paragraph 32, and 26, paragraph 14; document 33.126/18861). Subsequently, Interciment was further discussed at the meetings of the ETF on 9 January 1987 (contested decision, recital 25, paragraph 44; documents 33.126/18921 and 18922) and 11 February 1987 (contested decision, recitals 25, paragraphs 45, and 26, paragraph 10; documents 33.126/18937 and 18938). With a view to that last meeting, Holderbank sent the members of the ETF Interciment's balance sheet as at 31 December 1986 (contested decision, recital 26, paragraph 10; documents 33.126/18946 to 18949).

3088 In addition, it is clear from documents 33.126/10960 to 10962, cited in recital 26, paragraph 7, of the contested decision, and from the extract from Blue Circle's reply to the SO reproduced in recital 26, paragraph 9, that in September or October 1986 Blue Circle made a payment through its Swiss subsidiary BCO AG to Holderbank in connection with Interciment.

3089 Last, Italcementi subscribed to Interciment's capital on 11 February 1987 before reselling its shares to Holderbank on 7 November 1988 (contested decision, recital 26, paragraph 8; documents 33.126/16218 and 16220).

3090 Those various facts establish that the concurrence of wills which led to the setting-up of Interciment continued until 7 November 1988. On the other hand, it is not possible to consider that such a concurrence of wills continued after that date.

3091 In recitals 26, paragraph 9, and 54, paragraph 6, of the contested decision, the Commission states that Holderbank, which claimed to have bought back all the shares in Interciment, had never specified from whom it repurchased those shares nor produced any document whatsoever to show that it became the sole shareholder in Interciment.

3092 However, the Commission has not been able to put forward any evidence to show that, after 7 November 1988, any undertakings other than Holderbank held shares in Interciment. On the contrary, the record of the general assembly of Interciment on 26 March 1993 (contested decision, recital 26, paragraph 16) shows that Interciment was dissolved by Mr Akermann of Holderbank alone.

3093 In recital 26, paragraph 15, of the contested decision, the Commission relies again on the extract from Blue Circle's reply to the SO stating that the British undertaking claimed that 'Interciment was still ready to operate, but that it could serve any objective'.

3094 However, the extract in question shows at most that Interciment still existed at that time and that it could be made operational at any moment. It does not show that the concurrence of wills expressed in the middle of 1986 entrusting that company with the implementation of the dissuasive and persuasive measures recommended by the Zurich/Céligny document against countries threatening the stability of the member countries' markets was still in existence during the administrative procedure.

3095 Finally, in recital 54, paragraph 4, of the contested decision, the Commission puts forward the fact that the persuasive measures consisting of the absorption of Greek cement and clinker were carried out until 1991.

3096 It does not however produce any evidence to show that such persuasive measures were carried out by Interciment.

3097 In conclusion, Article 4(2) of the contested decision must be annulled in so far as it finds that the infringement relating to the agreement setting up Interciment continued after 7 November 1988. That conclusion applies not only to the applicants referred to in paragraphs 3084 to 3086

above, but also to SFIC, BDZ, Aker and EUROC, which have put forward arguments seeking, in substance, annulment of Article 4(2).

3098 With regard to Aker and EUROC, it must be stated that, having regard to the analysis in paragraphs 3087 to 3097 above, it is immaterial that the extract from Blue Circle's reply to the SO, mentioned at paragraph 3093 above, ought, for the reasons set out in paragraph 402 above, to have been considered inadmissible as evidence against them.

3099 Second, Lafarge claims that, by not taking any action on Holderbank's letter of 22 September 1986 requesting it to subscribe to Interciment's capital, it made it clear that it did not intend to take part in the setting-up of Interciment from September 1986. That decision was taken because Interciment did not satisfy the criteria of lawfulness which the ETF had set itself.

3100 It must, however, be stated that Lafarge adduces no evidence that, at the time, it openly informed the other parties concerned that such a decision was to be regarded as an act whereby it was disengaging itself from the agreement setting up Interciment or, at least, as a sign of distancing it from the unlawful purpose attributed to that company when it was set up. On the contrary, it is apparent that on 10 February 1987 Holderbank sent Lafarge Interciment's balance sheet as at 31 December 1986 with a view to the meeting of the ETF on the following day (contested decision, recital 26, paragraph 10; documents 33.126/18936 to 18938), a fact which contradicts Lafarge's argument that it had disassociated itself from the agreement setting up Interciment in September 1986.

3101 That argument cannot therefore, with regard to Lafarge, lead to the invalidity of the above analysis in paragraphs 3087 to 3097 concerning the duration of the infringement referred to in Article 4(2) of the contested decision.

3102 Third, Uniland claims that it cannot be held liable for maintaining Interciment when it has never participated in that company's share capital or managing bodies.

3103 However, that undertaking does not put forward any evidence to show that, after demonstrating its support, at the meeting in Baden-Baden on 9 September 1986, for the setting-up of Interciment and the anti-competitive object conferred on it, it thereafter openly distanced itself from the unlawful concurrence of wills in which it had taken part at that meeting.

3104 Uniland's argument cannot therefore invalidate the above analysis in paragraphs 3087 to 3097 concerning the duration of the infringement referred to in Article 4(2) of the contested decision.

E — Access to the file

3105 Following the measures of organisation of 2 October 1996 and 18 and 19 June 1997 concerning access to the file, Heidelberger, Asland and Cementir produced documents which, according to them, could have been useful to them during the administrative procedure in order to defend themselves against the claim alleging that they participated in the agreement setting up Interciment.

3106 There is however no longer any need to assess whether those comments are well founded, since it has already been held that Article 4(2) of the contested decision must be annulled in so far as it finds that Heidelberger, Asland and Cementir participated in the infringement concerning the agreement setting up Interciment (see paragraphs 3046, 3065 and 3080 above).

3107 Dyckerhoff, SFIC, Lafarge, Holderbank, Aker and EUROC also put forward a series of observations based on the documents which they were able to consult as a result of the measures of organisation of procedure referred to in paragraph 3105 above. They seek to show that, by granting them only limited access to the SO and to its investigation file during the administrative procedure, the Commission infringed their rights of defence when making the finding of an infringement by them in Article 4(2) of the contested decision, in so far as they had no access to evidence which might have exculpated them.

3108 First, Dyckerhoff, SFIC, Lafarge, Aker and EUROC rely on various documents which, in their view, underline the concern of the parties involved in the setting-up of Interciment to ensure that their initiative was lawful.

3109 In its observations of 5 January 1998, Dyckerhoff adduces documents to show that it had been agreed from the start to make the setting-up of Interciment conditional on a legal opinion being obtained (documents 33.126/7639 to 7641).

3110 Nevertheless, the observations which Dyckerhoff might have been able to put forward during the administrative procedure on the basis of those documents could not have precluded the findings made on the basis of the bundle of documents referred to by the Commission in recital

26 of the contested decision, namely that, without waiting for the contemplated legal opinion, it was decided to set up Interciment and to assign it an objective manifestly contrary to Article 85(1) of the Treaty.

3111 SFIC, in its observations of 7 January 1998, Lafarge, in its observations of 28 January 1998, and Aker and EUROC, in their observations of 29 December 1997, also rely on document 33.126/7639, mentioned in paragraph 3109 above. They claim that that document, a letter sent by CBR's Mr Van Hove on 6 November 1986 to Holderbank's Mr Akermann, is proof that the Community authorities had been informed of the setting-up of Interciment and that notification of that measure to the Commission had been contemplated.

3112 However, even if observations on that point could have been presented during the administrative procedure, they could not have refuted the argument raised by the Commission against the parties concerned in the setting-up of Interciment, namely, that it had never been notified to it (contested decision, recitals 26, paragraph 13, and 65, paragraph 5, fifth indent).

3113 Lafarge also relies on document 33.126/19009, a Blue Circle memorandum concerning the discussion on 6 November 1986 between Mr Sutherland, a member of the Commission, and some representatives of the European cement industry, in arguing that the setting-up of Interciment had been brought to the Commission's knowledge and discussed with it.

3114 However, that document shows at most that 'Mr Laplace pointed out the difficulties for other EEC cement companies retaliating in the Greek market'. It does not show that the representatives of the European cement industry informed the Commission of the setting-up of the Joint Trading Company Interciment with a view to implementing the dissuasive and persuasive measures against the producers — Greek producers in this case — threatening the stability of the other European markets. In any event, any observations which Lafarge might have put forward during the administrative procedure on the basis of those documents could not have rebutted the Commission's objection against the parties involved in the setting-up of Interciment, namely, that the setting-up had never been notified to the Commission.

3115 Second, Dyckerhoff and Holderbank maintain that if various documents in the Commission's file had been made available to them during the administrative procedure, they could have claimed with advantage that Interciment had remained a dormant company.

3116 In its observations of 5 January 1998, Dyckerhoff produces several documents to prove that Interciment never carried on any business whatsoever (documents 33.126/16509, 16515 and 16516).

3117 In its observations of 8 December 1997, Holderbank relies on the following extract from information supplied by Italcementi to the Commission on 21 March 1990 in connection with the investigation into this case (documents 33.126/15978 to 15985, in particular 15984): 'Until our shares were bought back [by Holderbank], Interciment remained dormant.' It claims that that extract would have provided it with support for its argument that Interciment had always been a dormant company, maintained in its books as a purely formal company, and did not trade.

3118 With regard to Dyckerhoff, it must first be observed that document 33.126/16509 corresponds to document 33.126/18857, and that documents 33.126/16515 and 16516 correspond to documents 33.126/18821 and 18822. Documents 33.126/18857, 18821 and 18822 were in the Box (see paragraph 95 above). In those circumstances, Dyckerhoff cannot plead infringement of its rights of defence during the administrative procedure.

3119 In any event, any comments which Dyckerhoff and Holderbank might have been able to make during the administrative procedure, on the basis of the documents mentioned in paragraphs 3116 and 3117 above, could only have confirmed what had already been duly noted by the Commission in the contested decision. In recital 26, paragraph 14, the Commission finds that it was decided on several occasions that Interciment was to remain dormant. In recital 54, paragraph 2, it acknowledges that that company 'did not apparently become operational'.

3120 Those observations could not, however, have shed a different light on the extract from the minutes of the meeting of Head Delegates and representatives of the ETF on 9 September 1986, reproduced in recitals 26, paragraph 15, and 54, paragraph 2, of the contested decision, according to which it was agreed to ensure that Interciment remained ready for operation in order to implement the dissuasive and persuasive measures (document 33.126/18861). In addition, they could not have shed a different light on the documents referred to in recital 26, paragraph 1, of the contested decision, on the basis of which the Commission correctly found in recital 54, paragraphs 1 and 2, that the object of the agreement setting up Interciment was anti-competitive, a finding which was sufficient for the conclusion that the agreement was contrary to Article 85(1) of the Treaty (see the case-law cited at paragraph 837 above).

3121 Third, in its observations of 8 December 1997, Holderbank identifies a Blue Circle internal memorandum of 20 October 1987 (document 33.126/10959), which states:

'A sum of money had been advanced to Holderbank with the intention that this should be a contribution towards share capital, but subsequently a decision was made and communicated to Holderbank that the Group did not wish to participate in the company's share capital. This

latter decision was not communicated, however, to those responsible for maintaining the books of BCO AG and hence an error was made in recording the nature of this cash outflow. This error will be corrected in 1987.'

3122 Holderbank considers that, if it could have had that document available to it in order to prepare its defence to the SO, it would have supported its argument regarding Blue Circle's decision not to take part in Interciment.

3123 Holderbank also relies on the following extract from the information supplied by Italcementi on 21 March 1990 following a request for information by the Commission (documents 33.126/15978 to 15985, in particular 15984, mentioned above at paragraph 3117):

'These were bearer shares. According to what Holderbank told us orally, until the latter repurchased our 12.5% holding in the shares, Holderbank and our company were the only members.'

3124 It claims that that extract would have enabled it to support its argument that, other than itself, Italcementi had been the only undertaking to hold shares in Interciment, before reselling its shares to Holderbank on 7 November 1988.

3125 Nevertheless, the Court points out that the Blue Circle internal memorandum of 20 October 1987 (document 33.126/10959) had been classified 'A: European producers' for the purposes of consulting the file during the administrative procedure and it was also in the Box (see paragraph 95 above). Holderbank could therefore have used that document in order to support its reply to the SO. In those circumstances, it cannot now rely on that document in order to demonstrate the existence of any infringement of its rights of defence during the administrative procedure.

3126 In any event, the evidence which it finds in that internal memorandum and in the extract of information supplied by Italcementi on 21 March 1990 were duly noted by the Commission in the contested decision.

3127 Thus, in the summary of facts relating to Interciment, the Commission (contested decision, recital 26, paragraph 7) observes first of all:

'Blue Circle paid the amount involved in its quota through the intermediary of its Swiss subsidiary BCO AG between the months of September and October, as may be seen from a statement of accounts of 7 November 1986 (documents 33.126/10960 to 10962), but it subsequently got BCO AG to amend the object of the payment relating to the shareholding in Interciment; it asked that the payment should be identified as being "a contribution towards market research expenses" (document 33.126/10958).'

3128 It then reproduces (recital 26, paragraph 9) the extract of Blue Circle's reply to the SO (point 4.159) in which Blue Circle stated that, 'through the payment carried out, it had reimbursed Holderbank its one-eighth share of the expenses incurred by Holderbank in setting up Interciment SA'.

3129 In addition, the Commission finds (recital 26, paragraph 8; documents 33.126/16218 and 16220) that Italcementi subscribed to the share capital on 11 February 1987 and resold its shares to Holderbank on 7 November 1988.

3130 Last, reproducing Holderbank's own statements supplied following a request for information (document 33.126/18329), it points out (contested decision, recital 26, paragraph 9):

'Apart from Holderbank, one other member [Italcementi] of the "European Task Force" subscribed and paid up its shares. (Another member [Blue Circle] paid the relevant amount, but never became an actual shareholder. The member in question preferred to request the postponement *sine die* of the transmission of the shares to the holders and subsequently never requested any such transmission, apparently through lack of interest. It is for this reason, and in view of the relatively small amounts involved, that no refund has so far taken place.) No document was drawn up on this subject; proof of this may be deduced from the wording of the document communicated in reply to question 7/e (abovementioned letters dated 22 September 1986, through which Holderbank requested payment of share quotas). Furthermore, Holderbank repurchased all the shares some time ago and is thus the only shareholder in Interciment SA, a company which has not so far had any activity.'

3131 Any observations which Holderbank might have been able to put forward during the administrative procedure in order to claim that, apart from Italcementi's temporary shareholding in Interciment's capital, no undertaking other than itself subscribed to shares in the Joint Trading Company, could thus only have confirmed evidence duly taken into account by the Commission in the contested decision. By contrast, they could not have shed a different light

on the bundle of documents referred to in recital 26, in particular paragraphs 1, 2 and 6, of the contested decision, on the basis of which the Commission correctly found, in recital 54, in particular paragraphs 1, 2 and 4, that there was a concurrence of wills as from 9 June 1986 with regard to the setting-up of the Joint Trading Company Interciment for the purposes of implementing dissuasive and persuasive measures, which sufficed for a finding that there was an infringement of Article 85(1) of the Treaty.

3132 In conclusion, the observations by Dyckerhoff, SFIC, Lafarge, Holderbank, Aker and EUROC would not have had even a small chance of altering the outcome of the administrative procedure. Those applicants have therefore not proved that there was any infringement of their rights of defence in that regard during the administrative procedure.

Measures to defend the Italian market (contested decision, Article 4(3))

3133 In Article 4(3) of the contested decision, the Commission finds two infringements connected with measures to defend the Italian market against imports of cement from Greece:

— concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (Article 4(3)(a));

— an agreement relating to the contract 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)).

3134 The Commission alleges that the first infringement was committed by the three Italian cement producers, Italcementi, Unicem and Cementir, and also the 'other participants in the "Cembureau Task Force"' (contested decision, recital 55, paragraph 1). The second infringement is alleged against the three Italian producers alone.

A — Concerted practices designed to withdraw Calcestruzzi from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)).

3135 According to Article 4(3)(a) of the contested decision, Cembureau, Holderbank, Blue Circle, Oficemen, Asland, Uniland, Hispacement, SFIC, Lafarge, Ciments français, BDZ, Dyckerhoff, Heidelberger, CBR, Aker, EUROC, Aalborg, Irish Cement, Italcementi, Unicem and Cementir 'infringed the provisions of Article 85(1) of the EC Treaty from 17 June 1986 to 15 March 1987 by participating in concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular'.

3136 With the exception of Hispacement, which has not brought an action for annulment of the contested decision, Cembureau and the SFIC, whose arguments do not contain any formal challenge to the existence of the infringement found in Article 4(3)(a), all the undertakings and associations of undertakings referred to in that provision seek its annulment. Some of the applicants deny the existence of the concerted practices in question. The great majority of them deny all involvement in such practices. Some of the arguments relate to the duration of the infringement found. The applicants concerned will be identified when those various arguments are considered.

3137 In addition, CBR, Dyckerhoff, Ciments Français, Asland, Uniland, Oficemen, Holderbank, Aker and EUROC allege that the Commission, in finding the infringement referred to in Article 4(3)(a) of the contested decision, infringed their rights of defence by not making available to them during the administrative procedure the whole of the SO and the investigation file, thus depriving them of allegedly exculpatory evidence.

1. Existence of concerted practices

3138 In its exposition of the facts concerning the measures to defend the Italian market (contested decision, recital 27, paragraph 2), the Commission states:

'On 30 April 1986, the Greek producer Titan ... and Calcestruzzi ..., the largest Italian ready-mix concrete producer, signed a five-year contract under which Titan undertook to sell and Calcestruzzi to buy up to a maximum of 440 000 tonnes of cement a year, with the quantities actually deliverable each year being specified in subsequent agreements (documents 33.126/16361 to 16368 and 19210 to 19217).'

3139 The Commission adds (recital 27, paragraph 3, first paragraph) that the problem of imports of Greek cement into Italy by Calcestruzzi was then brought before the ETF and discussed at several of its meetings from 17 June 1986 onwards, and at the meetings of Head Delegates on 9 September and 6 November 1986. An internal Blue Circle memorandum of 4 September 1986 (documents 33.126/11026 and 11027) shows that Blue Circle raised the problem of exports into Italy with Titan (paragraph 3, second subparagraph).

3140 Referring to a letter sent by Titan to its lawyers in London on 2 September 1988 at a time when the non-performance of the Titan-Calcestruzzi contract was being referred to arbitration, the Commission states (paragraph 4):

'At the same time as the problem was brought to the ETF's attention, pressure was exerted on Calcestruzzi not to honour the contract with Titan. As may be seen from [the letter in question], Calcestruzzi was unwilling to perform the contract because of talks with certain Italian cement producers.'

3141 The Commission then refers (paragraph 5) to extracts from the records of the meeting of the ETF on 11 February 1987 and of the meeting of the subgroup 'Defensive Measures' on 17 March 1987 (not 15 March 1987, as stated erroneously in the contested decision), which mention the report given by the Italian representative on the negotiations between the Italian cement producers, on the one hand, and Calcestruzzi and its parent company, Ferruzzi, on the other hand.

3142 On the basis of those various facts, the Commission considers (recital 55, paragraph 1):

'The pressure exerted on Calcestruzzi and the non-performance by Calcestruzzi of the contract for the purchase of Titan cement ... are the result of concerted practices between the Italian producers Italcementi, Unicem and Cementir and between them and the other participants in the Cembureau Task Force referred to in paragraph 9 of recital 53, the aim being to take away from the Greek producers a customer who was important to their penetration of the Italian market.'

3143 In substance, the applicants put forward seven arguments challenging the existence of the concerted practices found in Article 4(3)(a) of the contested decision.

3144 First, several of them maintain that the Commission has not established that the problem of imports by the Ferruzzi/Calcestruzzi Group of cement from Greece into Italy had given rise to unlawful collusion between cement producers at European level.

3145 Unicem challenges the link established by the Commission between the alleged pressure on Calcestruzzi and the ETF. It considers that a link cannot be established on the basis of the reference in the Zurich/Céligny document to the desired cooperation between Western European cement producers. It claims to have resolved the problem of supplying Calcestruzzi quite separately from and quite independently of the other European cement producers. Had the position been otherwise, it would not have shown any reluctance to approach those other producers in order to obtain their support for its actions vis-à-vis Calcestruzzi and Titan. Last, the documents relating to the meetings of the ETF and of the Head Delegates did not mention any specific action in relation to the Calcestruzzi-Titan contract. None of those documents mentions Titan. As regards the Blue Circle memorandum of 4 September 1986 cited in recital 27, paragraph 3, of the contested decision, its author might, in Unicem's opinion, very well have been able to obtain the information contained in it directly from Titan or from third parties. That note does not therefore show that there was any collusion at the ETF level concerning the Calcestruzzi-Titan contract.

3146 Uniland claims that in order to establish the alleged concerted practices the Commission relies on a vague allusion to alleged dissuasive measures in the Zurich/Céligny document (recital 27, paragraph 1). This applicant denies that the 'Calcestruzzi' problem was discussed at the meetings of the Head Delegates and of the ETF. It claims that the Commission cannot rely on statements made by Italian cement producers, since those statements are at most unilateral assertions in which the other participants had no interest. Finally, the Commission has not established the existence of the various constituent elements of a concerted practice contrary to Article 85(1) of the Treaty. It has not shown that there was an actual contract between the parties, since the only evidence put forward is a series of meetings at which some of the participants unilaterally expressed their concerns but at which there was no question at any time of an exchange of information or any discussion. Nor has it proved that the alleged collusion had led the parties to act in an anti-competitive manner on the market or to alter their behaviour on the market.

3147 Oficemen claims that the Commission has not established that the receipt of the information disclosed at ETF level was likely to influence its behaviour with regard to competition, or that of its members or that of the Italian cement producers.

3148 Italcementi states that the Commission puts forward no evidence of the existence of concerted practices. It maintains that, on the contrary, the exchange of information between undertakings (which took part within the framework of the ETF in the concerted lobbying activity and

pursued perfectly lawful objectives) concerning the forces of competition in play on one of the markets most exposed to the pressure of the Greek producers was engendered by an attitude in keeping with the requirements of Article 85(1) of the Treaty. It was, therefore, perfectly lawful for negotiations between the Italian cement producers and Calcestruzzi to have been discussed at the meetings of the ETF, negotiations which were, moreover, public knowledge. In addition, the discussions held within the framework of the ETF concerning Calcestruzzi did not result in pressure being brought to bear on Calcestruzzi and no action was taken following them. Furthermore, those discussions were random and unfocussed. Italcementi stresses that there was no connection between the contract for the delivery of cement concluded between the Italian cement producers and Calcestruzzi, on the one hand, and the dissuasive measures contemplated within the framework of ETF, on the other hand. It points out that the Commission has not stated what sort of pressure was brought to bear on Calcestruzzi by the other members of the ETF, which did not export into Italy and had no interest in doing so. Nor did the Commission take into account the fact that Italian cement producers alone took part in the delivery contracts concluded with Calcestruzzi.

3149 Holderbank denies that there was ever any fundamental agreement whatsoever within the ETF with regard to measures to defend the Italian market.

3150 On that point, the Court points out that the concept of a concerted practice refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The criteria of coordination and cooperation used to define that term must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market. This requirement of independence strictly precludes any direct or indirect contact between traders, the object or effect of which is to create conditions of competition which do not correspond to the normal conditions of the market in question. As is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two (see, most recently, *Commission* v *Anic*, cited above at paragraph 270, paragraphs 115 to 118, and *Hüls* v *Commission*, cited above at paragraph 155, paragraphs 158 to 161).

3151 In this instance, it must be found that at the meeting of the ETF in London on 17 June 1986, that is to say several weeks after the conclusion of the contract for the supply of cement between Calcestruzzi and Titan, it was agreed that Mr d'Agostino of Italcementi should 'coordin[ate] ... [the] Ferruzzi situation' (memorandum from Mr Cheney of Blue Circle dated 19 June 1986, headed 'Points for action'; contested decision, recital 25, paragraph 11; document 33.126/18787).

3152 In an internal memorandum of 4 September 1986 (contested decision, recital 27, paragraph 3; document 33.126/11026), Blue Circle states:

'In regard to Italy, Titan remain adamant that they will not cancel their contract with Ferruzzi before December 1987 at the earliest when it appears they have an escape clause.'

3153 At the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, it was observed, as regards Italy, in connection with point 1.5 ('Summary of statements and conclusions of the meetings of the Head Delegates and representatives of the Task Force at Baden-Baden on 9 September 1986'; contested decision, recital 25, paragraphs 22 and 28; documents 33.126/18859 and 18860):

'... Several meetings took place between Italian cement manufacturers and Ferruzzi and it appears that an understanding regarding the ready-mix market can be reached. ... Titan could determine agreements with Ferruzzi end of 1987.'

3154 According to Titan's letter of 2 September 1988 (contested decision, recital 27, paragraph 4; document 33.126/19196), mentioned above at paragraph 3140, '[o]n 6 February 1987, Calcestruzzi for the first time seem[ed] reluctant to confirm shipments schedule claiming that "the situation is in evolution with the local cement industries"'.

3155 According to the handwritten record drawn up on the following day by Mr Marichal of Lafarge (contested decision, recital 27, paragraph 5; document 33.126/4912), at the meeting of the ETF held in Geneva on 11 February 1987 the Italian representative, Italcementi, reported as follows on the Italian situation:

'The agreement between the cement producers and Ferruzzi has been signed. It allows the threat to be removed of imports of 1.5 [million tonnes] by the latter group in a dozen ports, which would have been catastrophic for prices. Duration: 5 years. Apart from the cross holdings which will block Calcestruzzi, the Ferruzzi subsidiary BPE [ready-made cement], but also the parent company, Ciments de Ravenna, a series of measures designed to consolidate the alliance have been taken.

Ferruzzi will in return for its compliance receive the tidy sum of US$ 15 million a year for five years. The sum will be paid partly in securities (Montedison) and partly in cash: Ferruzzi will have to use part of the money to purchase BPE companies or holdings in BPE companies so as to put the coast under lock and key.

Two problems remain to be solved:

1. A use would have to be found for two Ferruzzi vessels. These are 6 000 DWT floating silos.

2. The contracts for 75 000 tonnes a year with Titan ... will have to be honoured or the relevant penalties paid.

In order to solve these problems, Italcementi requests the aid of its European colleagues.

The Italian cement producers will request EEC agreement for application of the Italian Law providing for the introduction of "prior notification" of all cement imports.

They ask their European colleagues to apprise their EEC representatives so that they will not oppose the request.'

3156 At the meeting of the subgroup 'Defensive Measures' held on 17 March 1987, the Italian representative 'reiterated what had already been said at the meeting to the Task Force (cf. J.M. note of 12 February 1987), adding however that the agreement with Ferruzzi had not yet been finalised' ('Invasion threats to European cement producers: overview of the situation at 15 March 1987'; contested decision, recital 27, paragraph 5; document 33.126/4860).

3157 Those various extracts show that shortly after the conclusion of the contract for the supply of cement between Calcestruzzi and Titan in April 1986 the question of imports into Italy by the Ferruzzi/Calcestruzzi group of Greek cement was raised at the level of the ETF, which had been set up in order to evaluate measures, in particular dissuasive measures, to eliminate imports of cheap cement (in particular those from Greece) threatening the stability of Western European markets (see paragraphs 2537 and 2538 above).

3158 At the meeting of the ETF held on 17 June 1986, Italcementi was given the task of coordinating the 'Ferruzzi situation'.

3159 As a result of that collusion, vain attempts were made to induce Titan to terminate the contract which it had concluded with Calcestruzzi. At the same time, the Italian cement producers entered into negotiations with the Ferruzzi group for the purpose of persuading Ferruzzi's subsidiary Calcestruzzi to cease performing that contract.

3160 Those negotiations, reported to the members of the ETF and to the Head Delegates in their meeting in Baden-Baden on 9 September 1986, led to an agreement between the Italian cement producers and Ferruzzi.

3161 The Italian representative informed the members of the ETF of that agreement at the meeting on 11 February 1987. He stated, *inter alia*, that that agreement made it possible to avoid the threatened imports of cement by the Ferruzzi group, which would have been regarded as disastrous for prices. He also asked for the assistance of his European colleagues in resolving the problems connected with the non-performance of the Calcestruzzi-Titan contract.

3162 The agreement between the Italian cement producers and Ferruzzi was also mentioned at the meeting of the subgroup 'Defensive Measures' on 17 March 1987.

3163 It follows from the foregoing analysis that, subject to the assessment in paragraphs 3190 to 3300 below as to the correctness of the Commission's finding that the various undertakings and associations of undertakings referred to in Article 4(3)(a) of the contested decision did in fact participate, the Commission was entitled to find that there were concerted practices at European level, the anti-competitive purpose of which was to ensure that Calcestruzzi should cease to be a customer of the Greek producers, and in particular of Titan. Those practices constitute concerted practices contrary to Article 85(1) of the Treaty according to the case-law cited at paragraph 3150 above.

3164 The applicant's argument must therefore be rejected.

3165 Second, Cementir claims that the measures to defend the Italian market had no anti-competitive object.

3166 It is, however, apparent from the above analysis in paragraphs 3150 to 3163 that the object of the concerted practices implemented as a result of Calcestruzzi's imports of cement from Greece was to make that undertaking cease to be a customer of Titan, and thus to avoid the threatened import of 1.5 million tonnes 'which would have been catastrophic for prices' (document

33.126/4912). The Commission was therefore entitled to find that the object of those concerted practices was contrary to Article 85(1) of the Treaty.

3167 Third, Italcementi states that the record of the ETF meeting on 11 February 1987, drawn up by Lafarge's Mr Marichal, merely refers to the signing of an agreement whose object was to avoid the threatened imports by Calcestruzzi of cement from Greece. That document does not indicate that the agreement in question required Calcestruzzi to cease such imports.

3168 The Court points out that according to the document in question the Italian representative stated that 'the agreement allowed the threat to be removed of imports of 1.5 million tonnes by Ferruzzi into a dozen ports, which would have been catastrophic for prices'.

3169 That statement shows that the object of the concerted practices which led to the agreement between the Italian cement producers and the Ferruzzi group was to prevent the economic interpenetration of markets and to hinder competition, which is sufficient basis for a finding that those concerted practices were contrary to Article 85(1) of the Treaty.

3170 Italcementi's argument must therefore be rejected.

3171 Fourth, Italcementi challenges the accuracy of the other information contained in the abovementioned record of the meeting of the ETF held on 11 February 1987. It claims that that document does not prove that the Italian producers compensated Calcestruzzi for the breach of its contract with Titan. The sum of USD 15 million mentioned therein corresponds to the value of the discounts on list prices granted to Calcestruzzi by the Italian cement producers. Similarly, the sale of shares in Montedison to the Ferruzzi group, also mentioned in that record, was separate from the negotiations with Calcestruzzi for the conclusion of the supply contracts.

3172 The Court points out that, in assessing the evidential value of a document, regard should be had first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (Opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc* v *Commission*, cited above at paragraph 1053, at p. II-956).

3173 In the present case, the record of the meeting of the ETF on 11 February 1987 was drawn up by Lafarge's Mr Marichal the day after the meeting in which he had taken part.

3174 It states that the Italian representative first informed the other members that the agreement between the Italian cement producers and the Ferruzzi group had been signed, which removed the threat of cement imports which was perceived as catastrophic for prices.

3175 Next, it reports that the Italian representative stated that 'Ferruzzi [would] in return for its compliance receive the tidy sum of USD 15 million a year for five years ... [a] sum [which would] be paid partly in securities (Montedison)'.

3176 Last, it mentions the problems raised by the Italian representative with regard to the non-performance of the Calcestruzzi-Titan contract.

3177 The record therefore shows quite unequivocally that the Italian producers intended to reward the Ferruzzi group, by transferring to it in particular Montedison securities, for agreeing to suspend performance of the Calcestruzzi-Titan contract, a contract which Calcestruzzi had plainly concluded on particularly advantageous conditions in terms of price.

3178 In any event, Italcementi's argument cannot overturn the analysis of documents in paragraphs 3151 to 3163 above, which shows that the Commission correctly found that there were concerted practices whose anti-competitive purpose was to cause Calcestruzzi to cease being a customer of Titan.

3179 Fifth, Italcementi asks what reasons could have led the defensive measures decided on by a score of undertakings to be limited to the Italian market only. It claims that the absence of evidence of measures to defend the other national markets demonstrates that there was no connection whatsoever between the pressure allegedly brought to bear on Calcestruzzi and a common strategy to protect national markets.

3180 The Court points out, however, that Italcementi does not deny that 'at the end of 1985/early 1986, Greek producers looked towards Western Europe, especially to those markets [they] regarded as more easily accessible, [including] Italy, where small associations formed by consumers and small import/export companies had taken the step of importing Greek cement' (contested decision, recital 24, paragraph 1).

3181 In any event, the absence of evidence of any measures to defend markets other than the Italian market cannot alter the evidence in the bundle of documents referred to in recital 27, paragraphs 3 to 5, of the contested decision, on the basis of which the Commission correctly found that there were concerted practices to defend the Italian market (see paragraphs 3151 to 3163 above).

3182 Italcementi's argument must therefore be rejected.

3183 Sixth, Cementir states that the measures to defend the Italian market had no anti-competitive effect, as is shown by the statistics indicating that Heracles' exports to Italy increased from 1987 onwards.

3184 It must, however, be recalled that the concerted practices implemented following the imports into Italy by the Ferruzzi group of cement from Greece led in the end to an agreement between the Italian cement producers and the Ferruzzi group, an agreement which, according to the report by the Italian representative at the meeting of the ETF on 11 February 1987, 'allow[ed] the threat to be removed of imports of 1.5 [million tonnes] by [the Ferruzzi group] in a dozen ports, which would have been catastrophic for prices'.

3185 In any event, those concerted practices were found by the Commission to be infringements on the sole ground that they had an anti-competitive object, which has in fact been established (see paragraphs 3151 to 3163). Such proof is sufficient for a finding that such concerted practices are contrary to Article 85(1) of the Treaty (see, to that effect, the case-law cited in paragraph 1674 above).

3186 Seventh, CBR and Blue Circle argue that, since presence at ETF meetings was used to establish the infringement found in Article 4(1) of the contested decision, the Commission could not conclude that a separate infringement existed, on the basis of presence at those meetings, simply because the Italian situation was mentioned at them.

3187 None the less, it is apparent from reading recitals 25 and 27, paragraphs 1 to 5, of the contested decision, that the Commission relied for the most part on different evidence in establishing, on the one hand, the infringement referred to in Article 4(1) (agreement on the setting-up of the ETF) and, on the other, the infringement found in Article 4(3)(a) (concerted practices for the defence of the Italian market).

3188 Amongst the evidence presented in the above paragraphs of recital 27, it is clear that, as has been found in paragraphs 3138 to 3142 above, in finding the concerted practices referred to in Article 4(3)(a) the Commission relied on evidence other than discussion of the Italian situation

at meetings of the ETF, namely, on the Blue Circle internal memorandum of 4 September 1986 which refers to discussions with Titan concerning the contract which Titan had concluded with Calcestruzzi (contested decision, recital 27, paragraph 3; documents 33.126/11026 and 11027) and the extract from the letter of 2 September 1988 from Titan to its lawyers in London, describing Calcestruzzi's reluctance to perform that contract after February 1987 (contested decision, recital 27, paragraph 4; documents 33.126/19195 and 19196).

3189 CBR and Blue Circle's argument must therefore be rejected.

2. The applicants' participation in the concerted practices

3190 In the contested decision (recital 55, paragraph 1), the Commission states:

'The pressure exerted on Calcestruzzi and the non-performance by Calcestruzzi of the contract for the purchase of Titan cement ... are the result of concerted practices between the Italian producers Italcementi, Unicem and Cementir and between them and the other participants in the Cembureau Task Force referred to in paragraph 9 of recital 53 ... The other participants in the Cembureau Task Force are also parties to the concerted practices, since the Calcestruzzi problem was discussed at a number of meetings of the Task Force and Head Delegates (see paragraphs 3 and 5 of recital 27) and since the strategies developed by the Task Force are based on the solidarity of all the participants (see paragraph 3 of recital 25).'

3191 On those grounds, the Commission attributes responsibility for the concerted practices to all the applicants referred to in Article 4(1) of the contested decision, namely: CBR, Cembureau, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Asland, Uniland, Oficemen, Irish Cement, Italcementi, Holderbank, Aker, EUROC, Cementir et Blue Circle.

3192 Apart from Cembureau and the SFIC (see paragraph 3136 above), all those applicants have put forward arguments denying any involvement in the concerted practice in question.

2.1. CBR, Dyckerhoff, Aalborg, Uniland and Irish Cement

3193 CBR claims that it never took part in any meeting of the ETF. In any event, at those meetings there was never any question of exerting any pressure whatsoever on Calcestruzzi. While it acknowledges that it took part, as Head Delegate, in the meetings of Head Delegates on 9 September and 6 November 1986, CBR states that it is apparent from the minutes of the first of those two meetings that it was not associated with the measures taken to resolve the Calcestruzzi problem and that its intervention was neither contemplated nor sought. That can be explained by the fact that it was not present on the markets threatened by the exports of Greek producers. At the meeting of 6 November 1986, the Italian representative merely reported facts relating to his market.

3194 CBR adds that the Commission's argument that the ETF strategies were founded on the solidarity of all the participants is not relevant. That allegation is based on an extract from a mere working document, namely the Zurich/Céligny document, which was, moreover, updated at meetings in which CBR did not take part.

3195 Dyckerhoff states that it did not take part in the meetings of the ETF and that the documents referred to by the Commission in the contested decision show that the 'Calcestruzzi problem' was not tackled at the meetings in Rome on 28 May 1986, in Stockholm on 9 June 1986 or in Brussels on 6 November 1986, at which it was present. At the meeting of Head Delegates in Baden-Baden on 9 September 1986, in which it took part in the person of Mr Lose, there was only a very brief report on the Italian situation. Mr Lose was not up to date on relationships between Ferruzzi, Titan and the Italian cement producers. In any event, no decision or collusion on that point took place during that meeting. Emphasising that it had no business on the Italian market, Dyckerhoff claims that, according to the report given at the Baden-Baden meeting, the Italian producers had entered into negotiations with the Ferruzzi group a long time previously. The pressure brought to bear by the Italian producers on the Ferruzzi group to make it give up its supplies of Greek cement cannot therefore have been triggered off by that meeting.

3196 Aalborg claims that, although the Calcestruzzi-Titan contract was mentioned at the meeting in Baden-Baden on 9 September 1986, it was not invited to give any active support in that regard. Nor was it informed of subsequent developments in that matter. Moreover, it found no cause for concern in the purchase by Calcestruzzi of cement from Greece.

3197 Uniland denies that the solidarity rule to which all the participants in the meetings of the ETF supposedly conformed makes it possible to find that it participated in the concerted practices at issue. The reference to that alleged solidarity appears, moreover, in the Zurich/Céligny document, drawn up at meetings in which it did not take part. Uniland states that the presence of Mr Rumeu at the meetings of Head Delegates of 9 September and 6 November 1986 does

not establish that it participated in the concerted practices at issue. It cannot be concluded from the documents concerning those two meetings that Mr Rumeu participated in any discussion whatsoever concerning the attitude to be adopted with regard to the Italian market. Nor can remarks made by other persons at those meetings concerning the Italian market make it possible to conclude that there was any conduct seeking to restrict competition of which Mr Rumeu could have been aware. The allusion to the negotiations of the Italian cement producers reflect mere unilateral statements simply mentioning a future intention. Those statements never led to declarations or sanctions on the part of other European cement producers. The Calcestruzzi problem was not mentioned at the meeting in Brussels on 6 November 1986.

3198 Irish Cement objects to the way in which the Commission holds it responsible for measures to defend the Italian market, when it is not referred to in recitals 27 and 55 of the contested decision, which concern those defensive measures. It states that the Zurich/Céligny document, on which the Commission relies in recital 55, paragraph 1, was conceived at meetings in which it did not take part. It claims, moreover, not to have taken part in any discussion concerning the Ferruzzi problem at any meetings of the ETF, since it did not attend them, or at the meeting of Head Delegates in Baden-Baden on 9 September 1986. At that last meeting, the discussions concerning the measures to defend the Italian market did not take place in the presence of its representative, Mr Quirke, or, in any event, he was not aware that those discussions related to unlawful actions, since the sole purpose of his being there was to coordinate contacts arranged with members of the European Parliament in Strasbourg on 10 September 1986. Irish Cement points out in this connection that it was only its nationality that was of interest to the other participants in that meeting, since the member of the Commission responsible for competition policy at the time, Mr Sutherland, was Irish. Finally, it is not apparent from the notes concerning the meeting in Brussels on 6 November 1986, in which it acknowledges having taken part, that the problem of imports into Italy of cement from Greece was discussed during that meeting.

3199 The Court points out that where an undertaking has, even without playing an active role, attended a meeting during which unlawful concerted action has been mooted, it is deemed to have participated in that concerted action unless it proves that it openly distanced itself from it or informed the other participants that it intended to take part in that meeting with different objects in mind (see, to that effect, the case-law cited in paragraph 1353 above).

3200 In the present case, CBR, Dyckerhoff, Aalborg, Uniland and Irish Cement were present at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (see paragraphs 2599, 2618, 2655, 2695 and 2730 above).

3201 According to paragraph 1.5 of the minutes of that meeting (contested decision, recital 25, paragraphs 22 and 28; documents 33.126/18859 and 18860), it was pointed out, with regard to Italy:

'... Several meetings took place between Italian cement manufacturers and Ferruzzi and it appears that an understanding regarding the ready-mix market can be reached. ... Titan could determine agreements with Ferruzzi end of 1987.'

3202 As stated in paragraph 2600 above, that meeting in Baden-Baden was dedicated exclusively to the ETF, the anti-competitive objective of which was mentioned at the start of the meeting, and more specifically to the organisation of its work and to the assessment of the progress of various dissuasive and persuasive measures which had been entrusted to its consideration. The participants were therefore not unaware of the unlawful purpose behind the negotiations described to them during that meeting in regard to the Ferruzzi situation.

3203 Since CBR, Dyckerhoff, Aalborg, Uniland and Irish Cement have not shown that, at that meeting, they openly showed their disapproval of those unlawful practices or informed the other participants that they intended to take part in that meeting with different objects in mind, the Commission was therefore entitled to consider that those five undertakings had acceded to those practices or at least that they had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production to the markets of Western Europe, a decision perceived as a serious threat to the stability of all those markets. The lack of evidence of conduct by those undertakings on that market in relation to the situation brought about by Calcestruzzi is irrelevant in that regard, because the Commission has established (see paragraphs 3151 to 3163 above) that the collusion to which they acceded at the meeting in Baden-Baden was in the nature of a concerted practice contrary to Article 85(1) of the Treaty in that it gave rise to conduct on the market by other undertakings involved in that same collusion. Moreover, in the absence of proof to the contrary, which it was for them to adduce, it must be held that those undertakings, which remained active on the market, took account of that collusion when determining their conduct on that market (*Commission* v *Anic*, cited in paragraph 270 above, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

3204 There being no need to consider the correctness of the applicants' arguments seeking to show that the Ferruzzi situation was not raised during the meeting in Brussels on 6 November 1986, it must therefore be concluded that the Commission was entitled to find in Article 4(3)(a) of the contested decision that CBR, Dyckerhoff, Aalborg, Uniland and Irish Cement participated in the concerted practices which sought to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular.

3205 None the less, the contested decision does not include any evidence that those five undertakings adhered to those concerted practices before taking part in a meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986. In those circumstances, Article 4(3)(a) must be annulled in so far as it finds that those undertakings participated in the infringement in question before that date.

3206 Uniland also points out that the Commission did not find that Hornos Ibéricos, Cementos del Norte or Norcem took part in the infringement, even though representatives of those undertakings were present at the meeting of Head Delegates and members of the ETF in Baden-Baden on 9 September 1986.

3207 However, that fact cannot in any event constitute a ground for setting aside the finding of an infringement by Uniland, provided that its participation in the infringement has been correctly established by the Commission (see, to that effect, *Woodpulp II*, cited at paragraph 106 above, paragraph 146). On the basis of the grounds set out above, the Court is able to find that, in the contested decision, the Commission was entitled to conclude that Uniland had participated in the concerted practices referred to in Article 4(3)(a).

2.2. Ciments Français

3208 Ciments Français claims that the Head Delegates took no steps to defend the Italian market at the meetings referred to in the contested decision. At most, they were briefly informed of the general situation in Italy by that country's Head Delegate. In any event, Ciments Français never took part in discussions concerning the imports into Italy of cement from Greece.

3209 The Court points out that Ciments Français did not participate in any of the meetings of the ETF referred to in recital 27, paragraph 3, of the contested decision. Nor did it take part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986.

3210 Mr Laplace, its Chairman, did attend the meeting in Brussels on 6 November 1986, also referred to in recital 27, paragraph 3, of the contested decision. However, according to the notes relating to that meeting (contested decision, recital 25, paragraphs 39 and 40; document 33.126/19007), Italcementi's Mr Pesenti merely informed the other participants that 'while they had expected to see the first shipment of cement arrive in Sardinia in mid-October, nothing [had] yet taken place'. That extract does not prove that the problem of Calcestruzzi's imports into Italy of cement from Greece was discussed during that meeting.

3211 Consequently, Ciments Français' participation in the concerted practices in question cannot be inferred from its presence at the meeting in Brussels on 6 November 1986.

3212 In recital 55, paragraph 1, of the contested decision, the Commission, referring to the Zurich/Céligny document mentioned in recital 25, paragraph 3, claims that the strategies developed by the ETF were based on the solidarity of all the participants. It also points (defence in Case T-39/95) to the information in the report of the meeting of the ETF on 11 February 1987 concerning the help requested by the Italian representative from his 'European colleagues' to resolve the problems arising from the non-performance of the Calcestruzzi-Titan contract (contested decision, recital 27, paragraph 5; document 33.126/4912). Finally, the Commission points out that Mr Marichal of Lafarge was asked to send Ciments Français a copy of the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, minutes which mentioned the negotiations between Italian cement producers and the Ferruzzi group.

3213 It must however be stated that Ciments Français played no direct role in the negotiations seeking the termination of the Calcestruzzi-Titan contract. As has been found in paragraphs 3209 to 3211 above, it did not take part in any of the meetings at which those negotiations were mentioned.

3214 In those circumstances, none of the evidence adduced by the Commission (see above, paragraph 3212) is sufficient to prove that Ciments Français acceded, even implicitly, to the concerted practices in question, a necessary precondition for a finding that it was responsible for that infringement.

3215 The Commission was therefore not entitled to hold that Ciments Français took part in those concerted practices. It follows that Article 4(3)(a) of the contested decision must be annulled in so far as it finds that Ciments Français participated in those concerted practices.

2.3. Heidelberger

3216 Heidelberger claims that, according to the contested decision, the concerted practices began on 17 June 1986. The Commission has proved its presence only at the meeting in Rome on 28 May 1986. In those circumstances, it cannot be held responsible.

3217 The Court points out that Heidelberger did not in fact take part in any of the meetings referred to by the Commission in recital 27, paragraph 3, of the contested decision.

3218 In recital 55, paragraph 1, of the contested decision, the Commission, referring to the Zurich/Céligny document mentioned in recital 25, paragraph 3, claims that the strategies developed by the Task Force were based on the solidarity of all the participants. It also states (defence in Case T-42/95) that Mr Lose, of Dyckerhoff, was asked to send to Mr Schuhmacher, of Heidelberger, a copy of the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, minutes which mentioned the negotiations between the Italian cement producers and the Ferruzzi group.

3219 Heidelberger played no direct role in the negotiations seeking the termination of the Calcestruzzi-Titan contract. Nor did it attend any of the meetings at which those negotiations were mentioned (see paragraph 3217 above).

3220 In those circumstances, none of the evidence adduced by the Commission (see paragraph 3218 above) is sufficient to prove that Heidelberger acceded, even implicitly, to the concerted practices in question, a necessary precondition for a finding that it was responsible for that infringement.

3221 The Commission also claims that Heidelberger was present at the meeting in Rome on 28 May 1986 at which it was agreed to divert imports from Greece in order to protect the European markets, in particular the Italian market, which was especially threatened by those imports.

3222 However, besides the fact that the meeting of 28 May 1986 was not taken into consideration in the statement of facts relating to the measures to defend the Italian market (recital 27) or in the legal assessment of those facts (recital 55, paragraph 1), the minutes of that meeting do not show that the 'Calcestruzzi problem' was raised. Heidelberger's participation in the concerted practices cannot therefore be inferred from its presence at the meeting in Rome.

3223 The Commission was therefore not entitled to find that Heidelberger participated in the concerted practices in question. It follows that Article 4(3)(a) of the contested decision must be annulled in so far as it finds that Heidelberger participated in those concerted practices.

2.4. Lafarge

3224 Lafarge cannot understand the Commission's claims that it brought pressure to bear on Calcestruzzi. None of the documents referred to by the Commission, to which Lafarge had access, mentions its participation in such pressure.

3225 The Court points out that the Commission does not claim that Lafarge brought pressure to bear on Calcestruzzi in order to cause it to cease to be a customer of Titan. In recital 55, paragraph 1, of the contested decision, the Commission states that the pressure brought to bear to that end on Calcestruzzi was the result of concerted practices between the Italian cement producers, on the one hand, and the participants in the Task Force, including Lafarge, on the other hand. The latter were party to the concerted practices in question on the grounds, in particular, that the 'Calcestruzzi problem' was discussed at several meetings of the ETF and of the Head Delegates.

3226 Lafarge does not deny attending:

— the meeting of the ETF on 17 June 1986, at which it was agreed to entrust the 'coordination of [the] Ferruzzi situation' to Italcementi (contested decision, recital 25, paragraph 11: documents 33.126/18756 and 18787);

— the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which it was stated that the negotiations between the Italian cement producers and the Ferruzzi group might produce an agreement and that Titan might put an end to its contracts with that group by the end of 1987 (contested decision, recital 25, paragraphs 22, 23 and 28; documents 33.126/18857, 18858 and 18860);

— the meeting of the ETF of 11 February 1987 at which the Italian representative informed the other participants that the Italian cement producers and the Ferruzzi group had reached an agreement making it possible to avoid the threat of imports of cement by the Ferruzzi group, a threat considered to be catastrophic for prices, and requested the aid of his European colleagues with a view to resolving the problems raised by the non-performance of the Calcestruzzi-Titan contract (contested decision, recital 27, paragraph 5; documents 33.126/4911 and 4912);

— the meeting of the subgroup 'Defensive Measures' on 17 March 1987 at which it was again reported that agreement had been reached between the Italian cement producers and the Ferruzzi group (contested decision, recital 27, paragraph 5; document 33.126/4860).

3227 Since Lafarge has not shown that at those meetings it openly distanced itself from the unlawful measures mooted in relation to the Ferruzzi situation or that it informed the other participants that it intended to attend those meetings with different objects in mind, the Commission was entitled to take the view that Lafarge had acceded to those measures or at least that it had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production onto the markets of Western Europe, a decision perceived as a serious threat to the stability of all those markets (see, to that effect, the case-law cited at paragraph 1353 above). The lack of evidence of conduct by Lafarge on that market in relation to the situation brought about by Calcestruzzi is irrelevant in that regard, because the Commission has established (see paragraphs 3151 to 3163 above) that the collusion to which they acceded at the meetings referred to paragraph 3226 above was a concerted practice contrary to Article 85(1) of the Treaty in that it gave rise to conduct on the market by other undertakings involved in that same collusion. Moreover, in the absence of proof to the contrary, which it was for Lafarge to adduce, it must be held that Lafarge, which remained active on the market, took account of that collusion when determining its conduct on that market (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

3228 The Commission was therefore entitled to find in Article 4(3)(a) of the contested decision that Lafarge participated from 17 June 1986 in the concerted practices designed to induce Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular.

3229 Lafarge maintains that at the hearings in March 1993 it was not able to submit arguments on the objection that it participated in the concerted practices intended to deprive the Greek producers of Calcestruzzi as a customer.

3230 None the less, it is apparent from the timetable of the hearings that Lafarge was invited to submit its observations on 12 March 1993 between 10.30 and 11.00 on the objections set out in Chapter 2, section 2, and Chapter 10, point 61(h), of the SO concerning the European Task Force. One of those objections was that pressure had been brought to bear on Calcestruzzi in order to deprive the Greek producers, in particular Titan, of its custom (SO, point 19(d) and point 61(h)(iv)). Lafarge, which on reading the SO was in a position to understand that that specific objection was also directed against it (see paragraph 602 above), therefore had an opportunity to express itself with regard to that claim at the hearing on 12 March 1993. Its argument must therefore be rejected.

3231 Lafarge alleges that the Commission has found it responsible for an infringement of Article 85(1) of the Treaty consisting of bringing pressure to bear on Calcestruzzi on the sole basis of its participation in the ETF, an infringement upheld in Article 4(1). By so doing, the Commission breached its rights of defence and also Article 6(2) of the European Convention on Human Rights.

3232 However, in both the SO and the contested decision, the Commission separately identified the facts on the basis of which, correctly as far as Lafarge is concerned, it found, first, the infringement connected with the agreement on the setting-up of the ETF (SO, point 17; contested decision, recital 25) and, second, the infringements connected with the concerted practices directed at depriving the Greek producers and Titan in particular of Calcestruzzi as a customer (SO, point 19(d); contested decision, paragraph 27) (see above, paragraphs 2649 and 2650 and 3226 to 3228, respectively).

3233 Lafarge's argument, alleging infringement of its rights of defence and breach of the principle of the presumption of innocence laid down in Article 6(2) of the ECHR, must therefore be rejected.

2.5. BDZ and Oficemen

3234 BDZ states that recital 27 of the contested decision does not contain any allusion to either the BDZ or the participation of German representatives in the measures to defend the Italian market. It states that the ETF was a tool of the cement producers and not a Cembureau committee. In addition, none of the documents referred to in the contested decision reveals the express or implied approval by BDZ of the defensive measures in question.

3235 Oficemen states that it did not participate in the setting-up and running of the ETF. Consequently, it cannot be held responsible for the disputed concerted practices. Nor has the Commission proved that its participation in the infringement in question went beyond mere passive receipt of information concerning the Italian situation. Moreover, the Commission has not shown how Oficemen could have participated in exerting pressure on a market quite foreign to its members' markets.

3236 The Court points out that BDZ's Mr Steinbach attended the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (see paragraphs 2667 and 2668 above) and that Oficemen was represented there (see above, paragraphs 2711 and 2712). As has already been stated (see paragraph 3201 above), it was indicated at that meeting that negotiations between the Italian cement producers and the Ferruzzi group might lead to an agreement and that Titan might determine its contracts with that group at the end of 1987.

3237 Furthermore, BDZ and Oficemen attended the meeting of the subgroup 'Defensive Measures' on 17 March 1987 (see above, paragraphs 2670 and 2715 to 2718). At that meeting, the Italian

representative recalled what had been said at the previous meetings, in particular the meeting of the ETF on 11 February 1987, concerning the agreement between the Italian cement producers and the Ferruzzi group.

3238 Since BDZ and Oficemen have not demonstrated that, at those meetings, their representatives openly distanced themselves from the unlawful measures mooted in relation to the Ferruzzi situation or that they informed the other participants that they intended to attend those meetings with different objects in mind, the Commission was justified in considering that they had acceded to those measures or at least that they had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production onto the markets of Western Europe, a decision perceived as a serious threat to the stability of all those markets (see, to that effect, the case-law cited at paragraph 1353 above). The lack of evidence of action by those two associations on that market in relation to the situation brought about by Calcestruzzi is irrelevant in that regard, because the Commission has established (see paragraphs 3151 to 3163 above) that the collusion to which they acceded at the meeting in Baden-Baden was in the nature of a concerted practice contrary to Article 85(1) of the Treaty in that it gave rise to action on the market by other undertakings involved in that same collusion. Moreover, in the absence of proof to the contrary, which it was for them to adduce, it must be held that those two associations took account of that collusion when determining their conduct on the market (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

3239 The Commission was therefore entitled to find in Article 4(3)(a) of the contested decision that those two associations of undertakings had participated in the concerted practices designed to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular.

3240 Nevertheless, since the contested decision does not contain any evidence to show that BDZ and Oficemen acceded to those concerted practices before the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, Article 4(3)(a) must be annulled in so far as it finds that BDZ and Oficemen participated in the infringement before that date.

3241 Oficemen claims that the infringement alleged against it cannot be distinguished from the infringement consisting of its participation in the ETF. The Commission has therefore fined it twice for the same facts, in breach of the *non bis in idem* principle.

3242 However, as appears from Article 9 and recital 65, in particular paragraph 8, of the contested decision, it is only the infringement arising from participation in the Cembureau agreement

referred to in Article 1 which has given rise to the imposition of a fine with regard to the market for grey cement. Oficemen's argument alleging breach of the *non bis in idem* principle must, therefore, be rejected.

3243 Oficemen considers that, by finding the members of the ETF responsible for the measures taken by the ETF solely on the basis of their being members, the Commission has departed from the criterion used to impugn the other measures implementing the Cembureau agreement. Those measures were attributed only to their authors, whether or not they were discussed at meetings involving other undertakings or associations of undertakings.

3244 However, that line of argument cannot prevail over the above analysis in paragraphs 3236 to 3240 concerning the merits of the Commission's finding that Oficemen participated in the concerted practices found in Article 4(3)(a) of the contested decision.

2.6. Unicem

3245 Unicem observes that it took part in only one meeting concerning the ETF, namely that of the subgroup 'Defensive Measures' on 17 March 1987. That meeting, the object of which was lawful, does not establish any link between the presumed collusion at ETF level and Unicem. The applicant claims that no active or passive conduct on its part or on the part of the other European cement producers resulted from that meeting.

3246 The Court points out that, according to the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 and 28; documents 33.126/18859 and 18860), '[s]everal meetings took place between the Italian cement producers and Ferruzzi and it appeared that an agreement might be reached with regard to the ready-mix cement market'.

3247 In its letter of 2 September 1988 to its lawyers in London (contested decision, recital 27, paragraph 4; document 33.126/19196) Titan explains that 'on 6 February 1987, Calcestruzzi for the first time seem[ed] reluctant to confirm shipments schedule claiming that "the situation is in evolution with the local cement industries"'.

3248 At the meeting of the ETF on 11 February 1987 and that of the subgroup 'Defensive Measures' on 17 March 1987, mention was made of an agreement between the 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.

3249 According to a telex from Italcementi to Titan on 13 May 1987 (contested decision, recital 27, paragraph 8; document 33.126/19204) and a telex from Calcestruzzi to Titan on 2 June 1987 (contested decision, recital 27, paragraph 10; document 33.126/19218, and not 19208, as mistakenly stated in the contested decision (see above, paragraph 313)), the suspension of deliveries of cement agreed between Titan and Calcestruzzi was determined by an agreement concluded by Calcestruzzi with the major Italian cement producers, including Unicem.

3250 It is apparent from that bundle of documents that Unicem was one of the Italian cement producers which intervened with the Ferruzzi group in order to bring about Calcestruzzi's suspension of the performance of its contract concluded with Titan in April 1986.

3251 Moreover Mr Alber, of Unicem, reported at the meeting of the subgroup 'Defensive Measures' on 17 March 1987 on the progress of negotiations between the Italian cement producers and the Ferruzzi group (contested decision, recital 25, paragraph 47; documents 33.126/4858 and 4860).

3252 In those circumstances, the Commission was entitled to find in Article 4(3)(a) of the contested decision 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.

3253 Nevertheless, the contested decision contains no evidence on the basis of which it can be held that Unicem participated in those concerted practices before 9 September 1986, the date of the meeting of Head Delegates and representatives of the ETF in Baden-Baden, in whose minutes mention is made for the first time of the negotiations between the Italian cement producers and the Ferruzzi group. It follows that Article 4(3)(a) must be annulled in so far as it finds that Unicem participated in the infringement in question before that date.

2.7. Asland

3254 Asland states that it is not mentioned at all in the statement of facts concerning the measures to defend the Italian market. Moreover, the automatic application of the theory of a single and continuous agreement concerning the ETF cannot prove its involvement in such measures, since

it has not been charged with participating in all the infringements supposedly constituting measures to implement that single and continuous agreement. The Commission's reference in recital 55, paragraph 1, of the contested decision to the alleged solidarity of the participants in the ETF is quite without relevance in assessing Asland's responsibility for the infringement found in Article 4(3)(a). Finally, the dates taken as the start (17 June 1986) and end (15 March 1987) of that infringement rule out Asland's participation in it.

3255 The Court points out that Asland did not in fact attend any of the meetings referred to by the Commission in recital 27, paragraph 3, of the contested decision.

3256 In recital 55, paragraph 1, the Commission, referring to the Zurich/Céligny document mentioned in recital 25, paragraph 3, claims that the strategies developed by the ETF were based on the solidarity of all the participants.

3257 Asland played no direct role in the negotiations directed at termination of the Calcestruzzi-Titan contract. Nor did it attend any of the meetings at which those negotiations were mentioned (see above, paragraph 3255).

3258 In those circumstances, the fact that, according to the Zurich/Céligny document, the various measures contemplated at the time in order to counter the imports threatening the stability of the Western European markets (in particular imports from Greece) represented 'a response based on solidarity' (contested decision, recital 25, paragraph 3; document 33.126/18772) is not sufficient to prove the participation, even implicit, of Asland in the concerted practices in question, a necessary precondition of liability for the infringement.

3259 The Commission relies next on the presence of Asland at the meeting in Stockholm on 9 June 1986.

3260 It is sufficient to point out here that that fact has not been established (see above, paragraphs 3060 to 3063).

3261 Finally, the Commission claims that Asland's membership of the ETF indicated its general acceptance of the ETF's rules and actions. It is not therefore necessary to produce evidence of its specific consent with regard to each measure adopted by the others.

3262 However, the fact that it had established that Asland was involved in one of the infringements constituting the single continuous agreement concerning the ETF, namely the agreement relating to the setting-up of the ETF (contested decision, Article 4(1)), did not entitle the Commission to find, on absolutely no evidence, that Asland participated in other unlawful acts allegedly linked to the single and continuous ETF agreement, in this instance, the concerted practices to defend the Italian market referred to in Article 4(3)(a) of the contested decision. Nor is the Commission's line of argument in keeping with the approach followed in the operative part of the contested decision. As has been pointed out (see paragraphs 2509 to 2511 above), the Commission dealt quite separately with the various factors allegedly constituting the single and continuous ETF agreement, not referring to the same addressees each time, and finding a different duration for each of them.

3263 The Commission was therefore not justified in finding that Asland participated in those concerted practices. It follows that Article 4(3)(a) of the contested decision must be annulled in so far as it finds that Asland participated in the infringement in question.

2.8. Italcementi

3264 Italcementi claims that the explanations put forward by Calcestruzzi in February 1987 in order to justify breach of its delivery contract with Titan (see contested decision, recital 27, paragraph 4) cannot be relied upon against it, since they relate to a fact which concerns Calcestruzzi alone.

3265 However, it must be pointed out that Italcementi attended various meetings at which the Calcestruzzi problem was mentioned.

3266 It took part in the meeting of the ETF in London on 17 June 1986, at which it was given the task of 'coordinating the Ferruzzi situation' (contested decision, recital 25, paragraph 11; document 33.126/18787).

3267 It took part in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which it was stated that the negotiations under way between the Italian cement producers and Ferruzzi might lead to an agreement regarding the ready-mix concrete market, and that Titan might terminate its contracts with Ferruzzi at the end of 1987 (contested decision, recital 25, paragraphs 22 and 28; documents 33.126/18859 and 18860).

3268 It also attended the meeting of the ETF on 11 February 1987 (contested decision, recital 25, paragraph 45; document 33.126/18760). At that meeting, it informed the other participants that the Italian cement producers and the Ferruzzi group had reached an agreement making it possible to avoid threatened imports of cement by that group, a threat judged to be catastrophic for prices. It reported the problems connected in particular to the non-performance of the Calcestruzzi-Titan contract and sought the aid of its European colleagues with a view to resolving those problems (contested decision, recital 27, paragraph 5; document 33.126/4912).

3269 Furthermore, having regard to Italcementi's telex to Titan on 13 May 1987 and to Calcestruzzi's telex to Titan on 2 June 1987 (see paragraph 3249 above), Italcementi was one of the Italian cement producers which approached Ferruzzi in order to induce Calcestruzzi to suspend performance of its contract with Titan.

3270 On the basis of those various findings, the Commission was therefore justified in finding in Article 4(3)(a) of the contested decision that Italcementi participated from 17 June 1986 in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers and of Titan in particular.

2.9. Holderbank

3271 Holderbank denies any participation in the agreements signed with Calcestruzzi. Furthermore, it had no interest in participating in an agreement relating to the Italian market since, at that time, it had no production of its own or sales network in Italy.

3272 The Court points out that, among the measures to defend the Italian market, the Commission finds that Holderbank participated only in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular (contested decision, Article 4(3)(a)). It does not find that Holderbank participated in the agreement relating to the contracts and agreements signed on 3 and 15 April 1987 with Calcestruzzi, the purpose of which was to prevent imports by Calcestruzzi of cement from Greece (Article 4(3)(b)).

3273 With regard to Holderbank's participation in the infringement found in Article 4(3)(a) of the contested decision, it must be observed that Holderbank attended the meeting of the ETF on 17 June 1986 (contested decision, recital 25, paragraph 11; document 33.126/18756), the meeting of the Head Delegates and representatives of the ETF in Baden-Baden on 9 September

1986 (contested decision, recital 25, paragraphs 22 and 23; document 33.126/11857), and the meeting of the ETF on 11 February 1987 (contested decision, recital 25, paragraph 45; document 33.126/18760).

3274 Having regard to the above findings concerning those three meetings (see paragraph 3226 above), and in the absence of any evidence adduced by Holderbank to show that at these meetings it openly distanced itself from the unlawful measures which were mooted there concerning the Ferruzzi situation or that it informed the other participants that it was attending the meetings with different objects in mind, the Commission was justified in considering that Holderbank had taken part in such measures or at least given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production onto the markets of Western Europe, a decision perceived as a considerable threat to the stability of all those markets (see, to that effect, the case-law cited above at paragraph 1353). The lack of evidence of action by Holderbank on that market in relation to the situation brought about by Calcestruzzi is irrelevant in that regard, because the Commission has established (see paragraphs 3151 to 3163 above) that the collusion to which they acceded at the meetings referred to in paragraph 3273 above was in the nature of a concerted practice contrary to Article 85(1) of the Treaty in that it gave rise to action on the market by other undertakings involved in that same collusion. Moreover, in the absence of proof to the contrary, which it was for Holderbank to adduce, it must be held that Holderbank took account of that collusion when determining its conduct on the market (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

3275 The Commission was therefore entitled to find in Article 4(3)(a) of the contested decision that Holderbank had participated from 17 June 1986 in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

2.10. Aker and EUROC

3276 Aker and EUROC consider that the mere fact that they were present at several meetings of the ETF at which they were then informed of the situation on the Italian market is not sufficient to make them liable for the concerted practices for the defence of that market. They entered into no undertakings at those meetings, which they attended with perfectly lawful intentions. Moreover, liability on their part presupposed that they had taken some action concerning Calcestruzzi.

3277 The Court points out that Aker and EUROC were represented at several of the meetings referred to by the Commission at recital 27, paragraph 3, of the contested decision. Thus, they were represented at the meeting of the ETF in Geneva on 19 August 1986 (contested decision, recital 25, paragraph 14; document 33.126/18757 and Annex 15 to Aker and EUROC's reply

to the SO), the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 and 23; document 33.126/18857), the meeting of the ETF in Geneva on 21 October 1986 (contested decision, recital 25, paragraph 34; documents 33.126/18758 and 18897), and the meeting in Geneva on 11 February 1987 (contested decision, recital 25, paragraph 45; document 33.126/18760).

3278 The documents relating to the meetings on 19 August and 21 October 1986 do not show that at those meetings there was any specific discussion of the situation concerning the imports by the Ferruzzi group of cement from Greece.

3279 By contrast, at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, it was stated that the negotiations between the Italian cement producers and the Ferruzzi group might lead to results and that Titan might terminate its contracts with that group by the end of 1987. At the meeting on 11 February 1987, the Italian representative told the other participants that the Italian cement producers and the Ferruzzi group had reached an agreement to make it possible to avoid the threatened imports of cement by that group, a threat thought to be catastrophic for prices. In addition, he requested the aid of his European colleagues with a view to resolving the problems arising from the non-performance of the Calcestruzzi-Titan contract.

3280 In the light of those findings, and in the absence of any evidence produced by Aker and EUROC to show that at those two meetings their representatives openly distanced themselves from the unlawful measures which were mooted there concerning the Ferruzzi situation or that they informed the other participants that they were attending the meetings with different objects in mind, the Commission was justified in considering that Aker and EUROC had acceded to such measures or at least that they had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production onto the markets of Western Europe, a decision perceived as a major threat to all those markets (see, to that effect, the case-law cited above at paragraph 1353). The lack of evidence of action by those two undertakings on the market in relation to the situation brought about by Calcestruzzi is irrelevant in that regard, because the Commission has established (see paragraphs 3151 to 3163 above) that the collusion to which they acceded at the meetings referred to in paragraph 3279 above was in the nature of a concerted practice contrary to Article 85(1) of the Treaty in that it gave rise to action on the market by other undertakings involved in that same collusion. Moreover, in the absence of proof to the contrary, which it was for Aker and EUROC to adduce, it must be held that Aker and EUROC took account of that collusion when determining their conduct on the market (*Commission* v *Anic*, cited in paragraph 270 above, paragraph 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 162).

3281 The Commission was therefore entitled to find in Article 4(3)(a) of the contested decision that Aker and EUROC had participated in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

3282 None the less, since the contested decision does not contain any evidence to show that Aker and EUROC acceded to those concerted practices before 9 September 1986, the date on which they participated in the meeting of Head Delegates and representatives of the ETF in Baden-Baden, Article 4(3)(a) must be annulled in so far as it finds that they participated in the infringement in question before that date.

2.11. Cementir

3283 Cementir asserts that it never entered into negotiations with Calcestruzzi to implement an anti-competitive agreement seeking to prevent imports from Greece, of whose existence and content it was allegedly aware. It adds that it was never asked to bring any pressure to bear on Calcestruzzi.

3284 The Court points out, however, that, according to the minutes of the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 and 28; documents 33.126/18859 and 18860), 'several meetings took place between the Italian cement producers and Ferruzzi and it appeared that an agreement might be reached concerning the ready-mix concrete market'.

3285 In its letter sent to its lawyers in London on 2 September 1988 (contested decision, recital 27, paragraph 4; document 33.126/19196), Titan explains that 'on 6 February 1987, Calcestruzzi for the first time seem[ed] reluctant to confirm shipments schedule claiming that "the situation is in evolution with the local cement industries"'.

3286 At the meeting of the ETF on 11 February 1987 and the meeting of the subgroup 'Dissuasive Measures' on 17 March 1987, it was reported that an agreement had been reached between the Italian cement producers and Ferruzzi, making it possible to avoid a threat of imports of cement perceived as catastrophic for prices.

3287 According to Italcementi's telex to Titan on 13 May 1987, and the telex from Calcestruzzi to Titan on 2 June 1987 (see paragraph 3249 above), the suspension of deliveries of cement agreed between Titan and Calcestruzzi was determined by an agreement concluded by Calcestruzzi with major Italian cement producers, including Cementir.

3288 That bundle of documents shows that Cementir was one of the Italian cement producers which intervened with the Ferruzzi group in order to induce Calcestruzzi to suspend performance of the supply contract that it had concluded with Titan.

3289 In those circumstances, the Commission was entitled to find in Article 4(3)(a) of the contested decision that Cementir had participated in the concerted practices designed to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

3290 However, the contested decision does not contain any evidence from which it can be concluded that Cementir participated in those concerted practices before 9 September 1986, the date of the meeting of Head Delegates and representatives of the ETF in Baden-Baden in whose minutes the first report is made of negotiations between the Italian cement producers and the Ferruzzi group. It follows that Article 4(3)(a) must be annulled in so far as it finds that Cementir participated in the infringement in question before that date.

2.12. Blue Circle

3291 Blue Circle claims that its participation in the concerted practices in question is inferred by the Commission from a Blue Circle internal memorandum dated 4 September 1986 (contested decision, recital 27, paragraph 3), in which it noted that Titan had told it that it was not going to cancel its contract with Calcestruzzi. That document does not, however, suggest that Blue Circle attempted to bring pressure to bear on Titan to do so.

3292 Nor, claims Blue Circle, can its participation in the abovementioned infringement be inferred from the mere fact that the dissuasive and persuasive measures examined by the ETF had included possible action against Calcestruzzi. The ETF examined many approaches in order to submit proposals to the decision-makers.

3293 Finally, Blue Circle considers that the Commission could not infer its involvement in the concerted practices in question from the agreements concluded in April 1987 between the Italian producers in order to satisfy all Calcestruzzi's cement requirements (contested decision, recital 27, paragraphs 4 to 11). It acknowledges that the ETF was informed of the Italian situation. That information was not, however, very accurate. In any event, the mere receipt of information is insufficient to establish participation in a concerted practice. Blue Circle adds that the abovementioned agreements in April 1987 were strictly local and outside its knowledge, the evidence of those agreements never having been brought to its knowledge.

3294 The Court points out that, among the measures to defend the Italian market, the Commission finds that Blue Circle participated only in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)). The Commission does not find that Blue Circle participated in the

agreement concerning the contracts and agreements signed on 3 and 15 April 1987, the purpose of which was to prevent imports by Calcestruzzi of cement from Greece (Article 4(3)(b)).

3295 With regard to Blue Circle's participation in the infringement found in Article 4(3)(a) of the contested decision, the Court points out that in its internal memorandum of 4 September 1986 (contested decision, recital 27, paragraph 3; document 33.126/11026) Blue Circle states: 'In regard to Italy, Titan remain adamant that they will not cancel their contract with Ferruzzi before December 1987 at the earliest when it appears they have an escape clause.' Those statements show that Blue Circle tried in vain to persuade Titan to put an early end to the supply contract that it had just concluded with the Ferruzzi group.

3296 In any event, Blue Circle attended the meeting of the ETF on 17 June 1986 (contested decision, recital 25, paragraph 11; documents 33.126/18756 and 18787), the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraphs 22 and 23; document 33.126/18857), the meeting of the ETF on 11 February 1987 (contested decision, recital 25, paragraph 45; document 33.126/18760) and the meeting of the subgroup 'Defensive Measures' of 17 March 1987 (contested decision, recital 25, paragraph 47; document 33.126/4858).

3297 In the light of the findings already made relating to those four meetings (see paragraph 3226 above) and in the absence of any evidence adduced by Blue Circle to show that at those meetings it openly distanced itself from the unlawful measures which were mooted there concerning the Ferruzzi situation, or that it informed the other participants that it was attending the meetings with different objects in mind, the Commission was entitled to take the view that Blue Circle had acceded to such measures or at least had given that impression to the other participants in a spirit of solidarity when confronted with the decision of the Greek cement industry to export its surplus production onto the markets of Western Europe, a decision perceived as a major threat to the stability of all those markets (see, to that effect, the case-law cited above at paragraph 1353).

3298 It follows that the Commission was entitled to find in Article 4(3)(a) of the contested decision that Blue Circle participated from 17 June 1986 in the concerted practices designed to induce Calcestruzzi to cease to be a customer of Calcestruzzi, and of Titan in particular.

3299 Blue Circle claims not to understand how the Commission could have considered that the non-performance of the Calcestruzzi-Titan contract was the result of the concerted practices described in recital 55, paragraph 1, of the contested decision, but not have charged either Calcestruzzi or Titan with those practices.

3300 However, that argument cannot overturn the above analysis in paragraphs 3150 to 3163 and 3295 to 3298 concerning the merits of the Commission's findings as to the existence of concerted practices designed, in an anti-competitive spirit, to induce Calcestruzzi to cease to be a customer of Titan, and of the Commission's finding that Blue Circle participated in those concerted practices.

3. The duration of the infringement

3301 In Article 4(3)(a) of the contested decision, the Commission finds that the infringement lasted from 17 June 1986 until 15 March 1987.

3302 The Court has already found that by taking 17 June 1986 as the date on which the infringement began in the case of CBR, Dyckerhoff, Aalborg, BDZ, Unicem, Uniland, Oficemen, Irish Cement, Aker, EUROC and Cementir, the Commission wrongly assessed the start of their participation in that infringement. That date must therefore be fixed at 9 September 1986 (see paragraphs 3205, 3240, 3253, 3282 and 3290 above).

3303 Aker, EUROC and Cementir state that they did not attend either of the two meetings of the ETF on the dates taken to mark the start (17 June 1986) and end (15 March 1987) of the infringement. The duration of their participation in the infringement must in any event therefore be reduced.

3304 The start of the infringement in question has already been fixed at 9 September 1986 in the case of Aker and EUROC (see paragraph 3282 above) and in the case of Cementir (see paragraph 3290 above).

3305 As regards the end of the infringement, the Court points out, with regard to Aker and EUROC, that they were represented at the meeting of the ETF on 11 February 1987. There are therefore grounds for concluding that the concerted practices in question influenced their conduct on the market until the end of the period of infringement fixed by Article 4(3)(a) of the contested decision. It follows that the Commission was entitled to find that Aker and EUROC participated in the concerted practices in question until 15 March 1987.

3306 As for Cementir, the Court points out that at the meeting of the subgroup 'Defensive Measures' on 17 March 1987 a report was made of the negotiations between the Italian cement producers and the Ferruzzi group, negotiations in which Cementir was directly involved, as is clear from the above analysis in paragraphs 3284 to 3288. The Commission was therefore entitled to find

in Article 4(3)(a) of the contested decision that Cementir had participated in the concerted practices in question until the end of the period of infringement fixed by that provision.

3307 Blue Circle claims that the contested decision does not give reasons for the Commission's conclusions as to the duration of the infringement found in Article 4(3)(a).

3308 The Court points out that the date of 17 June 1986 taken as the start of the infringement corresponds to the first of the meetings referred to in recital 27, paragraph 3, of the contested decision in order to establish that the Ferruzzi situation was discussed at ETF level.

3309 As regards the date of 15 March 1987, taken as the date marking the end of the infringement, it relates, according to the evidence contained in recital 27, paragraphs 3 and 5, of the contested decision (see documents 33.126/4858 to 4861), to a meeting of the subgroup 'Defensive Measures' held on 17 March 1987, and not 15 March 1987 as erroneously stated by the Commission (see paragraph 3141 above), a meeting at which, according to the documents available, a report was given for the last time of the negotiations between the Italian cement producers and the Ferruzzi group.

3310 In those circumstances, Blue Circle, which also attended the meeting of 17 June 1986 and the meeting of 17 March 1987, cannot properly allege any lack of statement of reasons as to the duration of the infringement.

4. Access to the file

3311 Following the measures of 2 October 1996 and 18 and 19 June 1997 concerning access to the file, Ciments Français and Asland submitted documents which, they allege, could have been useful to them during the administrative procedure in order to defend themselves against the claim that they participated in the concerted practices concerning Calcestruzzi.

3312 There is no longer any need to assess whether those observations are well founded, since it has already been found that Article 4(3)(a) of the contested decision must be annulled in so far as it finds that those two undertakings participated in the infringement referred to therein (see paragraphs 3215 and 3263 above).

3313 CBR, Dyckerhoff, Uniland, Oficemen, Holderbank, Aker and EUROC also put forward a series of observations on the basis of the documents which they were able to consult following those same measures of organisation of procedure. They seek to show that by granting them only limited access to the SO and to its investigation file during the administrative procedure the Commission infringed their rights of defence when it found that they had committed the infringement, in so far as they had no access to exculpatory documents.

3314 In its observations of 10 February 1997 CBR invokes documents 33.126/2945 to 2951, 2954 to 2960, 15990 to 15995, 15997, 12145 to 12166, 12180 to 12188, 12204 to 12217, 12231 to 12338, 12341, 16235 to 16282, 15731 to 15739, 2917, 2918, 2948 and 2949, none of which shows that it played any role whatsoever in the relationships between Italian cement producers and Calcestruzzi. It observes that, in the chapters of the SO concerning Italy and (points 35 and 70), there is no reference to it among the cement producers who signed agreements with Calcestruzzi in breach of Article 85(1) of the Treaty.

3315 It must be observed that, with regard to the measures to defend the Italian market, the Commission finds that CBR participated only in the concerted practices designed to induce Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular (contested decision, Article 4(3)(a)). It does not find that CBR participated in the agreement relating to the contracts and agreements signed on 3 and 15 April 1987, the purpose of which was to avoid imports by Calcestruzzi of cement from Greece (contested decision, Article 4(3)(b)). Therefore, the only point to be assessed is whether CBR's comments set out in the previous paragraph could have had even a small chance of altering the outcome of the administrative procedure as regards the infringement which it was actually held to have committed.

3316 In point of fact, those comments would not have prevented the Commission from finding that CBR had participated in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which mention was made of the negotiations under way concerning the Calcestruzzi problem. Therefore, they would not have provided grounds for dismissing CBR's responsibility in the concerted practices in question.

3317 In its observations of 5 January 1998, Dyckerhoff cites several documents which, in its opinion, contradict the evidence put forward in the contested decision concerning pressure brought to bear on Calcestruzzi.

3318 It cites, first, the letter sent by Titan on 2 September 1988 to its lawyers in London (documents 33.126/19195 to 19197).

3319 On that point, without there being any need to consider whether the observations put forward by Dyckerhoff on the basis of that letter are of any relevance, it is sufficient to observe that the letter was expressly mentioned in point 19(d) of the SO, in the statement of facts concerning the measures to defend the Italian market.

3320 The first two pages of that letter (documents 33.126/19195 and 19196) were moreover to be found in the Box (see paragraph 95 above). Dyckerhoff could therefore have used them in support of its reply to the SO. In those circumstances, it cannot now invoke them in order to establish that there was a breach of its rights of defence during the administrative procedure.

3321 The third page of that letter (document 33.126/19197) contains only information concerning the address to which the reply to that letter was to be sent and the signature of the person who wrote the letter. It would therefore have been quite useless to Dyckerhoff's defence during the administrative procedure.

3322 Dyckerhoff then refers to Calcestruzzi's reply of 22 March 1990 to a request by the Commission for information (documents 33.126/16316 to 16330). Calcestruzzi explains in it that the termination of the contract that it had concluded with Titan in April 1986 was justified because it had not obtained from the Italian authorities the authorisation necessary in order to use its harbour installations for the purposes of performing that contract. Dyckerhoff claims that the documents which constitute that reply would have made it possible for it to refute the explanation put forward by the Commission in recitals 27 and 55 of the contested decision concerning the non-performance of the Calcestruzzi-Titan contract.

3323 The Court points out, however, that any comments which Dyckerhoff might have been able to submit during the administrative procedure on the basis of the documents which it now puts forward would not have made it possible to disregard the bundle of documents referred to in recital 27, paragraphs 3 to 5, of the contested decision, on the basis of which the Commission correctly found in Article 4(3)(a) of the contested decision that there were concerted practices between the Italian producers Unicem, Italcementi and Cementir and a number of European cement undertakings and associations, including Dyckerhoff, practices which sought in an anti-competitive spirit to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

3324 Finally, Dyckerhoff points out in its observations of 7 February 1997 that it is apparent from the Italian file that Dyckerhoff played no role in the measures concerning Calcestruzzi, since the latter was linked to the Italian producers through GU SIPAC, of which Dyckerhoff was not part (documents 33.126/15990 to 15997, 12145 to 12166, 12180 to 12188, 12204 to 12217 and 12231 to 12341).

3325 Nevertheless, any comments which Dyckerhoff might have put forward during the procedure on the basis of the documents to which it refers would not have prevented the Commission from finding that it had participated in the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986 at which a report was made of initiatives under way in connection with the Ferruzzi situation. Therefore, they would not have provided grounds for dismissing Dyckerhoff's responsibility in the concerted practices referred to in Article 4(3)(a) of the contested decision.

3326 Uniland and Oficemen maintain, in their observations of 10 February 1997 and 3 March 1998, that in the documents to which they had access following the measures of organisation of procedure referred to in paragraph 3311 above there is no evidence of their participation in the concerted practices found in Article 4(3)(a) of the contested decision. On the contrary, several documents show that the measures to defend the Italian market against imports from Greece did not arise out of a multilateral concerted practice in which they participated but out of unilateral reactions by the Italian producers.

3327 In their observations of 10 February 1997, they refer to an Italcementi letter of 26 October 1987 (document 33.126/2950) and the report of a meeting on 12 January 1988 of the Italian cement producers at Cementir (document 33.126/19872). Those two documents contain no allusion to any direct or indirect participation whatsoever by them in the measures taken by the Italian market to counter the imports from Greece. On the contrary, they confirm the purely local dimension of those measures.

3328 In their observations of 3 March 1998, Uniland and Oficemen rely on an extract from Unicem's replies to the Commission in October 1989 concerning the activities of the ETF (documents 33.126/12060 to 12065, especially 12063), and also on the letter in which Calcestruzzi explains to the Commission that the falling off in its imports from Greece could be explained by the sole fact that the Italian Government had not issued it with the necessary authorisations for the construction of a quay for the unloading of cement (documents 33.126/16317 to 16321, especially 16319, mentioned at paragraph 3322 above). They also refer to the letter sent by Titan on 2 September 1988 to its lawyers in London (documents 33.126/19195 to 19197) and to documents 33.126/19188 to 19193 and 19198 to 19200. Finally, they refer once again to the minutes of the meeting of the Italian cement producers at Cementir in Rome on 12 January 1988 (documents 33.126/19871 to 19873).

3329 The Court points out that, for the reasons set out in paragraphs 3319 to 3321 above, Titan's letter of 2 September 1988 to its lawyers in London cannot be relied on to any advantage by Uniland and Oficemen in order to prove infringement of their rights of defence during the administrative procedure.

3330 In any event, the comments which those two applicants might have been able to put forward during the administrative procedure on the basis of the various documents identified at paragraphs 3327 and 3328 above could not have prevailed over the documents referred to in recital 27, paragraphs 3 to 5, of the contested decision, on the basis of which the Commission correctly found in Article 4(3)(a) of the contested decision that there were concerted practices at European level that were designed, in an anti-competitive spirit, to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

3331 Nor could those observations have prevented the Commission from finding, first, that Uniland had attended the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which mention was made of the negotiations under way concerning the Ferruzzi situation and, second, that Oficemen had been represented at that meeting and had attended the meeting of the subgroup 'Defensive Measures' on 17 March 1987, at which the agreement between the Italian cement producers and the Ferruzzi group was mentioned. Therefore, they would not have provided grounds for dismissing Uniland and Oficemen's responsibility in the concerted practices found to exist in Article 4(3)(a) of the contested decision.

3332 In their observations of 3 March 1998, Uniland and Oficemen further cite a series of documents relating to contracts concluded between the Greek cement producers and Italian undertakings (documents 33.126/19781 to 19786, 19793 to 19798, 19802 to 19812, 20140 to 20147, 20148 to 20156, 20157 to 20164, 20166 and 20167), and to contracts concluded between Greek producers with a view to supplies to be made in Italy (documents 33.126/20132 to 20137 and 20259 to 20267). They also refer to the report on Titan's balance sheet for the year 1988 (document 33.126/19432), which shows that Titan's presence on the Italian market grew quite spectacularly in that year. Those various documents are at variance with the assessments made by the Commission in recital 55 of the contested decision.

3333 However, those observations by the applicants could not have prevailed over the documents referred to in recital 27, paragraphs 3 to 5, on the basis of which the Commission correctly found that there were concerted practices designed, in an anti-competitive spirit, to induce Calcestruzzi to cease to be a customer of Titan, a finding which was sufficient to support the conclusion that those concerted practices were contrary to Article 85(1) of the Treaty (see the case-law cited above at paragraph 837).

3334 In its observations of 8 December 1997, Holderbank claims, on the basis of the letter sent by Titan on 2 September 1988 to its lawyers in London (documents 33.126/19195 to 19197), that Calcestruzzi's non-performance of its contract concluded with Titan for the supply of cement was the result of an agreement between the Ferruzzi-Calcestruzzi group and the Italian cement producers alone, and not the result of any overall concerted practice in which Holderbank took part.

3335 However, for the reasons set out in paragraphs 3319 to 3321 above, Holderbank cannot now rely on that letter to show the existence of a breach of its rights of defence during the administrative procedure.

3336 Holderbank also refers to the note concerning the meeting of 12 January 1988 of the Italian cement producers at Cementir (see paragraph 3328 above). That note shows how the Italian market was sealed off as regards imports of cement, in this instance imports from Yugoslavia. It also mentions the solidarity which the Italian cement producers were requested to demonstrate in order to confront those imports. Finally the note refers to the necessity for finding an agreement with the Greek producers in order to prompt them to reduce their exports, on pain of unleashing a price war. Holderbank considers that, if that document had been available during the administrative procedure, it would have been able to show that the sealing off of the Italian market was due, not to the measures adopted by the ETF, but simply to the actions of the local producers.

3337 The Court finds, however, that those observations could not have prevailed over the bundle of documents referred to in recital 27, paragraphs 3 to 5, of the contested decision, on the basis of which the Commission correctly found in Article 4(3)(a) of the contested decision that there were concerted practices between the Italian cement producers Italcementi, Unicem and Cementir and a series of participants in the ETF, including Holderbank, practices which designed, in an anti-competitive spirit, to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular.

3338 In their observations of 10 February 1997, Aker and EUROC refer to various documents mentioned at paragraph 3324 above. These documents, they claim, would have made it possible for them to show that the contracts concluded in April 1987 between Cementir and Italcementi, on the one hand, and Calcestruzzi, on the other hand, were the result of negotiations carried out at local level between the major Italian cement producers. None of those documents supports the Commission's argument that those contracts were the tool for implementing a plan of action that had been debated and approved at the meetings of the ETF at which Aker and EUROC were present. They refer also to Italcementi's notes of 15 October 1986 (documents 33.126/2945 to 2948), 26 October 1987 (documents 33.126/2949 to 2951) and 13 November 1987 (documents 33.126/2954 to 2960), which show that 'the Greek problem' was dealt with at the time on a purely bilateral basis between the major Italian cement producers and their Greek counterparts. They refer in particular to the following extract from the Italcementi note of 13 November 1987 which, as translated by them, states: 'We must wonder whom to contact, how to contact the Greeks and to propose a truly viable agreement which should not last more than two years, with the intention subsequently of managing the Greek cement industry better, with the European producers, either by direct participation in capital, or by an indirect presence.'

3339 However, the observations that Aker and EUROC might have made during the administrative procedure on the basis of the various documents mentioned in the previous paragraph could not have prevailed over the bundle of documents referred to in recital 27, paragraphs 3 to 5, of the

contested decision, on the basis of which the Commission correctly found in Article 4(3)(a) of the decision that there were concerted practices at European level, which were designed, in anti-competitive spirit, to induce Calcestruzzi to cease to be a customer of the Greek producers, and of Titan in particular. Nor could those observations have prevented the Commission from finding that Aker and EUROC had been represented at the meeting of Head Delegates and representatives of the ETF in Baden-Baden on 9 September 1986, at which mention was made of the negotiations under way concerning the Ferruzzi situation, and at the meeting of the ETF of 11 February 1987, at which it was stated that an agreement had been reached between the Italian cement producers and the Ferruzzi group and that that agreement had made it possible to avoid the threat of imports of cement by that group, a threat considered catastrophic for prices. Those comments would not therefore have provided grounds for dismissing the responsibility of those two applicants in the infringement found at Article 4(3)(a) of the contested decision.

3340 In their observations of 29 December 1997, Aker and EUROC refer to a report of a meeting held on 13 March 1989 between Italian and Yugoslav cement producers (documents 33.126/16002 to 16006). To their mind, that document would have supported their argument that the contracts relating to Calcestruzzi were a purely local matter.

3341 However, the document in question shows at most that, nearly two years after the period of the infringement found in Article 4(3)(a) of the contested decision, bilateral negotiations were entered into between the Italian and Yugoslav markets, with a view to restricting imports from Yugoslavia to Italy. Any observations that Aker and EUROC could have put forward on the basis of that document would therefore quite obviously not have altered the findings of fact, referred to in paragraph 3339 above, concerning the concerted practices at European level at the time when the Calcestruzzi problem arose.

3342 In conclusion, the comments by CBR, Dyckerhoff, Uniland, Oficemen, Holderbank, Aker and EUROC would not have had even a small chance of altering the outcome of the administrative procedure. Those applicants have not therefore shown in that regard that there was any breach of their rights of defence during the administrative procedure.

B — Agreement concerning the contracts and agreements signed in April 1987 with Calcestruzzi (contested decision, Article 4(3)(b))

3343 According to Article 4(3)(b) of the contested decision, Italcementi, Unicem and Cementir 'infringed the provisions of Article 85(1) of the EC Treaty from 3 April 1987 to 3 April 1992 by participating 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'.

3344 The three applicants in question put forward a line of argument which basically seeks the annulment of that provision. In addition, Italcementi and Cementir allege that the Commission, when finding the infringement in question, infringed their rights of defence by failing to grant them during the administrative procedure access to the whole of the SO and its investigation file, thus depriving them of alleged exculpatory evidence.

1. Existence of the infringement

3345 In recital 27 of the contested decision, the Commission after observing (paragraph 5) that 'the agreement between the [Italian] cement producers and Ferruzzi' had been referred to by the Italian representative at the meeting of the ETF on 11 February 1987 and at the meeting of the subgroup 'Dissuasive Measures' on 17 March 1987 (see paragraph 3141 above), finds (paragraph 6) that that agreement was concluded the following April:

'On 3 and 15 April 1987 the Italian cement producers Italcementi, Unicem, Cementir and Calcestruzzi signed agreements and contracts on the supply of cement and on cooperation with one another (documents 33.126/12145 to 12342). Through the agreements and contracts, Italcementi, Unicem and Cementir jointly undertook to meet all the cement requirements of the Calcestruzzi group and to apply the price reduction specified; for its part, Calcestruzzi undertook to channel half of the price reductions to a joint subsidiary of the four contractors, which was to invest the sums in ready-mix concrete companies or related activities, and to obtain at least 80% of its cement requirements from Italcementi, Unicem and Cementir or from companies designated by them; the three cement producers reserved the right to terminate the agreements and contracts if Calcestruzzi's purchases from them were less than 95% of its requirements.'

3346 The Commission then refers (recital 27, paragraphs 7 to 10) to a series of telexes exchanged in May and June 1987 between Calcestruzzi and Titan, on the one hand, and Italcementi and Titan, on the other. Those telexes show that, following the agreement reached with the three Italian cement producers, Calcestruzzi suspended performance of the contract which it had concluded in April 1986 with Titan. They also show that there were meetings between the Italian producers Italcementi, Unicem and Cementir, on the one hand, and Titan, on the other hand, in order to find a solution to the problems linked to the non-performance of that contract.

3347 In recital 55, paragraph 2, the Commission states:

'The contracts and agreements signed on 3 and 15 April 1987 (see paragraph 6 of recital 27) represent the implementation of an agreement between Italcementi, Unicem and Cementir that

is caught by Article 85(1) and, consequently, an infringement as from the date they were signed and throughout their duration, i.e. until 3 April 1992. As may be seen from the minutes of 11 February 1987 and 15 March 1987, the purpose of the agreement was to avoid a threat of the import of 1.5 million tonnes of Greek cement by Calcestruzzi in ten or so ports, which would have been catastrophic for prices (see paragraph 5 of recital 27).'

3348 Unicem, Italcementi and Cementir put forward in essence nine arguments denying the alleged infringement.

3349 First, they deny that the agreements signed with Calcestruzzi in April 1987 were motivated by any anti-competitive purpose.

3350 Unicem claims that those agreements did not have any connection with the ETF. The fact that, in connection with those agreements, it adopted a line of conduct that was quite independent of any non-Italian producer must be the best proof of that. It adds that the agreements in question had a lawful purpose. The relations between the Italian cement producers and Calcestruzzi are explicable on commercial grounds, which had nothing to do with any international collusion. Calcestruzzi, which was the largest Italian customer on the cement market, wielded considerable purchasing power. The agreements in April 1987 must be considered as the realisation of Calcestruzzi's long-term objective for obtaining a 15% discount on all its purchases of cement in Italy. The price concessions made by Italcementi, Cementir and Unicem were the result of lawful competition. In addition, the offer made by the three Italian producers presented numerous advantages for Calcestruzzi compared to the contract which it had concluded with Titan in April 1986: the standard of service, the physical closeness of the suppliers, the lower transport costs, greater flexibility in the performance of the contract, the availability of technical and commercial assistance by the Italian suppliers. The delivery contracts were signed jointly by Italcementi, Cementir and Unicem, because Calcestruzzi's considerable supply requirements could not have been met by one producer alone.

3351 Italcementi claims that the above agreements constituted a competitive response by the Italian producers to imports onto their market of cement from Greece. In its view, the object of an agreement must be defined according to its sense and the purpose which it pursues, as objectively identified in the light of the economic context in which that agreement is to be applied, and not according to any subjective intention of the parties. In this instance, the Commission has not shown that there was any such objective to restrict competition.

3352 Cementir maintains that it took the initiative, with Italcementi and Unicem, to negotiate with Calcestruzzi in order to define the best organisation possible of their common commercial relationships. It points to the commercial importance of those negotiations, Calcestruzzi

representing an annual demand of approximately 2 200 000 tonnes of cement. That was the background to the setting-up of the Italian company SIPAC, a joint subsidiary of Italcementi, Unicem and Cementir. The object of that company was not therefore to prevent the performance of the obligations which Calcestruzzi had contracted vis-à-vis Titan. Cementir argues that there is an explanation for its actions in this matter other than unlawful collusion, namely, its wish to conclude a profitable contract. Its attitude was comparable to that adopted by a number of other Italian producers which took part in supply contracts with Calcestruzzi, but which were not fined in the contested decision.

3353 The Court points out that none of those three applicants denies that the conclusion in April 1987 of the agreements between them and Calcestruzzi was the object of the 'agreement between the [Italian] cement producers and Ferruzzi' which was referred to at the meeting of the ETF on 11 February 1987 (contested decision, recital 27, paragraph 5; document 33.126/4912) and at the meeting of the subgroup 'Defensive Measures' on 17 March 1987 (same paragraph; document 33.126/4860).

3354 At the first of those two meetings, the Italian representative stated that that agreement allowed 'the threat to be removed of imports of 1.5 million tonnes by [the Ferruzzi group] in a dozen ports, which would have been catastrophic for prices' (contested decision, recital 27, paragraph 5; document 33.126/4912). He added: 'Ferruzzi will in return for its compliance receive the tidy sum of US$ 15 million a year for [the] five years [of the agreement and] will have to use part of the money to purchase BPE [ready-mix concrete] companies or holdings in BPE companies so as to put the coast under lock and key'.

3355 Nor do the three applicants deny that the agreement between the Italian cement producers and Calcestruzzi referred to in the telexes mentioned by the Commission in recital 27, paragraphs 7 and 10, of the contested decision corresponds to the agreement relating to the contracts and agreements signed in April 1987. According to that telex, that agreement led to the suspension of the deliveries of cement which had been agreed between Calcestruzzi and Titan.

3356 On the basis of that bundle of documents, the Commission was entitled to find that the contracts and agreements signed in April 1987 between Italcementi, Unicem and Cementir, on the one hand, and Calcestruzzi, on the other hand, constituted the implementation of an agreement between Italcementi, Unicem and Cementir designed to prevent, in an anti-competitive spirit, imports by Calcestruzzi of cement from Greece. The Commission was therefore entitled to find in Article 4(3)(b) of the contested decision that that agreement was contrary to Article 85(1) of the Treaty.

3357 The argument, put forward by Cementir, that the other Italian cement producers which allegedly took part in those agreements with Calcestruzzi were not referred to in the contested

decision cannot overturn the analysis in paragraphs 3353 to 3356 above as to the merits of the Commission's finding concerning the anti-competitive object pursued by the agreement relating to those contracts and agreements, or the responsibility in that anti-competitive agreement of Cementir, which acknowledges having taken part in those agreements.

3358 Second, Italcementi claims that the meetings between the Italian cement producers and Titan described in recital 27, paragraphs 7 to 11, of the contested decision were intended purely to avoid worsening the tensions then existing on the Italian market, by demonstrating the lawfulness of the conclusion of new supply contracts with Calcestruzzi. The Italian producers took part in those meetings without the least intention of obtaining results that were unlawful under Article 85(1) of the Treaty.

3359 For its part, Cementir maintains that the meeting held in Luxembourg on 27 May 1987 between the Italian producers and Titan, a meeting referred to in recital 27, paragraphs 9 to 11, of the contested decision, was part of an attempt to settle a dispute arising out of the commercial negotiations between Italcementi, Unicem and Cementir, on the one hand, and Calcestruzzi, on the other, for the sole purpose of preventing that dispute from damaging the proper operation of the supply agreement concluded by Calcestruzzi with Titan. It adds that it participated in that meeting at the request of Calcestruzzi.

3360 However, it is apparent from the bundle of documents referred to in recital 27, paragraphs 7 to 10, of the contested decision (documents 33.126/19205, 19204, 19201 and 19218) that a meeting was held in Luxembourg at the end of May 1987 between Italcementi, Unicem and Cementir, on the one hand, and Titan, on the other, for the purpose, *inter alia*, of finding a solution to the problems connected to the 'suspension of deliveries provided in the contract concluded at the time [April 1986]' between Calcestruzzi and Titan (contested decision, recital 27, paragraph 10; document 33.126/19201), a suspension which had 'been determined by an agreement reached with the major Italian cement producers (Italcementi — Unicem — Cementir)' (contested decision, recital 27, paragraph 10; document 33.126/19218).

3361 In any event, Italcementi and Cementir's line of argument cannot prevail over the extract from the report of the meeting of the ETF on 11 February 1987 (see paragraph 3354 above), on the basis of which the Commission correctly concluded that the three Italian cement producers, Italcementi, Unicem and Cementir, had, by means of the agreement relating to the contracts and agreements signed with Calcestruzzi in April 1987, intended to prevent the threat of imports by the Ferruzzi group of 1.5 million tonnes of cement from Greece into a dozen ports, which would have been catastrophic for prices.

3362 Third, Italcementi points out that at the time imports into Italy of cement from Greece were being made at less than actual cost, so breaching the principle of fairness which must govern

intra-Community trade. Cementir claims that, from the end of 1985, the Greek producers made massive exports of cement and clinker, notably to Italy, thanks to very considerable State aid.

3363 Those arguments must, however, be dismissed, for the reasons set out above in paragraphs 2557 and 2558.

3364 Fourth, Unicem, Italcementi and Cementir claim that the contracts and agreements of 1987 did not prevent Calcestruzzi from performing its contractual obligations to Titan. The deliveries agreed upon between Calcestruzzi and Titan in their contract of April 1986 concerned, for the first year, only 75 000 tonnes, that is to say a quantity clearly lower than Calcestruzzi's real needs, which were estimated at some 2 200 000 tonnes a year. No minimum purchase obligation was provided for the following years. In addition, the deliveries made by Titan did not meet the same quality requirements as Italian cement.

3365 Italcementi adds that, at the same time, the supply contract concluded by Calcestruzzi with Yugoslav cement producers was performed in full. The clause allowing the Italian producers to terminate the contract if Calcestruzzi did not obtain 95% of its needs from them was never applied. Calcestruzzi therefore breached its contract with Titan quite independently, for financial reasons, exploiting the conditions offered by the Greek producer in order to negotiate the conclusion of contracts with its usual suppliers. It therefore demands the opportunity to inspect the documents in the Commission's file concerning the explanations given by Calcestruzzi during the administrative procedure as to why it breached its contract with Titan.

3366 Unicem further points out that Calcestruzzi's commitment to the three Italian cement producers was for 80% of its supply needs. Those needs being estimated at around 2 200 000 tonnes a year, Calcestruzzi therefore had a residual import margin of 400 000 tonnes, that is to say 325 000 tonnes more than the quantities supplied by Titan. Calcestruzzi therefore wrongly claimed in its telex of 13 May 1987 to Titan that it could not 'import cement in Italy as per purchase contract already signed as consequence of an agreement [it had] reached with Italian cement producers' (contested decision, recital 27, paragraph 7; document 33.126/19205). Calcestruzzi simply considered it more advantageous to obtain its supplies from Italian rather than Greek producers.

3367 It must however be stated that the applicants' argument cannot prevail against the bundle of documents referred to in recital 27, paragraphs 5 to 10, of the contested decision, from which it is clear that Calcestruzzi suspended the deliveries provided for in the contract which it had signed with Titan in April 1986, not on the basis of an independent decision prompted by commercial reasons, but as a result of the agreement concluded in April 1987 with Italcementi, Unicem and Cementir, which, motivated by an anti-competitive objective, had undertaken to

pay Ferruzzi USD 15 million a year for the five years of that agreement in recognition of its cooperation in that matter.

3368 Italcementi's request to inspect certain documents in the Commission's file (see paragraph 3365 above) was granted when the measures of organisation of procedure referred to above at paragraphs 164 and 168 were adopted. They enabled Italcementi to inspect, within the bounds set by the need to protect business secrets, the documents in the Commission's file containing the explanations put forward by Calcestruzzi to justify the breach of its April 1986 contract with Titan.

3369 Fifth, Italcementi asserts that Calcestruzzi's entering into supply contracts jointly with Unicem, Cementir and itself was the result of Calcestruzzi's own requirements, because it was anxious to ensure a continuous supply. The conclusion of contracts with Calcestruzzi could not therefore be considered to be the implementation of a pre-existing agreement between the Italian cement producers.

3370 However, Italcementi's claim cannot prevail over the documents referred to in recital 27, paragraphs 5 and 6, of the contested decision, on the basis of which the Commission found that the agreements of April 1987 between Italcementi, Unicem and Cementir, on the one hand, and Calcestruzzi, on the other, was the result of 'the agreements between the [Italian] cement producers and Ferruzzi', as noted by Italcementi itself at the meeting of the ETF on 11 February 1987 (see the handwritten report of that meeting; contested decision, recital 27, paragraph 5; document 33.126/4912). According to Italcementi's own statements at that meeting, that agreement by the Italian cement producers was intended to make it possible to avoid the threat of imports of cement by Ferruzzi, which was perceived as catastrophic for prices. The Commission was therefore entitled to consider (contested decision, recital 55, paragraph 2) that 'the contracts and agreements signed on 3 and 15 April 1987 ... represent[ed] the implementation of an agreement between Italcementi, Unicem and Cementir that is caught by Article 85(1) ...'.

3371 Sixth, Unicem, Italcementi and Cementir allege, with supporting statistics, that the contracts concluded in April 1987 with Calcestruzzi had no effect restricting competition. Those contracts did not prevent Titan from carrying on exporting to Italy. The Greek producers even appreciably increased their presence on the Italian market at that time despite the considerable disadvantage caused by transport costs. Unicem states that Calcestruzzi continued to look for new import opportunities in order to satisfy its cement requirements, in particular by acquiring a Greek cement works.

3372 Nevertheless, it is apparent from the bundle of documents referred to in recital 27, paragraphs 4 to 11, of the contested decision that the agreement relating to the contracts and agreements of 1987 referred to above led Calcestruzzi to suspend the deliveries of cement which it had agreed upon in April 1986 with Titan, which made it possible to avoid the threatened import of 1.5

million tonnes of cement, regarded as catastrophic for prices. The agreement in question therefore did have the effect of restricting competition.

3373 In any event, the Commission considered that agreement to be an infringement solely because of its anti-competitive object and that object has been established (see paragraphs 3353 to 3356 above). Such proof was sufficient for the finding in Article 4(3)(b) of the contested decision that that agreement was contrary to Article 85(1) of the Treaty (see, to that effect, the case-law cited at paragraph 837 above).

3374 Seventh, Italcementi states that Calcestruzzi's requirements represented only 6% of Italian cement production. Since the contracts of April 1987 related to 80% of those requirements, they concerned scarcely 5% of Italian demand for cement. Those facts should give rise to a considerable qualification as to the actual effect of the conclusion of those contracts in terms of penetration of the Italian market by cement from Greece.

3375 Cementir considers that Calcestruzzi's demand amounted to 5% of total demand on the Italian market. Any restrictive effects of the agreements concluded between the Italian producers and Calcestruzzi would therefore have had no effect on 95% of the Italian market.

3376 In this connection, it should be borne in mind that, in prohibiting agreements which have as their object or effect the restriction of competition and which are likely to affect trade between Member States, Article 85(1) of the Treaty does not require that the agreement in question should have actually affected such trade, which is difficult to prove to a sufficient legal standard in most cases, but requires it to be established that the agreement was capable of having such an effect. The condition that there be an effect on trade between Member States is therefore fulfilled where it is possible to foresee with a sufficient degree of probability, on the basis of a set of factors of law or of fact, that the agreement or practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see, to that effect, the case-law cited above at paragraph 1986).

3377 In this instance, the agreement referred to in Article 4(3)(b) of the contested decision involved 'the three [major] Italian producers (Italcementi — Unicem — Cementir)' (see Calcestruzzi's telex of 2 June 1987 to Titan; contested decision, recital 27, paragraph 10; document 33.126/19218). Its purpose was to induce Calcestruzzi, the main Italian producer of ready-mix concrete (contested decision, recital 27, paragraph 2), to abandon the import of 1.5 million tonnes of cement which would have caused a collapse in prices.

3378 In those circumstances, the Commission was justified in taking the view (recital 57) that that agreement was by its nature liable to have an appreciable effect on the free play of competition within the Community and to affect trade between Member States.

3379 Eighth, Italcementi maintains that it was not necessary to notify the contracts concluded by Calcestruzzi with the Italian producers under Article 4(1) of Regulation No 17, since they satisfied the conditions laid down in Article 4(2)(1) of that regulation. In those circumstances, the Commission could not impose a fine on Italcementi without having checked of its own motion whether or not the conditions for exemption under Article 85(3) of the Treaty had been satisfied. On this point, Italcementi refers to the judgments of the Court of Justice in Case 43/69 *Bilger* [1970] ECR 127, paragraphs 5 and 6, Case 63/75 *Fonderies Roubaix* [1976] ECR 111, paragraphs 7 and 8, and *Stichting Sigarettenindustrie and Others* v *Commission*, cited in paragraph 1088 above, paragraph 75.

3380 It should be borne in mind that, according to Article 4(1) of Regulation No 17, agreements, decisions and concerted practices which come into existence after the entry into force of that regulation and in respect of which the parties seek application of Article 85(3) of the Treaty must be notified to the Commission, failing which no decision in application of Article 85(3) may be taken. However, Article 4(2)(1) of that regulation exempts from notification agreements where the only parties thereto are undertakings from one Member State and where the agreements do not relate either to imports or exports between Member States.

3381 The two conditions thus laid down for exemption from notification are cumulative. If either of those conditions is not satisfied, the agreement cannot qualify for exemption under Article 85(3) of the Treaty unless it has been notified in accordance with Article 4(1) of that regulation (see *IAZ and Others* v *Commission*, cited at paragraph 1320 above, paragraph 33).

3382 In addition, the second condition must be interpreted with reference to the structure of Article 4 of Regulation No 17 and its aims of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85(1), appear in general, by reason of their special characteristics, to be less harmful from the point of view of the objectives of that provision (see *Fonderies Roubaix*, cited above at paragraph 3379, paragraph 6, and *IAZ* v *Commission*, cited above at paragraph 1320, paragraph 34).

3383 In this instance, the agreement found to exist in Article 4(3)(b) of the contested decision does not satisfy the second condition. It was intended (see paragraphs 3353 to 3356 above) to prevent Calcestruzzi, the principal Italian producer of ready-mix concrete, from importing 1.5 million tonnes of cement and to prevent the collapse of prices as a result of those imports. The agreement therefore related to imports to an extent which cannot be considered harmless.

3384 In consequence, the agreement could not qualify for the exemption from notification provided for in Article 4(3) of Regulation No 17. Failing notification, it could not therefore qualify for exemption under Article 85(3) of the Treaty.

3385 Ninth, Cementir points out that the Italian competition authority, to which the Commission had sent its decision not to take action against the national agreements and concerted practices, carried out investigations of the Italian undertakings concerned and sent them an SO. It claims that the Commission, by maintaining in the contested decision the claim based on the Calcestruzzi contracts, breached the principle that no one may be held liable twice on the same facts, at national and Community level.

3386 That argument must be rejected. As the Commission correctly points out in its rejoinder in Case T-87/95, the decision of the Italian competition authority related to the supply contracts and cooperation agreements signed between Calcestruzzi and the Italian cement producers (SIPAC Agreements) as such (Decision No 3671 (I.123) of 6 March 1996 of the Italian Competition and Market Authority, Bollettino of 25 March 1996, pp. 7 to 47). By contrast, the contested decision concerns the agreement concluded between the three Italian cement producers concerning those contracts and agreements, inasmuch as that agreement sought to prevent Calcestruzzi importing cement from Greece.

2. Access to the file

3387 Italcementi and Cementir put forward a series of observations on the basis of documents which they were able to inspect as a result of the measures of organisation of procedure (referred to in paragraphs 164 and 168 above). They seek to show that, by giving them only limited access to the SO and to its investigation file during the administrative procedure, the Commission breached their rights of defence in finding the infringement alleged in Article 4(3)(b) of the contested decision, in so far as they did not have access to exculpatory evidence.

3388 In its observations of 10 February 1997, Italcementi quotes the following extract from the minutes of the meeting of Heracles' board of directors on 23 July 1986 (document 33.126/19880): 'That agreement [the Calcestruzzi-Titan Agreement of 30 April 1986] ... does not contain any exclusive dealing clause inasmuch as the Italians have undertaken [to buy] 70–500 000 tonnes a year, which allows them to obtain supplies from any other producer.' Italcementi considers that document would have been useful to it during the administrative procedure in order to point out the arbitrariness of the connection established by the Commission in the SO, and then in the contested decision, between the signing in April 1987 of five-year supply contracts between Calcestruzzi and the three Italian cement producers Italcementi, Unicem and Cementir, and the concern to prevent Calcestruzzi from importing cement from Greece.

3389 In its observations of 26 November 1997, Italcementi refers to a series of contracts for the supply of cement and clinker from Greece to Italian customers, and Titan's balance sheet for the year 1989 (documents 33.126/20140 to 20147, 20148 to 20156, 20157 to 20167 and 19433 (pp. 22 and 23)). Those documents go to show that, when the three Italian cement producers concluded the supply contracts with Calcestruzzi, imports from Greece, in particular Titan's imports, were flooding the Italian market. They thus contradict the Commission's assertions that the Italian market had been closed to Greek cement producers. In addition, they prove the total absence of any connection between those contracts and the actions taken by the ETF to confront the Greek imports.

3390 Cementir claims, in its observations of 10 February 1997, that the minutes of the meeting of Heracles' board of directors on 23 July 1986 (documents 33.126/19878 to 19880) show, first, that the Greek producers concluded joint supply contracts in Italy and, second, that the contract concluded by Calcestruzzi with Titan in April 1986 did not prevent the other Greek producers from exporting to Italy. In its view, that document also confirms that Cementir's argument is well founded, Cementir having always maintained that its decision to conclude joint supply contracts with Calcestruzzi was solely intended to protect, and was the only possible means of protecting, its commercial interests, namely to avoid the loss of a major local customer, and that the raison d'être of those contracts was to be found in the particular circumstances of the Italian cement and concrete market. Cementir then produces a series of documents (documents 33.126/2945 to 2951, 2934, 2935, 3065 to 3068 and 2954 to 2966) to show that various Italian producers had at the time undertaken action seeking to protect their market against imports from Greece, actions which had nothing whatsoever to do with the Cembureau agreement. Furthermore, those documents reflect the minor role played by Cementir in those local actions.

3391 In its observations of 29 December 1997, Cementir relies on a series of documents showing that exports from Greece, which had been artificially maintained by substantial public subsidies wrongly tolerated by the Commission, and by export cooperation agreements concluded a long time previously between Greek producers (documents 33.126/19369 to 19377, 19387, 19389 and 19412), reached a particularly high level during the whole period considered in the contested decision, and that they even grew after 1987 (documents 33.126/20275 to 20282, 20294, 19889, 19781, 20124 to 20137, 20140 to 20156, 19433, 20001, 19401 and 19410). All those documents, which illustrate how deeply the Italian market was penetrated by Greek exports, are at variance with the existence, alleged by the Commission, of a European agreement for the protection of home markets. In any event, they show that that agreement had no effect in Italy, which the Commission ought to have taken into consideration, at the very least when setting fines. They also bear out Cementir's argument that its participation in the Calcestruzzi agreements was inspired by strictly commercial consideration and that those agreements had no damaging effect on the trade in cement between Italy and Greece.

3392 The Court points out, however, that any observations which Italcementi and Cementir might have been able to formulate during the administrative procedure on the basis of the documents to which they now refer could not have prevailed over the bundle of documents referred to in

recital 27, paragraphs 5 to 10, of the contested decision, on the basis of which the Commission correctly found that the agreements signed between Calcestruzzi and the three Italian cement producers, Italcementi, Unicem and Cementir, in April 1987 constituted the implementation of an agreement between those producers seeking to prevent the threat of imports by Calcestruzzi of cement from Greece, a threat perceived as catastrophic for prices.

3393 In addition, it must be pointed out that in recital 55, paragraph 3, of the contested decision the Commission expresses a view on the argument put forward by the Italian producers during the administrative procedure that 'imports of Greek cement into Italy rose every year, and the agreement had no effect on imports and thus no effect restricting competition'.

3394 Finally, it must be stated with regard to Cementir that during the administrative procedure the Commission clearly perceived the economic context which influenced the reactions of the Western European cement producers, in particular the measures to defend the Italian market against imports from Greece (see contested decision, recital 24, paragraph 2, and footnote 113, and also recital 53, paragraph 8).

3395 It follows that Italcementi and Cementir's observations would not have had even a small chance of altering the outcome of the administrative procedure. Italcementi and Cementir have therefore not proved on this point the existence of any breach of their rights of defence during the administrative procedure.

3396 It is clear from the foregoing considerations (paragraphs 3343 to 3395) that the Commission was fully entitled to find in Article 4(3)(b) of the contested decision that Italcementi, Unicem and Cementir infringed the provisions of Article 85(1) of the Treaty from 3 April 1987 to 3 April 1992 by participating 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.

Measures intended to deflect the Greek production surplus and to curb imports of cement from Greece into the Member States (contested decision, Article 4(4))

3397 In Article 4(4) of the contested decision the Commission finds a number of infringements relating to measures which were designed 'to deflect the Greek production surplus and to curb Greek cement imports into the Member States':

— a concerted practice between Blue Circle, Castle and Rugby designed to prevent and/or reduce Greek cement imports into the United Kingdom (Article 4(4)(a));

— an agreement between Blue Circle and Titan designed to deflect quantities of cement and clinker produced by Titan to the United States and Nigeria and to prevent direct sales of such products by Titan on the European markets (Article (4)(4)(b));

— an agreement between Holderbank and Titan designed to deflect quantities of cement and clinker produced by Titan to the United States and Africa and to prevent direct sales of such products by Titan on the European markets (Article 4(4)(c));

— an agreement between Holderbank and Heracles designed to prevent direct sales of cement by Heracles on the European markets and to deflect quantities of cement and clinker produced by Heracles to other markets (Article 4(4)(d));

— an agreement between Lafarge and Titan designed to deflect quantities of clinker produced by Titan to Canada and to prevent direct sales by Titan on the European markets (Article 4(4)(e));

— an agreement between Lafarge and Heracles designed to deflect quantities of cement and clinker produced by Heracles outside Europe and to prevent direct sales of such products by Heracles on the European markets (Article 4(4)(f));

— a concerted practice between CBR, Heracles and Titan designed to prevent direct sales by the two Greek producers on the European markets (Article 4(4)(g));

— an agreement between Aker, EUROC and Titan designed to deflect quantities of cement and clinker produced by Titan to Africa, the United States and the Bahamas and to prevent direct sales of such products by Titan on the European markets (Article 4(4)(h)).

3398 Before examining the lawfulness of that provision of the contested decision, the Court points out that Dyckerhoff (T-35/95), Ciments Français (T-39/95) and Halkis (T-104/95) deny having taken part, in the context of the ETF, in persuasive measures to encourage the purchase of cement and clinker from Greece.

3399 However, those three undertakings are not alleged to have committed any of the infringements found in Article 4(4) of the contested decision. Their arguments must therefore be rejected from the outset.

3400 It should also be pointed out that, in the observations it lodged on 10 February 1997 following the measure of 2 October 1996 regarding access to the file (see paragraph 164 above), Titan (T-64/95) relied on a number of items in the Italian file which, in its view, would have enabled it to show that there were no agreements or concerted practices between the Italian and Greek producers seeking to divert the Greek production surplus away from European markets and/or prevent exports from Greek producers to those markets, in particular to the Italian market.

3401 However, the contested decision does not accuse Titan of any infringement based on its participation in a bilateral agreement or concerted practice or in channelling measures with the Italian cement producers that were intended to prevent it exporting to European markets. The observations of that applicant must therefore be rejected from the outset.

A — Concerted practice referred to in Article 4(4)(a) of the contested decision

3402 According to Article 4(4)(a) of the contested decision, Blue Circle, Castle and Rugby infringed the provisions of Article 85(1) of the Treaty 'from 16 June 1986 to 5 September 1986, by participating in a concerted practice designed to prevent and/or reduce Greek cement imports into the United Kingdom'.

3403 In recital 28, paragraphs 8 to 11, of the contested decision, the Commission claims that a number of internal Blue Circle memoranda show that Blue Circle held a number of discussions, between June and September 1986, with the Greek producers with the intention of stopping or at least reducing their sales in the United Kingdom.

3404 It goes on to state (paragraph 12, first subparagraph):

'... it is apparent from a number of references in the documents obtained by the Commission that Blue Circle was not acting solely for its own account, but also for that of the two other British producers, Rugby and RTZ (now Castle). Blue Circle took defensive measures against imports on various occasions and got the other two companies to bear some of the costs. This may be seen from the following:

(a) the memorandum on the meeting held on 16 June 1986 between Mr Horner and Mr Presanis (document 33.126/10991) contains an explicit reference to Rugby and RTZ: Blue Circle was counting on their financial support so as to reduce the cost which it would otherwise have to bear alone for the measures envisaged with Titan;

(b) the internal Blue Circle memorandum relating to a meeting with Titan held on 17 September 1986 (document 33.126/11080) refers to a position which, in its talks with Titan, Blue Circle attributes to "the United Kingdom industry" as a whole;

(c) the internal Blue Circle memoranda of 7 September 1987, 22 October 1987, 18 December 1987 and 8 January 1988 (document 33126/11195 to 11198) show that Blue Circle had managed to get the other two companies to bear part of what it called the "Import Battle Costs". In particular, the memorandum of 18 December 1987 (document 33126/11197) reveals that there was a general requirement to share the costs relating to several years, which made it unnecessary to have any specific prior agreement for each operation.'

3405 On the basis of those various documents, it concluded (recital 56, paragraph 3) that there was a concerted practice between Blue Circle, Rugby and Castle aimed at preventing and/or reducing Greek cement imports into the United Kingdom.

3406 At the hearing, Castle (T-56/95) produced documents 33.126/11199 to 11206, which were in the part of the Commission's file which it was able to consult after the measures of organisation of procedure mentioned in paragraphs 164 and 168 above. Those documents are an internal Blue Circle memorandum on the cost of fighting imports.

3407 According to Castle, the comments which it could have made on the basis of those documents, if they had been made available during the administrative procedure, would have enabled it to shed a different light on the content of the four internal Blue Circle memoranda referred to in

recital 28, paragraph 12, first subparagraph, (c), of the contested decision (documents 33.126/11195 to 11198), on which the Commission relied in finding that Castle had agreed to bear part of the costs incurred by Blue Circle in preventing the importation into the United Kingdom of cement from Greece. More specifically, Castle states that documents 33.126/11199 to 11206 would have enabled it to show that there was no connection between those costs and the offer of GBP 595 000 made to Blue Circle by RTZ (Castle's predecessor (contested decision, recital 56, paragraph 4)) as a contribution to the cost of fighting imports, which is the offer mentioned in the abovementioned four internal Blue Circle memoranda and which the Commission expressly links to the costs involved in the battle against Greek imports (contested decision, recital 28, paragraph 12(e), third indent).

3408 The Commission, which raised no objection to the production of those documents, acknowledged that they led it to consider that the offer in question was not related to the costs incurred in the fight against Greek imports. It also acknowledged that in light of those documents it could not rely, as it had relied in the contested decision, on the four internal Blue Circle memoranda referred to in recital 28, paragraph 12, first subparagraph, (c), of the contested decision in order to find that Castle had participated in the infringement referred to in Article 4(4)(a).

3409 So as to allow the parties to submit their observations on the documents produced by Castle, the oral procedure was reopened in Case T-53/95 *Rugby* v *Commission* pursuant to Article 62 of the Rules of Procedure.

3410 The Commission then acknowledged that on reading those documents it could no longer rely on the four internal Blue Circle memoranda referred to recital in 28, paragraph 12, first subparagraph, (c), of the contested decision, in finding that Rugby had participated in the infringement referred to in Article 4(4)(a).

3411 It is none the less necessary to ascertain what it is in the documents relied upon by Castle that sheds a different light on the content of the four internal Blue Circle memoranda in question to such an extent that they should be excluded as evidence when establishing the reality of the concerted practice between Blue Circle, Rugby and Castle referred to in Article 4(4)(a). That is in order to assess the effect of those documents on the other evidence adduced in that connection by the Commission in the contested decision.

3412 The four internal Blue Circle memoranda referred to in the contested decision mention two types of costs incurred by Blue Circle in the import battle.

3413 They raise, first of all, the matter of the costs involved in the 'East German Contract'. In its memorandum of 22 October 1987 (document 33.126/11196) Blue Circle states that it entered

into that contract on its own initiative, 'without the knowledge of the other companies'. Although it expected them to contribute, they had made it clear that they did not acknowledge any responsibility in the matter.

3414 The memoranda deal furthermore with the costs involved in 'Western European Imports'. They show that the costs incurred by Blue Circle in fighting those imports had been the subject, for the period from 1983 to 1986, of at least a tacit agreement between Blue Circle, RTZ and Rugby to share them. Although Blue Circle was able to obtain a contribution to those costs from Rugby, there was a dispute between Blue Circle and RTZ in that regard during the second half of 1987. The offer to contribute GBP 595 000 which RTZ had made to Blue Circle in 1985/86 was not accepted by Blue Circle, since it considered that the contribution should be of GBP 840 000. In the end, RTZ informed Blue Circle that it did not intend to contribute to the costs.

3415 The documents relied upon by Castle (see paragraph 3406 above) are those in the annex to the internal Blue Circle memorandum of 7 September 1987 (document 33.126/11195), a point which was not challenged by the Commission at the hearing.

3416 They describe first of all (documents 33.126/11199 to 11204) nine cases in which, during the period from 1983 to 1986, Blue Circle incurred costs on behalf of the British cement industry in the fight against imports into the United Kingdom:

Item 1 Bulk Freighters
Item 2 Hego
Item 3 Marcon
Item 4 Cebo
Item 5 BCM (UK)
Item 6 East German Cement
Item 7 Cementa
Item 8 White Mountain
Item 9 MHS Cement Sales.

3417 They contain (document 33.126/11205) a 'suggested apportionment' between Blue Circle, RTZ and Rugby of the costs involved in those various cases.

3418 Document 33.126/11206 states:

'It should be noted, however, that it has already been agreed with Rugby that their obligations have been met except for items 5 & 6 by them having dealt with part of item 8 and having made a contribution of GBP 250 000. RTZ have offered GBP 595 000 as their contribution; their view on items 5 & 6 is not yet clear ...'

3419 None of those documents permits the inference that any of the cases they describe concerned imports of cement from Greece, at the end of 1985 or early 1986, into the United Kingdom market.

3420 They do not therefore make it possible to argue, as the Commission does in the contested decision, that the references made by Blue Circle in its four internal memoranda to the sharing between Rugby, RTZ and itself of the costs related to Western European imports, and in particular to the dispute between itself and RTZ at that time over the amount of its contribution, concerned the costs involved in the battle against imports from Greece.

3421 The four internal memoranda cannot therefore serve to show that the infringement found in Article 4(4)(a) of the contested decision actually took place.

3422 At the hearing in Case T-56/95 and when the oral procedure was reopened in Case T-53/95, the Commission nevertheless stated that the contributions made by Castle and Rugby to the costs borne by Blue Circle in the fight against imports from Greece and, thus, the existence of the concerted practice found were sufficiently established by Blue Circle's internal memorandum relating to the meeting held on 16 June 1986 between Mr Horner (Blue Circle) and Mr Presanis (Titan) (contested decision, recital 28, paragraph 8, and paragraph 12, first subparagraph, (a)), more specifically by the information contained in note (b) of its memorandum.

3423 In that connection, it should be stated that the last-mentioned document, drawn up by Mr Horner (Blue Circle) the day after his meeting on 16 June 1986 with Mr Presanis (Titan), relates a series of 'concepts arrived at' by the parties with regard to cement and clinker purchase/sale transactions involving Blue Circle, the Greek producers Heracles and Titan, and Bouri (agent for the Greek producers in the United Kingdom), and with regard to Blue Circle's charter of a Bouri terminal. As things stood at the time, it is apparent that the purpose of those discussions was to find a solution intended to halt or reduce imports into the United Kingdom of cement from Greece. The memorandum states however: 'Bouri will be more expensive to remove once he starts selling.'

3424 Note (b) of that document, to which the Commission specifically refers, states:

'[P]rices are tentative — subject to negotiation. If achieved BCI should not have additional cash outlay beyond GDR commitment and Rugby and RTZ still pay their proportion of nett loss, i.e. $ 5 per tonne'.

3425 That statement shows that Blue Circle, which was confident at the time that Rugby and RTZ would agree to contribute to the costs of the measures which it had been taking since 1983 in the fight against imports into the United Kingdom, 'was counting on their financial support so as to reduce the cost which it would otherwise have to bear alone for the measures envisaged with Titan' (contested decision, recital 28, paragraph 12, first subparagraph, (a)).

3426 They do not however prove that Rugby and RTZ had agreed to share the costs involved in those possible measures. As stated in paragraphs 3415 to 3419 above, Blue Circle's description in January 1987 of the costs which it had borne from 1983 to 1986 on behalf of the British cement industry in the fight against imports into the United Kingdom (documents 33.126/11199 to 11206) does not allude to costs involved in measures taken in the fight against imports from Greece, which Rugby, RTZ and itself are alleged to have agreed to bear together. Neither does the statement referred to in paragraph 3424 above prove that there was any collusion between Rugby, RTZ and Blue Circle designed to prevent and/or reduce imports of Greek cement into the United Kingdom.

3427 In conclusion, the evidence adduced by the Commission in recital 28, paragraphs 8 and 12, first subparagraph, (a), of the contested decision does not therefore prove the existence of the concerted practice referred to in Article 4(4)(a).

3428 In recital 28, paragraph 12, first subparagraph, (b), of the contested decision, the Commission relies once again on the internal Blue Circle memorandum relating to its meeting of 17 September 1986 with Titan (document 33.126/11080) in order to establish the existence of the concerted practice referred to in Article 4(4)(a) (see paragraph 3404 above). That memorandum '[referred] to a position which, in its talks with Titan, Blue Circle attributes to "the United Kingdom industry" as a whole'.

3429 The Court points out that in the memorandum in question Blue Circle relates what transpired during its meeting on 17 September 1986 with Titan, which dealt with the situation of the Greek cement industry and the question of imports into the United Kingdom of cement from Greece.

3430 That memorandum states among other things:

'Turning to the UK, I explained that the British Industry had taken a firm position and were unwilling to reach any accommodation with Bouri in the UK. There was considerable political and union activity going on, which we could not call a halt to, and were not minded to do so anyway.'

3431 Those statements do not make it possible to identify the precise nature of the conduct referred to when Blue Circle alludes to the taking of a firm position by the 'British industry'.

3432 Whatever its nature, Blue Circle might have wished to give Titan the impression that it was speaking on behalf of the United Kingdom industry as a whole, in order to bring pressure to bear on its interlocutor in the discussions then taking place in an attempt to resolve the matter of exports to the United Kingdom of Greek cement.

3433 In those circumstances, the evidence adduced by the Commission in recital 28, paragraph 12, first subparagraph, (b), of the contested decision cannot prove the existence of collusion between Blue Circle, Rugby and Castle intended to eliminate or reduce imports into the United Kingdom of Greek cement.

3434 It follows from the foregoing (paragraphs 3406 to 3433) that the Commission has not established the existence of a concerted practice between Blue Circle, Castle and Rugby designed to prevent and/or reduce Greek cement imports into the United Kingdom.

3435 It follows that Article 4(4)(a) of the contested decision must be annulled.

3436 It is therefore not necessary to examine the observations which Rugby (memoranda of 7 February and 29 December 1997) and Castle (memoranda of 10 February and 24 December 1997) submitted following the measures of organisation of procedure mentioned in paragraphs 164 and 168 above with a view to proving that their rights of defence had been infringed during the administrative procedure in connection with the finding of the infringement in Article 4(4)(a) of the contested decision.

B — Agreements and concerted practice referred to in Article 4(4)(b) to (h) of the contested decision

3437 In Article 4(4)(b) to (h) of the contested decision, the Commission finds seven infringements each of which involved, on the one hand, a European producer which participated in the ETF and, on the other, the Greek producers Heracles and/or Titan.

3438 The various alleged infringements relate to the purchases and contracts described in recital 28, paragraphs 15 to 22, of the contested decision, which all represent, according to the Commission (contested decision, recital 56, paragraph 1) 'the implementation of agreements and concerted practices prohibited by Article 85(1)', since they 'form part of the persuasive measures ("carrot actions") adopted by the Cembureau Task Force with a view to deflecting the Greek production surplus and halting or, at the very least, curbing exports within Europe by the Greek cement producers'.

3439 In the contested decision (recital 56, paragraphs 5, 8, 11, 12 and 13), the Commission takes the view that the abovementioned purchases and contracts were the implementation of agreements or concerted practices contrary to Article 85(1) of the Treaty because they were designed to prevent direct sales by the Greek producers on the European markets and/or to deflect all or part of the quantities concerned to other markets, and that the parties concerned were aware of this.

3440 It therefore finds that the Greek producers were responsible for infringements of Article 85(1) of the Treaty on the ground that, in its view, they knew that the aim pursued by their European co-contractors through the purchase transactions in question was to prevent direct sales of their products on the European markets and/or to deflect quantities of those products to other markets. It relies, in that connection, on various documents referred to in recital 28 of the contested decision to show that, after the problem involving imports into Western Europe of Greek cement arose, the Greek producers held discussions from mid-1986 with the European producers with a view to finding a solution to that problem.

3441 In that connection, it should first be observed that the Commission does not dispute that the business relations between the cement producers in general, and between the parties to the alleged infringements in particular, constitute a standard practice on the international market, which existed well before the problem of imports of Greek cement arose (see contested decision, recital 28, paragraphs 15, eighth subparagraph, 16, last subparagraph, 19, last subparagraph, and 22, last subparagraph). The purchases referred to in recital 28 of the contested decision cannot therefore be considered to be the result of an unusual process engendered by the conditions of the time, which would in itself make it possible to deem them unlawful. It must also be pointed out that other contracts entered into during the same period between Western European producers and the Greek producers were referred to in the SO (see point 20), but are no longer referred to in the contested decision.

3442 Next, it should be borne in mind that, towards mid-1985, the Greek producers were faced with very serious problems of over-capacity linked to the collapse of their Middle-Eastern export markets. They sought to resolve those problems by looking towards Western Europe, where they began to export, towards the end of 1985 or early 1986, on markets which they regarded as most accessible (contested decision, recital 24, paragraph 1, and contested decision, recital 56, paragraph 1). That situation induced a number of non-Greek cement producers and associations of cement producers to set up the ETF, which was entrusted with devising, *inter alia*, persuasive measures to eliminate the imports of cement into Western Europe, primarily from Greece. According to the Zurich/Céligny document (contested decision, recital 28, paragraph 1; document 33.126/18775), the persuasive measures in question were to consist in placing on a certain number of markets, primarily the United States of America and West Africa, tonnage of cement produced by the '"destabilising" cement industry', that is to say, at that time, the Greek cement industry.

3443 In such a context, the mere fact that the Greek producers, following their discussions with the western European producers, knew that, by the purchases in question, the latter intended to halt or, at least, reduce their direct sales in Western Europe does not allow the conclusion that they were parties to agreements or concerted practices contrary to Article 85(1) of the Treaty.

3444 Such knowledge can be deemed to reveal unlawful conduct only if it is established that it was accompanied by the adherence of the Greek producer in question to the object pursued by the western European producers through the purchases concerned. Since the object in question was clearly against the interests of the Greek cement industry (see paragraph 3442 above), only evidence of an undertaking by the Greek producer that, in return for the purchases or contracts under consideration, it would halt or reduce its direct sales on the European markets could be deemed to constitute adherence by it to that object.

3445 That was in any event the approach adopted in the SO by the Commission as regards the factor rendering the Greek producers liable.

3446 In point 61(h)(v) it stated:

'All the contracts listed in point 20 are agreements prohibited by Article 85(1). As may be seen in points 16 to 20, such contracts form part of the "carrot actions" adopted by the Cembureau Task Force in order to deflect the Greek production surplus, and the clear condition governing the conclusion of the contracts was that the Greek producers must cease their direct supplies in Europe.

Consequently, all the contracts must be deemed to be agreements in breach of Article 85, not only those concerning supplies in Europe, but also those concerning supplies outside Europe. Such latter contracts also restrict competition since, by virtue of their contractual obligations, the Greek producers selling outside Europe have lost the possibility of marketing all or a large proportion of their goods within the common market, where they were entitled to hope to be able to market them in the light of circumstances and in particular the prices which they could have charged. This applies all the more as the Greek producers had already begun to export to the Community countries which they considered most vulnerable and as the declared aim of the contracts was to halt such exports.'

3447 It is unequivocally clear from that passage that, in the SO, the Commission found the Greek producers liable for agreements with Western European producers contrary to Article 85(1) of the Treaty on the ground that, in its view, in exchange for the contracts in question, they had adhered to the unlawful object pursued by the Western European producers through such contracts, by undertaking in their turn to 'halt' (or 'cease') their direct supplies on the Community markets, thus losing, because of their 'contractual obligations', the chance of disposing of their products on those markets in accordance with their commercial interests.

3448 In conclusion, the Greek producer in question can be held responsible for conduct contrary to Article 85(1) of the Treaty only if there is evidence that in exchange for the purchases in question it undertook to halt or reduce its direct sales on the European markets.

3449 Only one undertaking, apart from Heracles and/or Titan, is accused of each of the infringements referred to in Article 4(4)(b) to (h) of the contested decision, namely the European co-contractor involved in the purchases or contracts in question, it being understood that, in Article 4(h), the Commission attributes to Aker and EUROC the allegedly unlawful conduct of their joint subsidiary Scancem (see contested decision, recital 28, paragraph 22, and recital 56, paragraph 13). It is therefore only on the condition set out in the preceding paragraph that it may be concluded that there was an agreement or concerted practice, as found in those various paragraphs of Article 4 of the decision. Even if it were to be found that the European co-contractor in question purchased products from Greece with a view to the anti-competitive object pursued at ETF level, it cannot be accused of having participated on its own in an unlawful agreement or concerted practice.

3450 In the light of those considerations, the legality of Article 4(4)(b) to (h) of the contested decision must be examined.

1. Agreement between Blue Circle and Titan referred to in Article 4(4)(b) of the contested decision

3451 According to Article 4(4)(b) of the contested decision, Blue Circle and Titan infringed the provisions of Article 85(1) of the Treaty 'from 4 July 1986 to 31 December 1989, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan to the United States and Nigeria and to prevent direct sales of such products by Titan on the European markets'.

3452 The matters relating to that infringement are set out in The Facts, in recital 28, paragraph 15, of the contested decision, and in the Legal Assessment, in recital 56, paragraph 5, of the contested decision.

3453 In recital 28, paragraph 15, first subparagraph, the Commission refers to two telexes of 4 and 7 July 1986 (documents 33.126/19545 and 19546) by which Blue Circle purchased from Titan 20 000 tonnes of cement destined for Boston at the price of USD 29 per tonne FOB. It also refers (third subparagraph) to telexes of 11 and 14 August and 1 and 5 September 1986 (documents 33.126/19547 to 19551 and 19553 to 19555) which report the purchase by Blue Circle of some 25 000 tonnes of cement from Titan on behalf of Blue Circle Atlantic for a maximum price of USD 27 FOB depending on the strength of the cement. It compares the quantities and the prices mentioned in those various telexes to the following information which appears in the record of the ETF meeting on 19 August 1986 (contested decision, recital 28, paragraphs 3 and 15, second and third subparagraphs): 'BCI [Blue Circle Industries] has started taking deliveries from Greece to US already (first vessel completed discharging Boston 20 000 ton second loading shortly for Baltimore 25 000 ton). Price: 1st shipment USD 29 — FOB and 2nd USD 27'.

3454 It then observes (paragraph 15, fifth subparagraph):

'The following contracts for cement supplies to the United States were signed between Blue Circle Atlantic and Titan: contract of 14 October 1986, amended on 30 November 1986 (documents 33.126/10926 to 10941); contract of 1 August 1987, amended on 2 August 1987, 31 August 1987, 15 January 1988 and 24 October 1988 (documents 33.126/10896 to 10905, 10946 to 10951 and 19562 to 19579); contract of 24 October 1988 (documents 33.126/10907 to 10914). These contracts relate to supplies, respectively, of 300 000 tonnes from 1 January to 31 December 1987, 200 000 tonnes from 1 January to 31 December 1988 plus an option for 200 000 tonnes, and 216 000 tonnes from 1 November 1988 to 31 December 1989.'

3455 According to the Commission, those quantities are to be compared with the quantities which Blue Circle stated it wished to purchase from Titan and Heracles for the United States for each

of the years 1986/87, 1987/88 and 1988/89. The Commission observes, moreover, that item 1.5 on the agenda for the ETF meeting held on 11 February 1987 states 'Greek exports: quantities and contracts with members of the Task Force 1987 [documents 33.126/18937 and 18938]'.

3456 It also mentions (sixth subparagraph) the telexes of 17 December 1986, 7 and 15 January, 12 and 26 February, 1 and 3 April 1987 (documents 33.126/19461 to 19469), concerning cement ordered by Blue Circle from Titan for Nigeria. According to the Commission (same subparagraph), those purchases should be compared with the quantities of 100 000 tonnes for unspecified destinations which Blue Circle stated that it wished to purchase for each year from 1986 to 1989.

3457 At recital 56, paragraph 5, the Commission concludes:

'Blue Circle's purchases from Titan agreed by telex message on 4 July 1986, 11 August 1986, 14 August 1986, 1 September 1986, 5 September 1986, 17 December 1986, 7 January 1987, 15 January 1987, 12 February 1987, 26 February 1987, 1 April 1987 and 3 April 1987 and the contracts concluded on 14 October 1986, 1 August 1987 and 24 October 1988 and their additional clauses, between Blue Circle and Titan (see paragraph 15 of recital 28) embody an agreement between undertakings in breach of Article 85(1) from 4 July 1986 to 31 December 1989. The purpose of the contract was to deflect the quantities concerned to markets other than the European markets, and this was known to the two parties (see paragraphs 1 to 11 and 15 of recital 28).'

3458 Rugby (T-53/95) and Castle (T-56/95) put forward a number of arguments to show the lawfulness of the purchases to which the agreement referred to in Article 4(4)(b) of the contested decision related. By those arguments, they in actual fact seek to prove the lawfulness of the object of the concerted practice found in Article 4(4)(a), a practice which, in the Commission's view, related in particular to some of the purchases covered by Article 4(4)(b) (see contested decision, recital 56, paragraph 3(i)).

3459 Those arguments must be rejected here, inasmuch as, first, Article 4(4)(a) of the contested decision has been annulled (see paragraphs 3406 to 3435 above) and, secondly, neither Rugby nor Castle is charged with the infringement referred to in Article 4(4)(b).

3460 Titan (T-64/95) and Blue Circle (T-88/95) put forward an argument on the substance whereby they seek the annulment of Article 4(4)(b). They claim, moreover, that the Commission infringed their rights of defence when it found the infringement in question, in that it did not

grant them access during the administrative procedure to the full SO and its investigation file, thus depriving them of allegedly exculpatory evidence.

3461 As to the substance, Titan argues that, whatever might have been the object pursued by the members of the ETF through the transactions referred to in recital 28 of the contested decision, they formed part, so far as it was concerned, of its normal export activities. Those transactions were not tainted, so far as it was concerned, by any anti-competitive purpose.

3462 Titan gives details of the economic context and the commercial opportunities which prompted it to seek new export markets from 1986. It explains that it turned its attention to the American market, which was booming, as well as to Western European markets, where it considered that there were unexploited opportunities. Those exports to the American market were determined solely by market forces and by the single concern to carry out profitable transactions. Furthermore, the quality of the cement which it produced (in particular its low alkaline content) corresponded to what was required on that market. As for the European markets, Titan observes that, on account of the structural over-capacity of those markets at the time, it, like the other Greek producers, had to overcome innumerable pressures, difficulties, obstacles (commercial, technical and administrative) and dissuasive measures, intended to prevent it from disposing of its production surpluses. In that situation, it cannot be criticised for having accepted purchase offers made to it from various European producers.

3463 Titan adds that, despite those many obstacles, its exports in Western Europe boomed from 1985. Thus it cannot be accused of having sought to reduce the level of intra-Community trade in cement and clinker. The fact that its European partners might have purchased its production surplus with a view to absorbing those quantities deemed to be destabilising for their markets does not make it possible to conclude that there was an unlawful intention on its part. Titan in any event did not knowingly participate in an unlawful agreement contrary to its interests by agreeing to the persuasive proposals whose purpose was to divert its production to non-member countries.

3464 Titan also complains that the Commission infringed the principle of equal treatment by finding its exports to the United States to be measures implementing the Cembureau agreement without having assessed the legality of the export activities of the members of the ETF on non-Community markets, in particular the United States, when their activities represented a major proportion of imports onto the American market. It claims also that the Commission failed to fulfil its obligation to provide reasons in that it did not set out in the contested decision the reasons which had led it to consider that the exports from Greece should be distinguished in that respect from other exports from Europe.

3465 Titan and Blue Circle submit, next, that the purchases referred to in recital 28, paragraph 15, of the contested decision, formed part of the long-term commercial relationship between Blue Circle and Titan, on the one hand, and Titan and Nigeria, on the other. Titan explains that trade between European cement producers with a view to re-exportation to countries which are not members of the Community is standard practice. Blue Circle adds that the contested decision does not suggest that an express or implied condition of those purchases was that Titan should in future refrain from exporting cement to any other place in the common market. It claims that the Commission made an error of law. Even if one of the reasons which induced it to purchase Greek cement was to reduce the surplus of that cement in Western Europe, and in the United Kingdom in particular, the existence of that intention, one of a number of reasons for those purchases, did not make those normal commercial transactions an infringement.

3466 So far as concerns, firstly, the cement purchased by Blue Circle from Titan destined for the United States, referred to in paragraph 3453 above, the Court points out that the parties do not dispute the connection made by the Commission between those purchases and the statements in the record of the ETF meeting on 19 August 1986 (contested decision, recital 28, paragraph 15, second and third subparagraphs). Such a connection leads to the view that those purchases had their origin in Blue Circle's contribution to the persuasive measures referred to in the Zurich/Céligny document in order to absorb the 'destabiliser's tonnage' (contested decision, recital 28, paragraph 1; document 33.126/18775), measures which it had been for the ETF to evaluate (see paragraph 2538 above).

3467 Moreover, when that document was being finalised, Blue Circle had pointed out that its American subsidiary, Blue Circle Atlantic, could place some of that 'destabiliser's tonnage' on the American market (contested decision, recital 28, paragraph 1; document 33.126/18775).

3468 That analysis is confirmed by the following extract from the internal Blue Circle memorandum (contested decision, recital 28, paragraphs 4 and 11; document 33.126/11083) entitled 'Greek imports', undated, but drafted in early September 1986, which is not challenged by the parties:

'In recent weeks Blue Circle, Holderbank and Lafarge have all started absorbing some Greek cement or clinker, primarily from Titan, in their US and Canadian operations in good faith to keep the door open with the Greeks.'

3469 None the less, neither the telexes concerning Blue Circle's purchases destined for the United States (see paragraph 3453 above), the record of the ETF meeting on 19 August 1986, nor the documents mentioned in the two preceding paragraphs contain anything to show that, in

exchange for the purchases in question, Titan gave Blue Circle an undertaking that it would halt or reduce its direct sales on the European markets, particularly in the United Kingdom.

3470 On the contrary, in a letter dated 22 September 1986 to Holderbank (contested decision, recital 28, paragraph 4; document 33.126/11094), Blue Circle stated that it had 'decided to continue with [its] arrangement to take Greek tonnage for [its] US operations, despite no resolution so far of the UK problem'. It continues: 'I told Presanis (and Karageropoulos in an earlier phone call) that so long as the Greeks remained a threat to the UK market we would not go on paying the premium prices that we had accepted on the recent shipments from Titan and our future US business would have to be at market rates.' It concludes: 'We hope that by holding out the prospects of continuing Blue Circle business in the USA, we will at least keep down their level of activity in the UK.'

3471 Such statements show that no solution to the problem of Greek imports had been found in the United Kingdom at the end of September 1986. They show that Blue Circle had not obtained a promise from Titan that it would halt or reduce its direct sales on the United Kingdom market in exchange for orders placed between the beginning of July and the beginning of September 1986.

3472 The lack of evidence of such an undertaking by Titan is also clear from the following extract from an internal Blue Circle memorandum of 24 October 1986 (document 33.126/11132, not cited in the contested decision): '[T]he Greeks are here to stay. Whilst political attention remains focused on the issue they cannot withdraw quietly and not being bound by the same rules of trading which limit our room for manœuvre they have everything to gain and nothing to lose by waiting.'

3473 In short, it appears that the orders referred in recital 28, paragraph 15, first and third subparagraphs, of the contested decision were merely a gesture of 'good faith' on the part of Blue Circle intended to 'to keep the door open with the Greeks' (contested decision, recital 28, paragraph 4; document 33.126/11083).

3474 As regards, secondly, the contracts between Blue Circle Atlantic and Titan (see paragraph 3454), it must be observed that the documents relating to those contracts do not show that, in exchange for them, Titan gave an undertaking to Blue Circle that it would halt or reduce its direct sales on the European markets. The extract from the internal Blue Circle memorandum of 24 October 1986 (see paragraph 3472 above) is proof to the contrary, in any event so far as concerns the contract of 14 October 1986.

3475 As has been pointed out above (paragraph 3455), the Commission makes a connection between the tonnage provided for under the contracts in question and those which 'Blue Circle stated it wished to purchase from Titan and Heracles for the United States for each of the years 1986/87, 1987/88, 1988/89'.

3476 In that respect, the Court points out that, in an internal memorandum 'Discussion paper — Cheap imports — Meeting at 9.30 a.m. on Monday 7 July 1986' (contested decision, recital 28, paragraph 9; documents 33.126/10992 to 10994), Blue Circle, after setting out the solutions available to the British cement industry, namely a policy of non-cooperation with the Greek producers or a policy of cooperation with them, states with regard to the latter that the discussions with Titan and Heracles had led to examination of two alternative solutions.

3477 According to the first solution, a European intermediary would purchase 1 million tonnes over one year for shipment to destinations outside Europe.

3478 The second solution envisaged a three-year agreement under which Titan and Heracles would sell part of their production to Blue Circle. It was thus envisaged that in each of the three years of the agreement 500 000 tonnes would be bought for shipment to the United States.

3479 The tonnage and destinations mentioned under that second solution are set out in a handwritten, undated Heracles note (contested decision, recital 28, paragraph 9; documents 33.126/19864 and 19865), as well as in a memorandum of understanding, also undated (contested decision, recital 28, paragraph 9; document 33.126/11096).

3480 Even if what had been offered in exchange for the two 'solutions' was the halting or, at least, the reduction by Heracles and Titan of their direct sales to the United Kingdom, it must be pointed out that none of the documents referred to in the context of those solutions show that either of them was adopted by the parties.

3481 As the Commission observes (contested decision, recital 28, paragraph 9), it is clear from the internal Blue Circle memorandum for the meeting of 7 July 1986 that the Greek producers had not accepted the one-year restriction under the first solution.

3482 So far as concerns the second solution, the same internal Blue Circle memorandum states that it is true that it '[had] been agreed in principle with the Greeks, but [that it was] contingent upon,

as is [the first solution], reaching agreement with Bouri' (contested decision, recital 28, paragraph 9; document 33.126/10993). However, the contested decision does not adduce any evidence to show that the latter agreement was reached.

3483 On the contrary, the memorandum of understanding referred to in paragraph 3479 above states (item 5): 'The Parties will enter into a formal agreement(s) to reflect the above intentions. The implementation of the agreement(s) will be conditional upon the Buyer concluding an agreement with Party D, in respect of its distribution facilities in the United Kingdom and Sellers appointing Buyer as its distributor in the UK.' However, once again the contested decision does not contain any evidence that those various conditions were fulfilled.

3484 Nor does the undated handwritten Heracles note (see paragraph 3479 above) prove that the second solution set out in the internal Blue Circle memorandum on the meeting on 7 July 1986 was adopted by the parties.

3485 In those circumstances, there is no evidence to establish, as the Commission claims, that there is a link between the quantities concerned by the contracts referred to in recital 28, paragraph 15, fifth subparagraph, of the contested decision and 'the quantities which Blue Circle stated that it wished to buy from Titan and from Heracles for the United States for each of the years 1986/87, 1987/88, 1988/89' during its discussions with them.

3486 Moreover, at the same time Blue Circle and Titan were discussing a programme under which purchases would be made for the United States 'independently from the [United Kingdom] situation' (internal Blue Circle memorandum on the meeting held on 17 September 1986 between Blue Circle and Titan; contested decision, recital 28, paragraph 10; document 33.126/11081). Under that programme, Blue Circle 'could make available 600 000 — 1 million tonnes of business to Titan and/or Heracles in the North East [United States]' (same document).

3487 The contracts referred to in recital 28, paragraph 15, fifth subparagraph, of the contested decision could have been related to that programme of importation rather than to the discussions to which the Commission links them.

3488 The Commission (same subparagraph) also compares those contracts with the fact that item 1.5 on the agenda of the ETF meeting on 11 February 1987 reads 'Greek exports: quantities and contracts with members of the Task Force 1987' (document 33.126/18937 and 18938).

3489 None the less, such a statement does not prove that the contracts were concluded as a result of an agreement between Titan and Blue Circle which was unlawful in so far as Titan had promised Blue Circle that in exchange for those contracts it would halt or reduce its direct sales on the European markets.

3490 So far as concerns, thirdly, Blue Circle's orders for Titan cement destined for Nigeria (see paragraph 3456 above), the telexes relating to those contracts do not show that, in exchange for them, Titan gave an undertaking to Blue Circle that it would halt or reduce its direct sales on the European markets, in particular in the United Kingdom.

3491 As has been stated above (paragraph 3456), the Commission compares the quantities concerned by those orders to 'the quantities of 100 000 tonnes for unspecified destinations which Blue Circle stated that it wished to purchase for each year from 1986 to 1989'.

3492 Under the second solution set out in the internal Blue Circle memorandum on the meeting of 7 July 1986 (see paragraph 3476 above), it was envisaged in particular that Heracles and Titan would sell to Blue Circle, during each of the three years of the agreement referred to in that second solution, 100 000 tonnes for unspecified destinations. Those particulars are also set out in the handwritten Heracles note and in the abovementioned memorandum of understanding (see paragraph 3479 above).

3493 However, as has been stated above (see paragraphs 3480 and 3482 to 3484), there is no evidence to support the view that the solution in question was adopted.

3494 Moreover, there is no evidence establishing, as the Commission claims, that there is a link between the quantities concerned by the orders referred to in recital 28, paragraph 15, sixth subparagraph, of the contested decision and 'the quantities of 100 000 tonnes for unspecified destinations which Blue Circle stated that it wished to purchase for each year from 1986 to 1989' during its discussions in July 1986 with the Greek producers.

3495 In recital 28, paragraph 15, penultimate subparagraph of the contested decision, the Commission sets out the following extract taken from Mr Marshall's (Blue Circle) note of 14 May 1987 concerning the EPC meeting of 13 May 1987 (documents 33.126/11344 and 11345):

'Titan. They were pleased with their contact with Blue Circle and in particular with Philip Hawkesworth. Ivan Tryfonas commented that with hindsight he believes that common sense is beginning to prevail, certainly in Titan.

They respect the way we have dealt with them in the USA and feel that their supplying Northern Ireland is not as emotive as to the mainland.'

3496 According to the Commission, that extract shows that the purchases referred to in recital 25, paragraph 15, of the contested decision 'represent something other than a normal business relationship' (same paragraph, last subparagraph).

3497 In that connection, the Court points out that the said extract does not contain any reference to Blue Circle's orders placed with Titan destined for Nigeria. It cannot therefore, in any event, prove the unlawful nature of the purchases referred to in recital 28, paragraph 15, sixth subparagraph, of the contested decision.

3498 Moreover, the comments and views expressed by Titan's representative to the participants in the meeting of the EPC of 13 May 1987 might have been intended to make the European producers reduce the pressure they were bringing to bear on the Greek producers, in particular on Titan, in order to induce them to halt their exports to Western European markets. In any case, they do not prove that in exchange for the purchases referred to in recital 28, paragraph 15, of the contested decision Titan promised Blue Circle that it would halt or reduce its direct sales on the European markets.

3499 The Commission (defence and rejoinder in Case T-64/95) refers to a number of documents to show that Titan participated in the elements of the infringement described in recital 28, in particular paragraph 15, of the contested decision.

3500 It relies, in the first place, on the content of the Zurich/Céligny document (see paragraph 2539 above). According to the Commission, that document shows that the members of the ETF quickly persuaded Titan, after it wished to break the rule on non-transhipment to home markets, to cooperate in implementing that rule by accepting measures intended to share the market.

3501 However, the Zurich/Céligny document only proves that, following the 'problems posed by the destabilising cement industry' (document 33.126/18772), the Western European cement producers agreed a number of measures, in particular persuasive, intended to eliminate those destabilising imports. It does not prove that Titan, which, for obvious reasons, was in no way involved in drawing it up nor ever asked to approve its content, adhered to the anti-competitive purpose pursued by the measure it advocated, by agreeing to halt or reduce its direct sales on the European markets in exchange for purchases by the European producers of its production

surpluses. It cannot therefore constitute proof that the purchases referred to in recital 28, paragraph 15, of the contested decision embodied an unlawful agreement between Blue Circle and Titan.

3502 Secondly, the Commission observes, as it does in the contested decision (recital 28, paragraph 11), that, according to the internal Blue Circle memorandum of early September 1986 (see paragraph 3468 above), 'at a meeting held the previous week in Athens, Titan proposed restricting the combined sales of Titan and Heracles in the United Kingdom to 300 000 tonnes the first year and 500 000 tonnes the second and third years'.

3503 However, that memorandum does not show that the offer in question was made by Titan in exchange for the purchases and contracts referred to in recital 28, paragraph 15, of the contested decision. Contrary to the Commission's submission, the statement in that memorandum to the effect that 'Titan see a quota for the UK as additional to any tonnage being absorbed by Blue Circle in its US operations' does not establish a link between the purchases made by Blue Circle of Titan cement for the United States and the reduced presence of Titan on the United Kingdom market. At most, it evinces Titan's concern not to have the quantities purchased by Blue Circle for its operations in the United States taken into account as part of a possible agreement to limit imports into the United Kingdom of cement from Greece.

3504 Moreover, the abovementioned offer was never seen by Blue Circle as a clear undertaking by Titan to halt or reduce its direct sales in the United Kingdom. In a letter to Holderbank dated 22 September 1986 (document 33.126/11094), that is to say shortly after Titan made the offer, Blue Circle stated that there was 'no resolution so far of the UK problem'. Furthermore, as the Commission states (recital 28, paragraph 13), restriction of Greek imports into the United Kingdom was the result of an agreement reached at the end of December 1986 between the United Kingdom and Greek governments rather than between the Greek and United Kingdom producers.

3505 Thirdly, the Commission submits that Titan was actively involved in the search for solutions likely to guarantee, in the interest of all the parties concerned, the stability of the Community markets. It relies on the various documents referred to in recital 28, paragraphs 1 to 9, of the contested decision.

3506 The documents referred to in recital 28, paragraphs 3, 5, 8 and 9 of the contested decision clearly show that discussions were held between Titan and European cement producers, primarily Blue Circle, with a view to finding a solution to the problem posed by the importation into Western Europe of cement from Greece.

3507 None the less, as the Commission finds (recital 28, paragraph 7), 'the ETF members did not manage to reach a collective agreement with the Greek producers [to absorb destabilising quantities], since the Greek producers were very hesitant on this subject'. The solution based on a restriction of Greek imports into the United Kingdom was the result of an intergovernmental agreement between the United Kingdom and Greece (see paragraph 3504 above).

3508 In any event, none of the documents referred to in recital 28, paragraphs 1 to 9, of the contested decision shows that, in exchange for the transactions referred to in recital 28, paragraph 15, Titan gave an undertaking to halt or reduce its direct sales on the European markets.

3509 Fourthly, the Commission states that, according to the letter of 22 September 1986 from Blue Circle to Holderbank, the special prices fixed in the contracts agreed between Titan and Blue Circle Atlantic were explained by the anti-competitive object of those contracts rather than the particular quality of the Titan products. It also relies on the following extract from the internal Blue Circle memorandum on the meeting of 17 September 1986 (documents 33.126/11080 to 11082): 'Presanis [Titan] agreed that the premium prices we had been paying on the shipments to Boston and Baltimore this year had been contingent upon finding a negotiated solution in the UK and that next year's business should be discussed, therefore, on a commercial basis relative to BC Inc's interests.'

3510 It is true that those various items of evidence confirm the persuasive intention behind Blue Circle's purchases referred to in recital 28, paragraph 15, first and third subparagraphs, of the contested decision. However, the internal Blue Circle memorandum of 17 September 1986 shows also that, in exchange for those purchases at preferential prices, Titan had at most agreed to give some thought to a negotiated solution to the problem posed by the importation into the United Kingdom of cement from Greece.

3511 However, none of those particulars shows that in exchange for orders from Blue Circle for Boston and Baltimore Titan gave an undertaking to halt or reduce its direct sales in the United Kingdom. Rather, as has been pointed out (see paragraph 3470 above), the Blue Circle letter to Holderbank of 22 September 1986 emphasises the continuing absence, up to the end of September 1986, of a solution to the matter of imports into the United Kingdom of cement from Greece.

3512 In view of the foregoing (paragraphs 3439 to 3450 and 3466 to 3511), it must be concluded that the Commission has not established that the purchases and contracts referred to in recital 28, paragraph 15, of the contested decision embodied an anti-competitive agreement between Blue Circle and Titan designed to deflect quantities of cement and clinker produced by Titan to the United States and Nigeria and to prevent direct sales of such products by Titan on the European markets.

3513 It follows that Article 4(4)(b) of the contested decision must be annulled.

3514 Accordingly, there is no need to examine the observations which Blue Circle (memorandum of 10 February 1997) and Titan (memoranda of 10 February and 18 December 1997) submitted following the measures of organisation of the procedure mentioned in paragraphs 164 and 168 above in order to prove that their rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(b) of the contested decision.

2. Agreement between Holderbank and Titan referred to in Article 4(4)(c) of the contested decision

3515 According to Article 4(4)(c) of the contested decision, Holderbank and Titan infringed the provisions of Article 85(1) of the Treaty 'from 19 June 1986 to 31 December 1990, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan to the United States and Africa and to prevent direct sales of such products by Titan on the European markets'.

3516 The arguments concerning that infringement are set out, in The Facts, in recital 28, paragraph 16, of the contested decision and, in the Legal Assessment, in recital 56, paragraphs 6 and 8, of the contested decision.

3517 In recital 28, paragraph 16, first subparagraph, the Commission observes:

'There is a draft contract between Titan and UMAR (a Holderbank subsidiary) dated 19 June 1986; this draft was signed by Titan but not by UMAR and relates to the supply of clinker and cement for the United States (document 33.126/19501 to 19511). According to Titan (p. 50 of the reply to the statement of objections), this contract was not accepted by UMAR: nevertheless during June and July 1986 Titan supplied UMAR with two cargoes of clinker and one of cement totalling 61 437 tonnes. This tonnage is to be compared with the record of the ETF meeting of 19 [August] 1986 (see paragraph 3 above). "Holderbank has also agreed to buy (not signed yet) 90 000 tons from Titan. One shipment of 7 000 tons has been taken ..."'

3518 It states next (second subparagraph) that two contracts were signed between UMAR and Titan on 16 January and 18 December 1987 relating to the supply of clinker of at least 200 000

tonnes for 1987 and 90 000 tonnes for 1988 to Ideal Basic Industries (a Holderbank subsidiary in the United States) (documents 33.126/19482 to 19489).

3519 It also states (third subparagraph) that, on 20 August 1988, Pays Bas Cement Co (a subsidiary of Holderbank in the Netherlands) and Titan signed a contract relating to the shipment from 1 August 1988 to 31 December 1990 of a total of 300 000 tonnes of clinker, at least half of which was destined for Benelux and the rest for Africa (documents 33.126/19814 to 19843).

3520 It compares (fourth subparagraph) the quantities concerned by those three contracts with 'the undertaking of ETF members to buy a million tonnes and more, and even 2 to 3 million tonnes from Greek producers (see documents mentioned in paragraphs 1 to 6 above)'.

3521 In recital 56, paragraphs 6 and 8, it concludes:

'The purchases made by the Holderbank group in June and July 1986 from Titan and the contracts signed between the Holderbank group and Titan on 16 January 1987, 18 December 1987 and 20 August 1988 (see paragraph 16 of recital 28) embody an agreement between those undertakings in breach of Article 85(1) from 19 June 1986 to 31 December 1990.

...

The purpose of the contracts was to prevent direct sales by the two Greek producers on the European markets and to deflect part of the quantities concerned to other markets, and this was known to the parties in question (see paragraphs 1 to 7 and 16 and 17 of recital 28).'

3522 Titan (T-64/95) and Holderbank (T-68/95) submit arguments on the substance seeking the annulment of Article 4(4)(c) of the contested decision. Titan also claims that the Commission infringed its rights of defence when it found the infringement in question, because it did not grant it access during the administrative procedure to the full SO and its investigation file, thus depriving it of allegedly exculpatory evidence.

3523 As to the substance, Titan, in addition to its general line of argument set out above in paragraphs 3461 to 3464, and Holderbank maintain that the various purchases referred to in recital 28, paragraph 16, of the contested decision formed part of their pre-existing business relationship. Those transactions were devoid of any anti-competitive purpose. Titan adds that the trade between European cement and clinker producers with a view to re-exportation to countries within and outside the Community is standard practice.

3524 So far as concerns the transactions referred to in recital 28, paragraph 16, first subparagraph, of the contested decision (see paragraph 3517 above), the Court points to the following statements contained in the record of the ETF meeting on 19 August 1986 (contested decision, recital 28, paragraph 3):

'Holderbank has ... agreed to buy (not signed yet) 90 000 tons from Titan. One shipment of 7 000 tons has been taken.

...

Holderbank has also bought 50 000 tons clinker from Titan at a price of US$ 19.80 FOB. 25 000 tons already delivered, all above for US markets.'

3525 The internal Blue Circle memorandum of early September 1986 (see paragraph 3468 above) states:

'In recent weeks Blue Circle, Holderbank and Lafarge have all started absorbing some Greek cement or clinker, primarily from Titan, in their US and Canadian operations in good faith to keep the door open with the Greeks.'

3526 On reading those various extracts, the Commission was justified in taking the view that the purchases of cement and clinker made by UMAR in June and July 1986 from Titan originated, at least in part, in Holderbank's contribution to the persuasive measures envisaged in the Zurich/Céligny document in order to absorb the 'tonnage (from) the "destabilising" Cement Industry' (contested decision, recital 28, paragraph 1; document 33.126/18775), measures which it had been for the ETF to evaluate (see paragraph 2538 above).

3527 At the time when that document was finalised, Holderbank had also offered to place part of that 'destabilising tonnage' on the American market.

3528 However, the contested decision does not contain any evidence that, in exchange for those purchases, Titan gave an undertaking that it would halt or reduce its direct sales on the European markets.

3529 Those purchases were thus merely a sign of 'good faith' on the part of Holderbank vis-à-vis Titan, intended to encourage it to seek with the European producers a solution to the problem posed by the importation into Western Europe of cement from Greece.

3530 So far as concerns, next, the contracts of 16 January 1987, 18 December 1987 and 20 August 1988 (see paragraphs 3518 and 3519 above), the Court finds that the documents relating to them do not show that, in return for them, Titan gave an undertaking to Holderbank that it would halt or reduce its direct sales on the European markets.

3531 The documents referred to in recital 28, paragraphs 1 to 6, of the contested decision (see paragraph 3520 above), which the Commission (same recital, paragraph 16, fourth subparagraph) compares with the quantities concerned by the contracts in question in order to establish their unlawful nature, show first of all that, when the Zurich/Céligny document was finalised, several European producers, members of the ETF, pointed to the apparent opportunities for placing part of the Greek production surplus on non-European markets (see the Zurich/Céligny document, in particular document 33.126/18775, cited in the contested decision, recital 28, paragraph 1).

3532 Those documents indicate that, during August 1986, Blue Circle, Holderbank and Lafarge 'all started absorbing some Greek cement or clinker, primarily from Titan, in their US and Canadian operations in good faith to keep the door open with the Greeks' (contested decision, recital 28, paragraph 4; document 33.126/11083). At the same time, the participants in the ETF examined, in August/September 1986, the possibility of negotiating with the Greek producers a collective take-off agreement involving one or even two to three million tonnes of their production in return for the halting of their direct shipments of cement to Western Europe (contested decision, recital 28, paragraphs 2 and 5; documents 33.126/10988 to 10990, 18858 and 18859). The 'undertaking' given by the European producers to purchase the above-mentioned quantities was thus part of a collective negotiation, the consideration being the halting of direct sales of Greek products in Western Europe.

3533 However, as the Commission states, 'the ETF members did not manage to reach a collective agreement with the Greek producers, since the Greek producers were very hesitant on this subject' (contested decision, recital 28, paragraph 7).

3534 The Commission contends that the absence of a collective take-off agreement is explained by the Greek producers' preference for individual agreements with certain ETF members.

3535 In that regard, the only document referred to in the contested decision which may be relied upon in support of that claim is the record of the meeting of Head Delegates and ETF representatives of 9 September 1986 in Baden-Baden. It stated that 'the Task Force believes that the Greek industry is no longer interested in a global take-off-agreement, preferring individual agreements with other countries (e.g. Italy)' (contested decision, recital 25, paragraphs 22 and 25; document 33.126/18859). It added: 'In the light of the support by the British Government and other institutions in the campaign against subsidised Greek cement imports it would not be appropriate to enter into any agreements at that time.' Such statements do not prove that individual take-off agreements were concluded between the Greek producers and ETF members on the basis of the former promising the latter that they would halt or reduce their direct sales on the European markets.

3536 In those circumstances, the connection alleged by the Commission in recital 28, paragraph 16, fourth subparagraph, of the contested decision cannot support the conclusion that the contracts signed by Holderbank and Titan on 16 January 1987, 18 December 1987 and 20 August 1988 were unlawful.

3537 The Commission (defence and rejoinder in Case T-64/95) relies on two further documents to show that Titan participated in the infringement referred to in recital 28, particularly in paragraph 16, of the contested decision.

3538 It relies, first of all, on the content of the Zurich/Céligny document (see paragraph 3500 above).

3539 For the reasons set out in paragraph 3501 above, that document cannot however prove that the transactions referred to in recital 28, paragraph 16, embodied an unlawful agreement between Holderbank and Titan.

3540 The Commission states, secondly, that Titan was actively involved in the search for solutions to ensure the stability of the Community markets in the interest of all the parties concerned. It

relies on the various documents referred to in recital 28, paragraphs 1 to 9, of the contested decision.

3541 Several of those documents do in fact refer to discussions between Titan and European cement producers intended to find a solution to the 'Greek problem'. The record of the meeting of Head Delegates and ETF representatives of 9 September 1986 in Baden-Baden states in particular that, '[during] the most recent meeting between Titan and Blue Circle/Holderbank, Titan had expressed willingness to cooperate'.

3542 None the less, as has already been stated several times (see, *inter alia*, paragraph 3507 above), those discussions were never successful owing to the hesitancy of the Greek producers. As regards the United Kingdom in particular, the problem posed by imports from Greece was resolved in December 1986 at political level by an intergovernmental agreement between the United Kingdom and Greece.

3543 In any case, none of the documents referred to in recital 28, paragraphs 1 to 9, of the contested decision shows that, in return for the transactions referred to in recital 28, paragraph 16, Titan gave an undertaking to Holderbank that it would halt or reduce its direct sales on the European markets.

3544 In view of the foregoing (paragraphs 3439 to 3450 and 3524 to 3543), it must be concluded that the Commission has not established that the shipments and contracts referred to in recital 28, paragraph 16, of the contested decision embodied an unlawful agreement between Titan and Holderbank designed to deflect quantities of cement and clinker produced by Titan to the United States and Africa and to prevent direct sales of such products by Titan on the European markets.

3545 It follows that Article 4(4)(c) of the contested decision must be annulled.

3546 Accordingly, there is no longer any need to examine the observations which Titan (memoranda of 10 February and 18 December 1997) submitted following the measures of organisation of the procedure mentioned in paragraphs 164 and 168 above, in order to prove that its rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(c) of the contested decision.

3. Agreement between Holderbank and Heracles referred to in Article 4(4)(d) of the contested decision

3547 According to Article 4(4)(d) of the contested decision, Holderbank and Heracles infringed the provisions of Article 85(1) of the Treaty 'from 9 May 1986 to 31 December 1990, by participating in an agreement designed to prevent direct sales of cement by Heracles on the European markets and to deflect quantities of cement and clinker produced by Heracles to other markets'.

3548 The arguments concerning that infringement are set out in The Facts, in recital 28, paragraph 17, of the contested decision, and in the Legal Assessment, in recital 56, paragraphs 7 and 8, of the contested decision.

3549 In the contested decision, recital 28, paragraph 17, first subparagraph, the Commission observes that '[o]n 9 May 1986 a contract for the supply of 100 000 tonnes of cement was signed between Heracles and UMAR (documents 33.126/20057 to 20064)'. It compares those quantities with the information in the record of the ETF meeting on 19 August 1986: 'Furthermore they [Holderbank] have bought 100 000 tons from Heracles, whereof 40 000 has been delivered.'

3550 It goes on to state (second subparagraph):

'On 19 May 1988 a contract for the supply of 490 000 tonnes (230 000 tonnes of clinker and 260 000 tonnes of clinker or cement) broken down into 110 000 tonnes in 1988, 190 000 tonnes in 1989 and 190 000 tonnes in 1990, was signed between Heracles and UMAR (documents 33.126/20063 to 20071). Under Article 6 of this contract, the destination for at least 230 000 tonnes of clinker must, at the purchaser's choice, be the Netherlands and/or Luxembourg and/or Belgium; the remaining quantities of clinker or cement may go to non-Benelux countries and the purchaser must ask for the vendor's prior consent in writing.'

3551 It compares (third subparagraph) the quantities concerned by that contract with 'the statement by Holderbank and other producers that they wished to purchase one million tonnes and more, and even 2 to 3 million tonnes from Greek producers (see documents mentioned in paragraphs 1 to 6 above)'.

3552 In recital 56, paragraphs 7 and 8, it concludes:

'The contracts signed between the Holderbank group and Heracles on 9 May 1986 and 19 May 1988 (see paragraph 17 of recital 28) embody an agreement between those undertakings in breach of Article 85(1) from 9 May 1986 to 31 December 1990.

The purpose of the contracts was to prevent direct sales by the two Greek producers on the European markets and to deflect part of the quantities concerned to other markets, and this was known to the parties in question (see paragraphs 1 to 7 and 16 and 17 of recital 28).'

3553 Heracles (T-57/95) and Holderbank (T-68/95) contest the existence of the infringement found in Article 4(4)(d) of the contested decision.

3554 Heracles complains that the Commission wrongly evaluated its market position and strategy and the economic context which led it to turn, from 1986, to the Community markets in order to ensure its survival. It refers to the numerous obstacles and difficulties which it had to surmount in order to dispose of its production on those markets. They related in part to the economic situation, the structure of the Western European markets, its geographical location, financial situation and infrastructures, as well as, in part, to the setting-up of the ETF. Those barriers did not however prevent it from concluding contracts with various European producers and from increasing considerably the volume of its exports to Europe from 1986. In those circumstances, it cannot be accused of having knowingly participated, against its own interests, in arrangements which reduced its export opportunities.

3555 Heracles and Holderbank maintain that the contracts referred to in recital 28, paragraph 17, of the contested decision were normal commercial transactions, devoid of any anti-competitive object or effect. They stress that UMAR, a business partner of Heracles' in those transactions, was a company specialising in the international clinker and cement trade.

3556 As regards the contract of 9 May 1986 mentioned in recital 28, paragraph 17, first subparagraph, of the contested decision (see paragraph 3549 above), the following extract from the record of the ETF meeting of 19 August 1986 (contested decision, recital 28, paragraph 3) should be noted: 'Furthermore they have bought 100 000 tons from Heracles, whereof 40 000 tons has been delivered. Bloom is involved in the last deal as he unloads the vessels in Mississippi and distributes it to Dundee's market.'

3557 On reading that extract, the Commission was entitled to consider that Holderbank had intended to present the contract in question, which concerned the supply of 100 000 tonnes of cement, as its contribution to the persuasive measures contemplated in the Zurich/Céligny document in order to absorb the 'tonnage [from] the "destabilising" Cement Industry' (contested decision, recital 28, paragraph 1; document 33.126/18775), measures which it had been for the ETF to evaluate (see paragraph 2538 above).

3558 It is common ground that the problem relating to the importation into Western Europe of cement from Greece arose towards the end of 1985 or early 1986 (contested decision, recital 24, paragraph 1). Holderbank was thus able, without awaiting the setting-up of a structured agreement or concerted practice with its European colleagues, to undertake action through its subsidiary UMAR designed to remove the threat from such imports, action which it subsequently presented as its contribution to the persuasive measures agreed in the meantime at ETF level.

3559 However, the contested decision contains no evidence to show that, in return for that contract, Heracles gave an undertaking to Holderbank that it would halt or reduce its direct sales on the European markets. Indeed, according to the documents mentioned in recitals 25 to 28 of the contested decision, that contract was concluded before discussions were held between the European and Greek producers with a view to finding a solution to the problem posed by the importation into Western Europe of cement from Greece.

3560 The absence of an undertaking by Heracles to halt or reduce its direct sales on the European markets in return for the contract concluded with UMAR on 9 May 1986 is corroborated by the following passage from the minutes of the meeting of the board of Heracles on 23 July 1986 (documents 33.126/19878 to 19880, not cited in the contested decision):

'[Th]e European manufacturers have formed a united front with the British to prevent us from going into Britain with Titan, and in the face of this threat they offered us some small quantities for America. Of course we rejected this arrangement, because it was not in our interest, nor did we yield to their threats and coercion. However, they continued to threaten us, and closed ranks with a company based in Switzerland, which they are financing, in order to make war on us. ... It is true ... that this trust of European cement manufacturers is formidable, because they have control of 120 million tonnes of cement, but in spite of this we did not yield to their threats. The result of this was that the British alone asked to negotiate and offered us satisfactory quantities for America. Once again we stuck to our guns, on the grounds that we want to have foot in Britain, and in the end the British accepted this, but we are still negotiating.'

3561 So far as concerns the contract of 19 May 1988, referred to in recital 28, paragraph 17, second subparagraph, of the contested decision (see paragraph 3550 above), the Court points out that

the documents relating to that contract do not show that, in return for it, Heracles gave an undertaking to Holderbank that it would halt or reduce its direct sales on the European markets.

3562 In the light of the Court's analysis of the documents in paragraphs 3531 to 3535 above, the connection established by the Commission, on the basis of the documents referred to in recital 28, paragraphs 1 to 6, of the contested decision, between the quantities concerned by that contract and the 'statement by Holderbank and other producers that they wished to purchase one million tonnes and more, and even 2 to 3 million tonnes from Greek producers' (contested decision, recital 28, paragraph 17, third subparagraph) does not support the view that the contract was unlawful.

3563 The Commission (defence in Case T-57/95) also puts forward other documents to show that Heracles committed an infringement by participating in the contracts referred to in recital 28, paragraph 17, of the contested decision.

3564 Referring generally to the documents referred to in recital 28 of the contested decision, it states that Heracles knew about the ETF and the discussions which were held in that context with a view to diverting part of the Greek surplus production outside Western European markets. Heracles was even involved in those discussions. It thus participated in full awareness of the facts in resolving the problem relating to the importation of Greek cement. The documents referred to in recital 28, paragraph 9, illustrate Heracles' involvement in the negotiations.

3565 In point of fact, several documents mentioned in recital 28, particularly in paragraphs 5 and 9, of the contested decision, illustrate Heracles' participation in discussions with the European cement producers, primarily Blue Circle, with a view to finding a solution to the problem relating to the importation of cement from Greece.

3566 None the less, as has already been found several times (see, *inter alia*, paragraph 3507 above), those discussions were never successful because of the hesitancy of the Greek producers. As regards the United Kingdom in particular, the problem posed by imports from Greece was resolved in December 1986 at political level by an intergovernmental agreement between the United Kingdom and Greece.

3567 In any case, none of the documents referred to in recital 28 of the contested decision show that, in return for the contracts mentioned in recital 28, paragraph 17, Heracles gave an undertaking to Holderbank that it would halt or reduce its direct sales on the European markets.

3568 In view of the foregoing (paragraphs 3439 to 3450 and 3556 to 3567), it must be concluded that the Commission has not established that the contracts signed on 9 May 1986 and on 19 May 1988 between the Holderbank Group and Heracles embodied an anti-competitive agreement between those two undertakings designed to prevent direct sales of cement by Heracles on the European markets and to deflect quantities of cement and clinker produced by Heracles to other markets.

3569 It follows that Article 4(4)(d) of the contested decision must be annulled.

4. Agreement between Lafarge and Titan referred to in Article 4(4)(e) of the contested decision

3570 According to Article 4(4)(e) of the contested decision, Lafarge and Titan infringed the provisions of Article 85(1) of the Treaty 'from 22 July 1986 to 31 December 1991, by participating in an agreement designed to deflect quantities of clinker produced by Titan to Canada and to prevent direct sales by Titan on the European markets'.

3571 The matters concerning that infringement are set out in The Facts, in recital 28, paragraph 18, and in recital 19, third and fourth subparagraphs, and in the Legal Assessment, in recital 56, paragraphs 9 and 11, of the contested decision.

3572 In recital 28, paragraph 18, first subparagraph, the Commission notes the following statement from the record of the ETF meeting of 19 August 1986: 'Lafarge has bought one cargo from Titan for Montreal and second cargo will be taken in September.'

3573 It mentions next (second subparagraph) a number of Lafarge's internal documents of 28 January 1986 (rather than 28 January 1987, as erroneously stated) and of 8 July 1986, and the table of Lafarge's purchases from Greece in 1986 (documents 33.126/14407, 14412 and 14417). According to those documents (same subparagraph), 'on 22 July 1986 Lafarge bought 33 051 tonnes of clinker in Greece via CFCI for delivery to Montreal on 5/10 August 1986 and on 19 August 1986 bought 29 806 tonnes of clinker for Canada Cement Lafarge'.

3574 It also states (third subparagraph): '[o]n 12 June 1987, Titan agreed to sell Lafarge a cargo of 26 000 tonnes of clinker for Montreal (documents 33.126/14433 to 14437)'.

3575 Finally, it mentions (fourth subparagraph) the contract of 3 June 1988 (documents 33.126/14422 to 14424), incorporated into the contract of 20 October 1988 (documents 33.126/19708 to 19721), by which 'Titan and Lafarge agreed on 150 000 tonnes a year of clinker to be supplied from 1 November 1988 to 31 December 1991, half of which was to go to France, including the islands belonging to France'.

3576 According to the Commission (fifth subparagraph), the quantities involved in those contracts should be compared with 'the statement by Lafarge and other producers that they wished to buy one million tonnes and more, and even 2 to 3 million tonnes from Greek producers'.

3577 In recital 56, paragraphs 9 and 11, it concludes:

'The direct or indirect purchases made by Lafarge from Titan on 22 July 1986, 19 August 1986 and 12 June 1987, and the contracts concluded between Lafarge and Titan on 3 June 1988 and 20 October 1988 (see paragraph 18 of recital 28) embody an agreement between those undertakings in breach of Article 85(1) from 22 July 1986 to 31 December 1991.

...

The purpose of the contracts was to prevent direct sales by the two Greek producers on the European markets and to deflect a part of the quantities concerned to other markets, and this was known to the parties in question (see paragraphs 1 to 7 and 18 and 19 of recital 28).'

3578 Lafarge (T-43/95) and Titan (T-64/95) put forward an argument on the substance, seeking the annulment of Article 4(4)(e) of the contested decision. They complain, moreover, that the Commission infringed their rights of defence when it found the infringement in question in that it did not grant them access during the administrative procedure to the full SO and its investigation file, thus depriving them of allegedly exculpatory evidence.

3579 On the substance, Lafarge complains first of all that the Commission ignored the special features of international trade in cement and clinker when it analysed the transactions referred to in recital 28, paragraph 18, of the contested decision. The outlets offered by the markets for which the purchases were intended were manifestly much greater than the surpluses which the Greek cement producers sought to dispose of at that time. The Commission also failed to take account of the difference between cement and clinker.

3580 Next, Lafarge and Titan, in addition to Titan's general line of argument set out in paragraphs 3461 to 3464 above, state that the various purchases referred to above formed part of their pre-existing business relationship and that they were motivated exclusively by lawful concerns.

3581 As regards, first, the purchases referred to in recital 28, paragraph 18, second subparagraph, of the contested decision (see paragraph 3573 above), the Court points to the following statement from the record of the ETF meeting of 19 August 1986 (contested decision, recital 28, paragraph 3): 'Lafarge has bought one cargo from Titan for Montreal and second cargo will be taken in September.'

3582 The internal Blue Circle memorandum of early September 1986 (see paragraph 3468 above) states: 'In recent weeks Blue Circle, Holderbank and Lafarge have all started absorbing some Greek cement or clinker, primarily from Titan, in their US and Canadian operations in good faith to keep the door open with the Greeks.'

3583 Although the Lafarge documents mentioned in recital 28, paragraph 18, second subparagraph, do not indicate that the orders for Greek clinker to which they refer where placed with Titan, the Commission was justified, in view of the fact that the times and the destinations coincided, to compare those orders with the information in the record of the ETF meeting on 19 August 1986. Such a comparison leads to the view that those purchases originated in Lafarge's contribution to the persuasive measures contemplated in the Zurich/Céligny document in order to absorb the 'tonnage [from] the "destabilising" Cement Industry' (contested decision, recital 28, paragraph 1; document 33.126/18775), measures which it had been for the ETF to evaluate (see paragraph 2538 above).

3584 However, the contested decision does not contain any evidence that, in return for those orders, Titan gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3585 Those purchases were thus merely a sign of 'good faith' on the part of Lafarge vis-à-vis Titan, intended to encourage them to seek with the European producers a solution to the problem posed by the importation into Western Europe of cement from Greece.

3586 So far as concerns, secondly, the contracts referred to in recital 28, paragraph 18, third and fourth subparagraphs, of the contested decision (see paragraphs 3574 and 3575 above), the documents relating to them do not show that, in return for them, Titan gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3587 In the light of the Court's analysis in paragraphs 3531 to 3535 above of the documents referred to in recital 28, paragraphs 1 to 6, the connection established by the Commission between the quantities concerned by those contracts and 'the statement by Lafarge and other producers that they wished to buy one million tonnes and more, and even 2 to 3 million tonnes from Greek producers' (recital 28, paragraph 18, fifth subparagraph) does not support the view that those contracts were unlawful.

3588 In recital 28, paragraph 19, third subparagraph, of the contested decision, the Commission also relies on the fact that the contract of 20 October 1988, in which the contract of 3 June 1988 was incorporated (recital 28, paragraph 18, fourth subparagraph), was mentioned at the EPC meeting of 20 October 1988, as indicated in the record of that meeting drawn up by Ciments Français (documents 33.126/18179 and 18180).

3589 The Court points to the following passage from that record:

'Lafarge is engaged in two sets of negotiations with the Greeks which are proving very difficult because of their fussiness over details.

... negotiation with Titan is more difficult, Lafarge is looking to incorporate its contract with the contract for the exchange of Dassault aircraft, which would yield a commission (?) of 3% for them.

Many bilateral talks between Mr Liduena and the Greeks of course, but also with Hispacement.'

3590 The parties do not dispute that the 'negotiation with Titan', which Lafarge mentioned during that meeting, concerned the contract which they concluded on 20 October 1988, that is to say, the day of the meeting itself. Moreover, that contract was signed in Barcelona, the very city in which the EPC meeting in question was held.

3591 However, there is nothing in the extract from the abovementioned record of the meeting to suggest that, in return for that contract, Titan gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3592 The Commission (defence and rejoinder in Case T-64/95) relies on two further documents to show that Titan committed an infringement by participating in the transactions referred to in recital 28, particularly in paragraph 18, of the contested decision.

3593 It relies, first of all, on the content of the Zurich/Céligny document (see paragraph 3500 above).

3594 For the reasons set out in paragraph 3501 above, that document cannot however prove that the transactions referred to in recital 28, paragraph 18, embodied an unlawful agreement between Lafarge and Titan.

3595 The Commission states, secondly, that Titan was actively involved in the search for solutions to ensure, in the interest of all the parties concerned, the stability of the Community markets. It relies on the various documents referred to in recital 28, paragraphs 1 to 9, of the contested decision.

3596 Several of those documents do in fact attest to the participation of Titan in discussions with European cement producers to find a solution to the problem relating to importations into Western Europe of cement from Greece.

3597 None the less, as has already been stated several times (see, *inter alia*, paragraph 3507 above), those discussions never had a successful outcome. In any case, none of the documents referred to in recital 28, paragraphs 1 to 9, of the contested decision show that, in return for the transactions mentioned in recital 28, paragraph 18, Titan gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3598 In view of the foregoing (paragraphs 3439 to 3450 and 3581 to 3597), it must be concluded that the Commission has not established that the purchases and contracts between Lafarge and Titan referred to in recital 28, paragraph 18, of the contested decision embodied an unlawful agreement between those parties designed to deflect quantities of clinker produced by Titan to Canada and to prevent direct sales by Titan on the European markets.

3599 It follows that Article 4(4)(e) of the contested decision must be annulled.

3600 Accordingly, there is no longer any need to examine the observations which Lafarge (memorandum of 28 January 1998) and Titan (memoranda of 10 February and 18 December 1997) submitted following the measures of organisation of procedure mentioned in paragraphs 164 and 168 above, in order to prove that their rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(e) of the contested decision.

5. Agreement between Lafarge and Heracles referred to in Article 4(4)(f) of the contested decision

3601 According to Article 4(4)(f) of the contested decision, Lafarge and Heracles infringed the provisions of Article 85(1) of the Treaty 'from 1 June 1988 to 15 June 1991, by participating in an agreement designed to deflect quantities of cement and clinker produced by Heracles outside Europe and to prevent direct sales of such products by Heracles on the European markets'.

3602 The arguments concerning that infringement are set out in The Facts, in recital 28, paragraph 19, of the contested decision, and in the Legal Assessment, in recital 56, paragraphs 10 and 11, of the contested decision.

3603 In recital 28, paragraph 19, first subparagraph, the Commission states:

'On 17 June 1988, a contract, running from 1 June 1988 to 15 June 1991, was signed between Lafarge Overseas America and Heracles (documents 33.126/14454 to 14469). This contract is for the supply, for each year of the contract, of 500 000 tonnes of clinker and cement. The clinker could be for destinations outside France, and part of the cement could be exported to the countries indicated in addendum No 2 and, as far as Europe is concerned, to France, Portugal, Scandinavia, Turkey, but most of it had to go to France. The price of the clinker and cement for delivery to France varied in keeping with changes in the price of cement in France (documents 33.126/14446 to 14453).'

3604 It compares (second subparagraph) the quantities concerned by that contract 'with the statement by Lafarge and other producers that they wished to buy a million tonnes and more, and even 2 to 3 million tonnes from Greek producers'.

3605 In recital 56, paragraphs 10 and 11, it concludes:

'The contract concluded between Lafarge and Heracles on 17 June 1988 (see paragraph 19 of recital 28) embodies an agreement between those undertakings in breach of Article 85(1) from 1 June 1988 to 15 June 1991.

The purpose of [that] contrac[t] was to prevent direct sales by the two Greek producers on the European markets and to deflect a part of the quantities concerned to other markets, and this was known to the parties in question (see paragraphs 1 to 7 and 18 and 19 of recital 28).'

3606 Lafarge (T-43/95) and Heracles (T-57/95) put forward an argument on the substance seeking the annulment of Article 4(4)(f) of the contested decision. Lafarge also complains that the Commission infringed its rights of defence when it found the infringement in question in that it did not grant it access during the administrative procedure to the full SO and its investigation file, thus depriving it of allegedly exculpatory evidence.

3607 On the substance, Lafarge puts forward an argument similar to that set out in paragraph 3579 above. Heracles also criticises the Commission for having failed to take account, when examining the contract in question, of the difference between the markets for cement and for clinker, a distinction which it does nevertheless recognise in the contested decision.

3608 Lafarge and Heracles, in addition to Heracles' general line of argument set out in paragraph 3554 above, state that their contract of 17 June 1988 formed part of their pre-existing business relationship and that it was motivated exclusively by lawful grounds. They claim that that contract had no anti-competitive object or effect.

3609 The Court points out that the documents relating to that contract do not show that, in return for it, Heracles gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3610 In the light of the Court's analysis in paragraphs 3531 to 3535 above, of the documents referred to in recital 28, paragraphs 1 to 6, the connection established by the Commission between the quantities concerned by that contract and the 'statement by Lafarge and other producers that they wished to purchase one million tonnes and more, and even 2 to 3 million tonnes from Greek producers' (recital 28, paragraph 19, second subparagraph) cannot support the view that the contract was unlawful.

3611 In recital 28, paragraph 19, third subparagraph, of the contested decision, the Commission also relies on the fact that that contract was referred to at the EPC meeting of 20 October 1988, as attested by the record of that meeting drawn up by Ciments Français (documents 33.126/18179 and 18180).

3612 The following passage from that record states:

'Lafarge is engaged in two sets of negotiations with the Greeks which are proving very difficult because of their fussiness over details.

The Heracles talks seem settled (Lafarge must provide them with a supply timetable next month, once their 1989 budgets are drawn up).

...

Many bilateral talks between Mr Liduena and the Greeks of course, but also with Hispacement.'

3613 Even if the Commission were justified in making the connection between the contract signed on 17 June 1988 between Heracles and Lafarge and the information provided by Lafarge at the EPC meeting of 20 October 1988 on its negotiations with Heracles, it must be held that there is nothing in the above extract of the record drawn up by Ciments Français of that meeting to suggest that, in return for the contract of 17 June 1988, Heracles gave an undertaking to Lafarge that it would halt or reduce its direct sales on the European markets.

3614 The Commission (defence in Case T-43/95) also states that that contract provided for changes in the purchase price in line with fluctuations in the price of cement and clinker on the French market. That clause shows that the purchases referred to in that contract were intended to prevent competition from the Greek producers on the Community market.

3615 However, whatever the purpose of such a clause, there is no evidence that Heracles promised Lafarge that it would halt or reduce its direct sales on the European markets in return for the contract in question.

3616 In view of the foregoing (paragraphs 3439 to 3450 and 3609 to 3615), it must be concluded that the Commission has not established that the contract of 17 June 1988 between Lafarge and Heracles embodied an unlawful agreement between those parties designed to deflect quantities produced by Titan outside European markets and to prevent direct sales of the products by Titan on those markets.

3617 It follows that Article 4(4)(f) of the contested decision must be annulled.

3618 Accordingly, there is no longer any need to examine the observations which Lafarge (memorandum of 28 January 1998) submitted, following the measures of organisation of the procedure mentioned in paragraphs 164 and 168 above, in order to prove that its rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(f) of the contested decision.

6. Concerted practice between CBR, Heracles and Titan referred to in Article 4(4)(g) of the contested decision

3619 According to Article 4(4)(g) of the contested decision, CBR, Heracles and Titan infringed the provisions of Article 85(1) of the Treaty 'from 4 May 1988 to 31 December 1990, by participating in a concerted practice relating to supplies, through UMAR, of clinker intended for CBR and ENCI in Belgium and the Netherlands and designed to prevent direct sales by the two Greek producers on the European markets'.

3620 The matters concerning that infringement are set out, in The Facts, in recital 28, paragraphs 20 and 21, of the contested decision, and in the Legal Assessment, in recital 56, paragraph 12, of the contested decision.

3621 In recital 28, paragraph 20, second subparagraph, of the contested decision, the Commission observes that 'on 19 May 1988 and 20 August 1988 UMAR and Pays Bas Cement Co. signed contracts with Heracles and Titan respectively for the supply of clinker, at least half of which was intended for Benelux'.

3622 It goes on to state (third subparagraph):

'On 15 July 1988, UMAR and CBR concluded a contract on the general conditions for transferring Greek clinker (documents 33.126/18117 to 18121). By telex messages dated 13 September 1988, 27 January 1989 and 24 March 1989, CBR placed orders, each for 25 000 tonnes of clinker, with UMAR (documents 33.126/18122 to 18124). Sea freight contracts for the execution of three orders indicate CBR as the consignee and Titan as the supplier-consignor (documents 33.126/18125 to 18127).'

3623 Finally, it sets out (fourth subparagraph) the following extract from the handwritten record of the CBR Board of Directors meeting on 4 May 1988 on the conclusion of the transfer contract referred to in the preceding paragraph (documents 33.126/7632 and 7633):

'Preferring in Benelux clinker imports to cement imports because they confer no possibility of influence over the market, Mr Celis, with the agreement of the EEC, concluded an agreement to import clinker from Greece. This clinker will be used in the grinding halls of the Netherlands and in Belgium. Through the intermediary of the Madrid company [U]MAR (international trading company) Mr Celis will draw up a contract relating to the import of Greek clinker, provided that Greece limits cement exports to Benelux. This contract will run for two years and will cover 280 000 tonnes or 1.65% of our consumption. The purchase price FOB Greece is USD 29.5, plus transport and unloading costs. The Chairman thanks Mr Celis for negotiating this contract brilliantly and reaching a very positive result.'

3624 In recital 56, paragraph 12, it concludes:

'The contract concluded between UMAR and CBR on 15 July 1988 (see paragraphs 20 and 21 of recital 28), being an indirect application of a concerted practice between CBR, Heracles and Titan on the limitation of sales by those Greek producers in the Benelux countries in return for purchases by CBR, constitutes an infringement of Article 85(1) from 4 May 1988 to 31 December 1990.

The purpose of the contract was to prevent direct sales by the two Greek producers on the Benelux markets, and this was known to the parties in question (see paragraphs 1 to 7, 16, 17, 20 and 21 of recital 28).'

3625 Although the alleged arrangement between CBR, Heracles and Titan is described as a concerted practice, it is none the less clear from the latter passage in the contested decision that the Commission accuses the parties concerned of having pursued, through the alleged concerted practice, a purpose similar to that of the agreements referred to in Article 4(4)(b) to (f) and (h) of the contested decision, namely to prevent direct sales by the Greek producers on the European markets.

3626 The three applicants concerned put forward an argument on the substance seeking the annulment of Article 4(4)(g) of the contested decision. CBR and Titan also complain that the Commission infringed their rights of defence when it found the infringement in question in that it did not grant them access during the administrative procedure to the full SO and its investigation file, thus depriving them of allegedly exculpatory evidence.

3627 On the substance, CBR (T-25/95), Heracles (T-57/95) and Titan (T-64/95) dispute that the transactions referred to in recital 28, paragraph 20, of the contested decision amount to an infringement.

3628 CBR states that its purchases of Greek clinker from UMAR in pursuance of their agreement of 15 July 1988 responded to a real demand. It is clear from the official minutes of the meeting of its Board of Directors on 4 May 1988 (contested decision, recital 28, paragraph 21; documents 33.126/7629 to 7631) that it had to deal with a period of unexpected growth in cement consumption on its natural market. It also claims that it was concerned to honour the clinker export contracts which it had signed in early 1988 with Scancem. Finally, it explains the reasons for the difference between the Commission's estimates and its own of the level of growth of its supplies of cement in 1988 (see recital 28, paragraph 21, last subparagraph, of the contested decision). It relies also on the comparison (1985) in its reply to the SO illustrating the increase of its supplies of cement and clinker during the period from 1988 to 1990.

3629 It maintains that the handwritten record mentioned in recital 28, paragraph 20, of the contested decision was drawn up by one of its secretaries. It claims that that record contains clear errors which the Commission does not dispute and which deprives it of any evidential value.

3630 Heracles, in addition to the general line of argument set out in paragraph 3554 above, stresses the lawful nature of the contract which it concluded with UMAR on 19 May 1988. It disputes the connection made in recital 28, paragraphs 20 and 21, of the contested decision between that contract and the contract for the transfer of clinker signed between CBR and UMAR on 15 July 1988. It points out that UMAR was a company engaged in the international clinker and cement trade and that therefore it was solely for UMAR to decide to whom it wished to sell on the quantities of cement and clinker in question. Heracles was not in any way involved with that process. Nor has the Commission produced any evidence to suggest that it was involved.

3631 Titan, in addition to its general line of argument set out in paragraphs 3461 to 3464 above, observes that the contract which it signed on 20 August 1988 with Pays Bas Cement Co. was part of its normal business activity. It claims that the decision, taken quite independently by UMAR, to deliver clinker to CBR cannot be attributed to the existence of an agreement or concerted practice between Titan and CBR. It also points out that, even if CBR could have been under the impression that it was fulfilling a promise made to the members of the ETF by buying from UMAR clinker originating from Titan, Titan was unaware of such a promise.

3632 It should be borne in mind that the handwritten record of the CBR Board of Directors meeting on 4 May 1988 states that, '[t]hrough the intermediary of the ... company [U]MAR ... Mr Celis will draw up a contract relating to the import of Greek clinker, provided that Greece limits cement exports to Benelux'.

3633 According to the statement in that record, CBR intended to make the contract in question subject to an undertaking by the Greek producers to limit their direct sales of cement on the Benelux markets. Such statements do not however prove that CBR did, in fact, actually obtain a promise to that effect from the Greek producers, in particular from Heracles and Titan.

3634 It is not disputed that, at that time, CBR had to deal with an increase in consumption on its natural market. The parties differ only as to the extent of that increase (see contested decision, recital 28, paragraph 21, penultimate and final subparagraphs). In those circumstances, CBR might have signed its import contract with UMAR on 15 July 1988, despite not being able to obtain an undertaking from the Greek producers to limit their direct sales of cement on the Benelux markets.

3635 In recital 28, paragraph 21, penultimate subparagraph, of the contested decision, the Commission refers to the extract from CBR's reply to the SO in which CBR states that, 'in buying clinker from Greek producers, CBR was hoping to reduce the interest which the importation of cement into Belgium might have had for them'. In the course of the written and oral procedure, the Commission also pointed out that the import contract signed by CBR was the kind of persuasive measure envisaged by the ETF, in which CBR had participated, in order to prevent the destabilisation of the European markets.

3636 However, none of those documents proves that Heracles and Titan promised to reduce their direct sales of cement on the Benelux markets in return for the import contract signed between CBR and UMAR in July 1988.

3637 In recital 28, paragraph 20, of the contested decision the Commission links the contract to import Greek clinker, signed on 15 July 1988 by CBR and UMAR, to the contracts concluded

on 19 May 1988 between UMAR and Heracles and on 20 August 1988 between Pays Bas Cement Co. and Titan respectively, contracts which provided that at least half the quantities concerned was destined for the markets of the Benelux. At the hearing in Case T-25/95, the Commission particularly emphasised that the latter two contracts involved subsidiaries of Holderbank, one of the undertakings which was primarily responsible for the ETF and its activities.

3638 However, even if the Commission were justified in making the connection between the various contracts, there is nothing in the documents relating to those contracts to suggest that, in return for them, Heracles and Titan gave an undertaking, as CBR claims, that they would halt or reduce their direct sales of cement on the Benelux markets.

3639 At the hearing in Case T-25/95, the Commission observed that both the handwritten record and the official minutes of the meeting of the CBR Board of Directors meeting of 4 May 1988 mention the gratitude expressed by the Chairman of CBR to Mr Celis for the 'positive result' of his negotiations.

3640 However, there is no evidence to suggest that the chairman of CBR was thereby thanking Mr Celis for having obtained an undertaking from Heracles and Titan to limit their direct sales of cement on the Benelux markets in return for the import contract which it was preparing to sign with UMAR. On the contrary, the handwritten record of the meeting (see paragraph 3632 above) shows that such an undertaking had not yet been obtained. The 'positive result' in question could have referred to the purchase price negotiated by Mr Celis with UMAR or to the fact that his having opted to import clinker rather than cement warded off the 'possibility of [the Greek producers exerting an] influence over the market' (same document).

3641 The Commission (defence and rejoinder in Case T-64/95) relies on the content of the Zurich/Céligny document in order to establish that Titan participated in the concerted practice referred to in Article 4(4)(g) of the contested decision (see paragraph 3500 above).

3642 For the reasons set out in paragraph 3501 above, that document cannot however constitute evidence that the transactions referred to in recital 28, paragraph 20, embodied a concerted practice between CBR, Heracles and Titan.

3643 During the written procedure in Cases T-57/95 and T-64/95, the Commission also stated that Heracles and Titan had been involved in discussions aimed at resolving, in the interest of all the parties concerned, the problems posed by the importation of cement from Greece.

3644 However, as has already been stated several times (see, in particular, paragraph 3507 above), those discussions never had a successful outcome. In any case, none of the documents referred to in the contested decision show that, in return for the transactions mentioned in recital 28, paragraph 20, Heracles and Titan gave an undertaking to CBR that they would halt or reduce their direct sales in Europe, and on the Benelux markets in particular.

3645 In view of the foregoing (paragraphs 3439 to 3450 and 3632 to 3644), it must be concluded that the Commission has not established the existence of a concerted practice between CBR, Heracles and Titan designed to prevent direct sales by the two Greek producers on the European markets.

3646 It follows that Article 4(4)(g) of the contested decision must be annulled.

3647 Accordingly, there is no longer any need to examine the observations which CBR (memorandum of 12 November 1997) and Titan (memoranda of 10 February and 18 December 1997) submitted following the measures of organisation of procedure mentioned in paragraphs 164 and 168 above, in order to prove that their rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(g) of the contested decision.

7. Agreement between Aker, EUROC and Titan referred to in Article 4(4)(h) of the contested decision

3648 According to Article 4(4)(h) of the contested decision, Aker, EUROC and Titan infringed the provisions of Article 85(1) of the Treaty 'from 28 January 1987 to 31 December 1990, by participating in an agreement designed to deflect quantities of cement and clinker produced by Titan to Africa, the United States and the Bahamas and to prevent direct sales of such products by Titan on the European markets'.

3649 The matters concerning that infringement are set out, in The Facts, in recital 28, paragraph 22, and in the Legal Assessment, in recital 56, paragraph 13, of the contested decision.

3650 In recital 28, paragraph 22, first subparagraph, the Commission states:

'The document prepared by the working party in Zurich and Céligny (see paragraph 1 above) mentions Cementa/Norcem among the companies which could take part in the absorption of Greek cement. The Blue Circle internal memorandum of 4 September 1986 (documents 33.126/11026 to 11027) states that Norcem/Cementa (part of the same Aker/EUROC group as Scancem) are among the companies which should participate in the absorption of Greek products. The Aker/EUROC group was represented at two Head Delegates meetings and at ETF meetings (see points (c), (g), (i), (l) and (o) of recital 25).'

3651 It goes on to state (second subparagraph) that Titan and Scancem signed the following contracts:

'— on 28 January 1987 (documents 33.126/19621 to 19629) [a contract] on the supply, from 1 February to 31 December 1987, of 125 000 tonnes of clinker to Ghana, Liberia and Togo;

— on 7 October 1987, [a contract] amended several times by additional clauses, the most recent dating from 17 November 1989 (documents 33.126/19585 to 19620), on the supply, from 1 January 1988 to 31 December 1990, of 650 000 tonnes of cement to the United States and the Bahamas;

— on 15 October 1987, [a contract] amended several times by additional clauses, the most recent dating from 15 March 1990 (documents 33.126/19631 to 19656), on the supply, from 1 January 1988 to 31 December 1990, of 300 000 tonnes of clinker to Ghana, Liberia and Togo'.

3652 It compares (third subparagraph) the quantities concerned by those various contracts with 'the European producers' intention of absorbing 2 to 3 million tonnes of products with a view to curbing Greek exports to Europe (see documents mentioned in paragraphs 1 to 6 above)'.

3653 In recital 56, paragraph 13, it concludes:

'The contracts concluded between Titan and Scancem (Aker/EUROC) on 28 January 1987, 7 October 1987 and 15 October 1987 and their additional clauses (see paragraph 22 of recital

28) embody an agreement between those undertakings in breach of Article 85(1) from 28 January 1987 to 31 December 1990.

The purpose of the contracts was to deflect the quantities concerned to markets other than the European markets, and this was known to the two parties (see paragraph 1 to 7 and 22 of recital 28).'

3654 Titan (T-64/95), Aker (T-70/95) and EUROC (T-71/95) put forward an argument on the substance seeking the annulment of Article 4(4)(h) of the contested decision. They also complain that the Commission infringed their rights of defence when it found the infringement in question in that it did not grant them access during the administrative procedure to the full SO and its investigation file, thus depriving them of allegedly exculpatory evidence.

3655 As to the substance, Titan, in addition to its general line of argument set out above in paragraphs 3461 to 3464, Aker and EUROC state that the contracts referred to in recital 28, paragraph 22, of the contested decision formed part of the normal business activity of Scancem and Titan. Those contracts, according to Titan, had no anti-competitive purpose.

3656 Titan states that its deliveries of clinker to Scancem for Ghana, Liberia and Togo were justified by the effort to find outlets for clinker produced in its Thessaloniki plant and that its deliveries for the United States were a response to the particular opportunities in that market. Furthermore, Scancem was one of the main cement and clinker traders in the world and therefore a particularly appropriate purchaser.

3657 Aker and EUROC claim that the purchases by Scancem from Titan were to allow Scancem to meet the increasing demand for cement and clinker in its operations outside Europe.

3658 Titan, Aker and EUROC also complain that the Commission did not examine the prices at which Scancem purchased Titan's product. They add that those prices were no different from the prices paid by Scancem under the purchase contracts concluded with Heracles and Halkis, contracts which, although mentioned in the SO, were not deemed to constitute an infringement in the contested decision.

3659 The Court finds that the documents relating to the contracts between Scancem and Titan referred to in recital 28, paragraph 22, of the contested decision do not show that, in return for

them, Titan gave an undertaking to the Aker/EUROC group to halt or reduce its direct sales on the European markets.

3660 The Commission states that the Zurich/Céligny document mentioned Cementa/Norcem among the companies which could take part in the absorption of Greek cement. It also mentions the internal Blue Circle memorandum of 4 September 1986, which identifies Norcem and Cementa as among the companies which were to participate in the absorption of Greek products (see paragraph 3650 above).

3661 In that regard, it is worth noting the following extract from the Zurich/Céligny document (contested decision, recital 28, paragraph 1; document 33.126/18775):

'Absorption of "destabiliser's tonnage"

The opportunity exists in a number of markets for European Producers to arrange to place tonnage with the "destabilising" Cement Industry.

For example:

USA — 1st priority

...

(4) Cementa/Norcem could offer?'

3662 For its part, the internal Blue Circle memorandum of 4 September 1986 (documents 33.126/11026 and 11027) states: 'On the carrot side a solution based on the absorption of 1 million tonnes plus outside Europe by Holderbank, Lafarge, Norcem, Cementa and ourselves etc., is predicated ...'.

3663 Those extracts show that in mid-1986 Aker and EUROC offered, through their subsidiaries Norcem and Cementa, to participate in the absorption of surplus Greek production outside European markets. They do not however prove that the contracts between Scancem and Titan, mentioned in recital 28, paragraph 22, of the contested decision were the result of an unlawful agreement between the parties, in that, in return for those contracts Titan promised to halt or reduce its direct sales on the European markets.

3664 In recital 28, paragraph 22, third subparagraph, of the contested decision, the Commission cites the record of the ETF meeting on 19 August 1986. It claims that it shows 'that Scancem was participating in the absorption of Greek products since its author complains solely of the fact that the initiatives of certain ETF members had put Scancem in a weak position in the negotiations with Greek producers'.

3665 It should be observed that that record, drawn up by Mr Ulestig (Scancem), states first of all (point 4.1): 'No agreement has been reached with the Greek companies. They have not even been in contact with each other the last month! ...'. He next reports the information given by Blue Circle, Lafarge and Holderbank on their purchases of product from Heracles and Titan for the United States and Canada, concluding in that respect: 'In summary, although we have not agreed with the Greeks on a take-off agreement, some members, in my opinion, have put us in a rather weak position in negotiations.'

3666 Those statements show that Scancem feared that the absorption measures undertaken during the summer of 1986 by certain ETF members with regard to Heracles and Titan might have weakened the position of the European cement producers in the negotiations they were holding with their Greek counterparts with a view to reaching a collective take-off agreement for their surplus production, negotiations which ultimately failed on account of the great hesitancy of the Greek producers (see paragraph 3507 above).

3667 They do not show that the contracts signed between Scancem and Titan on 28 January, 7 and 15 October 1987 were conditional on Titan's undertaking to halt or reduce its direct sales on the European markets.

3668 Nor is it possible to infer that those contracts were unlawful in nature from the fact that the 'Aker/EUROC group was represented at two Head Delegates meetings and at ETF meetings' (contested decision, recital 28, paragraph 22, first subparagraph). That fact is at most evidence

that Aker and EUROC acceded to the agreement setting up the ETF and to the measures discussed at those meetings with a view to eliminating destabilising imports into Western Europe. It does not, however, prove that in exchange for the abovementioned contracts, Titan gave Aker and EUROC an undertaking that it would halt or reduce its direct sales on the European markets.

3669 In the light of the Court's analysis of the documents in paragraphs 3531 to 3535 above, the Court finds that the connection alleged by the Commission, on the basis of the documents referred to in recital 28, paragraphs 1 to 6, of the contested decision, between the quantities concerned by the contracts referred to in recital 28, paragraph 22, second subparagraph, of the contested decision and the 'European producers' intention of absorbing 2 to 3 million tonnes of products with a view to curbing Greek exports to Europe' (contested decision, recital 28, paragraph 22, third subparagraph) does not support the view that those contracts were unlawful.

3670 The Commission (defence and rejoinder in Case T-64/95) relies on two further documents to show that Titan committed an infringement by participating in the transactions referred to in recital 28, particularly paragraph 22, of the contested decision.

3671 It relies, first of all, on the content of the Zurich/Céligny document (see paragraph 3500 above).

3672 For the reasons set out in paragraphs 3501 and 3663 above, that document cannot however prove that the contracts referred to in recital 28, paragraph 22, embodied an unlawful agreement between Aker and EUROC, on the one hand, and Titan, on the other.

3673 The Commission states, secondly, that Titan was actively involved in the search for solutions to ensure, in the interest of all the parties concerned, the stability of the Community markets. It relies on the various documents referred to in recital 28, paragraphs 1 to 9, of the contested decision.

3674 However, as has already been stated on several occasions (see, in particular, paragraph 3507 above), those discussions never had a successful outcome. In any case, none of the documents referred to in recital 28, paragraphs 1 to 9, of the contested decision show that, in return for the contracts mentioned in recital 28, paragraph 22, Titan gave an undertaking to halt or reduce its direct sales on the European markets.

3675 The Commission (defence in Cases T-70/95 and T-71/95) again relies on the record of the EPC meeting of 13 May 1987, reproduced in recital 24, paragraph 3, second subparagraph, of the contested decision. It claims that it reflects the anti-competitive purpose which led Scancem to conclude with Titan the various contracts referred to in recital 28, paragraph 22.

3676 However, the extract in question illustrates at most Scancem's continuing unease over imports from Greece, and its concern to see joint pressure maintained on the Greek producers. It does not prove that the above contracts embodied a common anti-competitive concurrence of wills between Aker and EUROC, on the one hand, and Titan, on the other.

3677 In view of the foregoing (paragraphs 3439 to 3450 and 3659 to 3676), it must be concluded that the Commission has not established that the contracts in question embodied an anti-competitive agreement between Aker and EUROC, on the one hand, and Titan, on the other, designed to deflect quantities of cement and clinker produced by Titan to Africa, the United States and the Bahamas and to prevent direct sales of such products by Titan on the European markets.

3678 It follows that Article 4(4)(h) of the contested decision must be annulled.

3679 Accordingly, there is no longer any need to examine the observations which Titan (memoranda of 10 February and 18 December 1997), Aker and EUROC (memoranda of 10 February 1997) submitted following the measures of organisation of procedure mentioned in paragraphs 164 and 168 above, in order to prove that their rights of defence were infringed during the administrative procedure in relation to the finding of the infringement in Article 4(4)(h) of the contested decision.

Characterisation, as a single and continuous agreement, of the agreements and concerted practices referred to in Article 4 of the contested decision

3680 In recital 53 of the contested decision, the Commission states that the agreements and practices described in Chapter 5, on the 'Cembureau Task Force' or 'European Task Force', proceeded from a 'single and continuous agreement'.

3681 It states (same recital, paragraphs 2 and 3):

'Under the "single and continuous agreement" on non-transhipment to home markets, Cembureau and the undertakings specified below entered into a single and continuous "agreement"... consisting of all the measures adopted at the meetings held from 28 May 1986 to the end of May 1987.

The concurrence of wills on the part of each participant was expressed at various meetings and, in particular, at the meetings of the Head Delegates as well as through participation in the various actions undertaken.

The agreement has the following features: (1) a Task Force, set up by common agreement by the participants in the infringement, examined and prepared the various dissuasive and persuasive measures and the market regulation measures (see paragraphs 2 to 6 of recital 25); (2) the measures were put for decision to the Head Delegates, who adopted some of them (see paragraph 10, 24 to 32 and 40 and 41 of recital 25); (3) the measures were then implemented by the various participants in the Task Force (see recitals 26, 27 and 28).'

3682 It concludes (same recital, paragraph 9) that there was a 'single and continuous agreement relating to the setting-up of the Cembureau Task Force or ETF and the various measures adopted at the meetings to eliminate imports into Western Europe and, in particular, to prevent imports of Greek cement into the Member States'. It also refers (paragraph 14) to the 'single and continuous agreement relating to the Cembureau Task Force or ETF'.

3683 Before examining the arguments raised on that point by the applicants, it should be recalled that, although the various agreements and practices found in Article 4 are considered in recital 53 of the contested decision to be the constituent elements of a single and continuous agreement relating to the ETF, the Commission does not find in the operative part of the decision that such an agreement existed. As has been stated in paragraphs 2507 to 2511 above, Article 4(1) refers only to the agreement on the setting-up of the ETF, not to the single and continuous agreement relating to the setting-up of the ETF and the measures adopted in the framework thereof. The Commission in fact deals separately with the various elements alleged to constitute that single and continuous agreement.

3684 The only inference specifically drawn by the Commission from its conclusions as to the single and continuous nature of the conduct referred to in Article 4 of the contested decision is set out in recital 65, paragraph 3(c). In summarising, in its reasoning relating to the fixing of fines, how the indirect members of Cembureau mentioned in Article 1 implemented the Cembureau

agreement it takes those agreements and practices into consideration not separately but as being in the nature of the single and continuous 'ETF' agreement ('... participated in the agreement relating to the Cembureau or European Task Force') or in conformity with it ('... participated, within the framework of the Cembureau or European Task Force').

3685 CBR (T-25/95), Cembureau (T-26/95), Ciments Français (T-39/95), Aalborg (T-44/95), Unicem (T-50/95), Asland (T-55/95), Uniland (T-58/95), Italcementi (T-65/95) and Cementir (T-87/95) submit arguments concerning the characterisation, as a single and continuous agreement, of the practices referred to in Article 4 of the contested decision.

3686 One argument is based on the lack of consistency between the SO and the contested decision. Several applicants dispute the existence of a link between the various agreements and concerted practices referred to in Article 4 of the contested decision. Some of them deny having participated in the single and continuous agreement relating to the ETF or, at least, dispute the duration of their participation. One argument alleges breach of the principle of equal treatment.

3687 Heracles (T-57/95) and Titan (T-64/95) also submit arguments which go to the substance of their participation in the single and continuous ETF agreement. Moreover, in the memoranda which they submitted following the measures of organisation of procedure mentioned in paragraphs 164 and 168 above, they put forward observations seeking to show that incomplete access to the Commission's file in the course of the administrative procedure impaired the exercise of their rights of defence, inasmuch as the Commission deprived them of access to allegedly exculpatory evidence.

3688 However, the only practices for which Heracles and/or Titan were held responsible 'within the framework of the Cembureau or European Task Force' (contested decision, recital 65, paragraph 3(c), 17th and 18th subparagraphs) are those mentioned in Article 4(4)(b) to (h) of the contested decision. Since the Court finds in paragraphs 3513, 3545, 3569, 3599, 3617, 3646 and 3678 above that each of those provisions should be annulled, their arguments and observations are now devoid of purpose.

A — Consistency between the SO and the contested decision

3689 Aalborg claims not to have had the opportunity of expressing a view during the administrative procedure on the Commission's characterisation, in recital 53 of the contested decision, of the various agreements and concerted practices referred to in Article 4 as a single and continuous agreement.

3690 It should be pointed out that in the first subparagraph of point 61(h) of the SO the Commission stated:

'The agreements and practices entered into within the "Cembureau Task Force or European Task Force" (points 16 to 20) must be viewed as the implementation of a single plan established by Cembureau and [a number of undertakings and associations of undertakings, including] Aalborg against the Greek producers for having infringed the home market rule. The overall measures were decided on 3, 4 and 5 June 1986 and implemented in full.

These agreements and practices constitute clear infringements of Article 85(1). Their object is to partition national markets despite the removal of economic frontiers and to prevent consumers from taking advantage of supply from another Community country.

The infringements committed by the undertakings in question as from 1986 are all the more serious as they were of long duration ...'

3691 On reading those passages, Aalborg was able to understand that the Commission considered that the various agreements and practices mentioned in point 61(h) of the SO were the result of a 'single and continuous agreement' relating to the 'Cembureau Task Force' or 'European Task Force', intended to eliminate imports into Western Europe from a Community country.

3692 In any event, any mistake by Aalborg on that point could not have harmed its rights of defence. As has been stated in paragraphs 2506 to 2511 above, the Commission, while stating in the contested decision that the various infringements found in Article 4 were part of the single and continuous ETF agreement, does not refer to the ETF agreement as such in the operative part. It considers the constituent elements separately. Aalborg was thus found to have been involved in the agreement on the setting-up of the ETF (Article 4(1)) and in concerted practices designed to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular (Article 4(3)(a)). Those two objections were clearly made against Aalborg in the SO (see paragraphs 599 to 602 and 2519 to 2524 above respectively).

3693 Aalborg's argument must therefore be rejected.

B — The single and continuous nature of the infringement referred to in Article 4 of the contested decision

3694 CBR, Unicem, Uniland and Italcementi contest the single nature of the various infringements found in Article 4 of the contested decision.

3695 CBR states that the ETF was a specific working party, created on the initiative of a number of undertakings in the cement industry, whose main tasks consisted in supporting lobbying of the Community authorities in order to heighten awareness of the anti-competitive practices of the Hellenic Republic and to seek other solutions which complied with Community competition law. It claims that, other than the creation of Interciment, the Cembureau head delegates did not take any decision on the basis of ETF recommendations. Nor did they ratify proposals made by the ETF.

3696 Unicem states that a link between the pressure brought to bear on Calcestruzzi and the ETF cannot be established on the basis of the reference in the Zurich/Céligny document to solidarity between the cement producers. Nor does examination of the documents reveal that in the discussions which took place at the ETF and Head Delegates meetings there was any specific action with regard to the contract concluded in April 1986 between Calcestruzzi and Titan. Unicem claims furthermore that the contracts concluded in April 1987 between the Italian cement producers and Calcestruzzi/Ferruzzi are not linked at all to the ETF.

3697 Uniland rejects the Commission's assertion that Interciment was the ETF's tool.

3698 Italcementi states that the Commission cannot infer from the documents adduced that there was a concurrence of wills on the part of the ETF members to coordinate their conduct on the market. It adds that the Commission established an artificial link, unsubstantiated by reliable evidence, between, on the one hand, the contacts among European cement producers in order to settle their joint lobbying activities and, on the other, the unilateral measures adopted by some of those producers.

3699 The Court points out that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim (see, in particular, *Rhône-Poulenc* v *Commission*, cited in paragraph 1053 above, paragraphs 125 and 126).

3700 In the present case, the Court must therefore ascertain whether the Commission was justified in concluding that the agreements and concerted practices referred to in Article 4(1), (2), (3)(a)

and (b) of the contested decision were the result of a single infringement. That is unnecessary as regards the practices to which the Commission refers in Article 4(4), since they have not been proved (see paragraphs 3402 to 3679 above).

3701 The purpose of the agreement on the setting-up of the ETF (Article 4(1)) was to evaluate dissuasive and persuasive measures capable of eliminating imports to Western Europe, primarily those from Greece (see paragraphs 2537 and 2538 above).

3702 The aim of the agreement on the setting-up of the Joint Trading Company, Interciment (Article 4(2)) was to implement dissuasive and persuasive measures against countries which threatened to destabilise the markets of the Member States (see paragraph 2978).

3703 The concerted practices referred to in Article 4(3)(a) of the contested decision were designed, with anti-competitive intent, to stop Calcestruzzi/Ferruzzi from continuing as a customer of the Greek producers, and of Titan in particular (see paragraph 3163 above).

3704 The aim of the agreement referred to in Article 4(3)(b) of the contested decision was to prevent, with anti-competitive intent, imports of Greek cement by Ferruzzi/Calcestruzzi (see paragraph 3356 above).

3705 Those various agreements and concerted practices were thus driven by the same anti-competitive economic aim, namely the elimination of imports to Western Europe, primarily those from Greece. That identity of purpose is confirmed by the fact that those various unlawful measures were adopted, or at least discussed, during the series of meetings of, or relating to, the ETF between 28 May 1986 and the end of May 1987.

3706 In view of the foregoing, it must be concluded that the Commission was justified in finding that the infringements referred to in Article 4(1), (2), and (3)(a) and (b) of the contested decision were part of a single agreement relating to the ETF designed to 'eliminate imports into Western Europe and, in particular, to prevent imports of Greek cement into the Member States' (contested decision, recital 53, paragraph 9).

3707 Italcementi states that the various documents on which the Commission based itself in order to conclude that there was a single and continuous ETF agreement are not official documents. They reflect only purely personal views.

3708 The Court points out that the evidence must be assessed as a whole (Case 48/69 *ICI* v *Commission*, cited in paragraph 636 above, paragraph 68).

3709 In the present case, the various items of evidence adduced by the Commission in order to conclude that there was a single ETF agreement consist essentially of minutes of meetings held between May 1986 and May 1987. All those documents, drawn up by different authors, reflect a clear convergence of the unlawful objectives pursued by the measures referred to in Article 4(1), (2), and (3)(a) and (b) of the contested decision.

3710 Italcementi's argument must, accordingly, be rejected.

3711 Italcementi criticises the Commission for using the Zurich/Céligny document, which had been finalised prior to the setting-up of the ETF. Moreover, the contested decision does not specify the date and place of adoption of that document, or the parties which allegedly adopted it.

3712 In that connection, it should first of all be noted that Italcementi does not dispute the contents of the Zurich/Céligny document, which it also helped to draft during the meeting of 4 June 1986 in Zurich (contested decision, recital 25, paragraph 2).

3713 Next, it should be noted that that document, to which the Commission refers in recital 53, paragraph 3, of the contested decision, forms part of the series of documents referred to in paragraphs 2 and 3 of that same recital. Taken together, those documents make it clear that the intended aim within the framework of the various infringements found in Article 4(1) to (3) was identical.

3714 Italcementi's argument must, therefore, be rejected.

3715 Italcementi claims that, contrary to what the Commission states in recital 53, paragraph 5, of the contested decision, the participants in the ETF did not share out tasks in order to achieve the unlawful objective which they are alleged to have jointly pursued.

3716 The Court points out that in its description of the features of the single and continuous ETF agreement (contested decision, recital 53, paragraphs 2 and 3) the Commission does not claim that there was a formal sharing-out of tasks among the participants in the ETF. The allusion to

'sharing between the participants of the tasks and actions required to achieve [the single design]' (recital 53, paragraph 5) was a response to the observation made during the administrative procedure by some of the undertakings to the effect that, since they had not participated in the ETF meetings or in the measures decided on by it, they could not be held responsible for the whole of the conduct relating to the ETF.

3717 In any event, various documents mentioned in recital 25 of the contested decision show that there was a sharing of tasks and actions at ETF level. Thus, for example, the Blue Circle memorandum ('Points for action') drawn up following the first ETF meeting (London, 17 June 1986) sets out a series of actions agreed at that meeting, indicating for each of them who was responsible for its implementation. At that time, Mr d'Agostino, of Italcementi, was entrusted, in particular, with coordination of the 'Ferruzzi situation' (contested decision, recital 25, paragraph 11; document 33.126/18787). As has been stated in paragraph 2600 above, it is apparent from the minutes of the meeting of ETF Head Delegates and representatives on 9 September 1986 at Baden-Baden that it was agreed to create five subgroups to assist the ETF in its anti-competitive task. Mr Clemente, of Italcementi, was appointed as a member to the 'Greek export markets' subgroup and coordinator for the 'exports to Greece' subgroup (contested decision, recital 25, paragraph 24; documents 33.126/18858 and 18862).

3718 Italcementi's argument cannot therefore be accepted.

C — Participation in the single agreement relating to the ETF

3719 CBR, Cembureau, Ciments Français, Unicem, Uniland, Italcementi and Cementir dispute that they participated in the single agreement relating to the ETF or, at least, the duration of their participation.

1. CBR

3720 CBR denies having participated in the single ETF agreement. It adds that, in any event, most of those who participated in the creation of Interciment, the only ETF proposal adopted by the Head Delegates, decided not to continue to participate in that company beyond 6 November 1986. That should have been regarded as indicating their withdrawal from the agreement.

3721 It should be borne in mind that CBR participated in the following constituent elements of the single agreement relating to the ETF: agreement on the setting-up of the ETF (see paragraphs

2597 to 2603); agreement on the setting-up of Interciment (see paragraphs 3008 to 3017); concerted practices referred to in Article 4(3)(a) of the contested decision (see paragraphs 3199 to 3204).

3722 It attended the meeting of 9 June 1986 in Stockholm, at which it was decided, first, to entrust the ETF with examination of the dissuasive and persuasive measures advocated by the Zurich/Céligny document in order to eliminate imports into Western Europe and, secondly, to create Interciment with a view to implementing those dissuasive and persuasive measures. Furthermore, it participated in the meeting of ETF Head Delegates and representatives on 9 September 1986 in Baden-Baden, during which the creation, anti-competitive objective and activities of the ETF, the creation of Interciment and the negotiations in hand on the Ferruzzi situation were dealt with in turn.

3723 It therefore knew that the agreements and concerted practices in which it participated at that time formed part of an overall strategy designed to eliminate imports to Western Europe, primarily those from Greece.

3724 In those circumstances, the Commission was justified in considering that CBR had participated in the single agreement relating to the ETF (contested decision, recital 65, paragraph 3(c), sixth subparagraph). The fact that CBR did not participate in all the constituent elements of that single infringement cannot exonerate it of responsibility in it (see, to that effect, *PVC*, cited in paragraph 734 above, paragraph 773).

3725 CBR participated in the agreement on the setting-up of the ETF from 9 June 1986 to the end of May 1987; the agreement on the setting-up of Interciment from 9 June 1986 to 7 November 1988; and in the concerted practices referred to in Article 4(3)(a) of the contested decision from 9 September 1986 to 15 March 1987.

3726 It therefore participated continuously in the single agreement relating to the ETF from 9 June 1986 to 7 November 1988.

2. Cembureau

3727 Cembureau denies any involvement in the single agreement relating to the ETF.

3728 The Court points out that Cembureau's participation in the agreement on the setting-up of the ETF has been established (see paragraphs 2608 to 2613 above). Cembureau does not deny its participation in the concerted practices referred to in Article 4(3)(a) of the contested decision.

3729 Through Mr Dutron it attended the meeting of 28 May 1986 in Rome, in which it was agreed to react collectively to the decision of the Greek cement industry to export cement into Western Europe with a combination of dissuasive and persuasive measures. It also took part, through Mr Collis, in the meeting of 3 June 1986, during which work began on the Zurich/Céligny document, 'the framework document' of the ETF's studies for the evaluation of dissuasive and persuasive measures. Finally, it was represented by Sir John Milne, its chairman at the time (contested decision, recital 24, paragraph 3), at the meeting of Head Delegates and ETF representatives on 9 September 1986 in Baden-Baden, at which the creation, anti-competitive objective and activities of the ETF, and the negotiations in hand on the Ferruzzi situation were dealt with in turn.

3730 It therefore knew that the agreement and concerted practices in which it participated at that time were part of an overall strategy designed to eliminate imports to Western Europe, primarily those from Greece. Its responsibility in the single infringement relating to the ETF is therefore established. The fact that Cembureau did not participate in all the constituent elements of that single infringement cannot exonerate it of such responsibility (see, to that effect, the case-law cited in paragraph 3724 above).

3731 Cembureau participated in the agreement on the setting-up of the ETF from 28 May 1986 to the end of May 1987 and in the concerted practices referred to in Article 4(3)(a) of the contested decision from 17 June 1986 to 15 March 1987.

3732 It therefore participated continuously in the single agreement relating to the ETF from 28 May 1986 to the end of May 1987.

3. Ciments Français

3733 Ciments Français claims not to have had an overall view of the strategy to combat Greek exports. Since it was not represented at the meetings of the ETF and did not take part in any actual measure, it cannot be regarded as a party to the agreement concerning imports from Greece.

3734 The Court points out that Ciments Français participated in the following constituent elements of the single agreement relating to the ETF: agreement on the setting-up of the ETF (see paragraphs 2628 to 2632 above); agreement on the setting-up of Interciment (see paragraphs 3035 to 3038 above).

3735 It attended the meeting of 28 May 1986 in Rome, during which it was agreed to react collectively to the decision of the Greek cement industry to export cement into Western Europe with a combination of dissuasive and persuasive measures. At that meeting, the possible setting-up of a joint venture between the major European cement producers in order to put the necessary measures into practice was also raised (contested decision, recital 25, paragraph 1; document 33.126/18771). Ciments Français also participated in the meeting of 9 June 1986 in Stockholm, in the course of which it was decided, first, to entrust the ETF with examination of the dissuasive and persuasive measures advocated by the Zurich/Céligny document in order to eliminate imports into Western Europe and, secondly, to create Interciment with a view to implementing those measures.

3736 It was not therefore unaware that the agreements in which it participated at that time formed part of an overall strategy designed to eliminate imports to Western Europe, primarily those from Greece.

3737 In those circumstances, the Commission was justified in taking the view that Ciments Français had participated in the single agreement relating to the ETF (contested decision, recital 65, paragraph 3(c), 13th subparagraph). The fact that Ciments Français did not participate in all the constituent elements of that single infringement cannot exonerate it of responsibility in it (see, to that effect, the case-law cited in paragraph 3724 above).

3738 Ciments Français participated in the agreement on the setting-up of the ETF from 28 May 1986 to the end of May 1987 and in the agreement on the setting-up of Interciment from 9 June 1986 to 7 November 1988.

3739 It therefore participated continuously in the single agreement relating to the ETF from 28 May 1986 to 7 November 1988.

4. Unicem

3740 Unicem claims that its participation in only one meeting (that of the 'stick actions' subgroup of 17 March 1987) cannot render it responsible for the various activities of the ETF. Only regular attendance at the meetings held in the context of the ETF could justify holding it responsible for

the activities of that committee (*BASF* v *Commission*, cited in paragraph 1852 above, paragraphs 76, 92 and 185). Moreover, it took no part in the actions undertaken in the context of the ETF. It claims to have been unaware that a meeting was being held in Rome on 28 May 1986.

3741 The Court points out that Unicem participated in the following constituent elements of the single agreement relating to the ETF: agreement on the setting-up of the ETF (see paragraphs 2678 to 2682); concerted practices and agreement referred to in Article 4(3) of the contested decision relating to the measures to defend the Italian market (see paragraphs 3246 to 3253 and 3345 to 3373).

3742 It had proposed that a member of its staff, Mr Albert, should be a member of two of the five working subgroups (the 'exchange of defensive experiences' subgroup and the 'threats from other countries' subgroup) set up at the meeting of Head Delegates and ETF representatives on 9 September 1986 in Baden-Baden in order to assist the ETF in its anti-competitive task. Through Mr Albert it participated in the meeting of the subgroup on 'stick actions' on 17 March 1987. At that meeting it reported on the latest developments concerning the agreement between the Italian cement producers and the Ferruzzi group, whose purpose was to avoid the threat of imports by that group of large quantities of cement from Greece.

3743 It was thus fully aware that the agreements and concerted practices in which it participated at that time formed part of an overall strategy designed to eliminate imports to Western Europe, in particular those from Greece. Its responsibility for the single infringement relating to the ETF is therefore established. The fact that it did not participate in all the constituent elements of that single infringement cannot exonerate it of such responsibility (see, to that effect, the case-law cited in paragraph 3724 above).

3744 Unicem participated in the agreement on the setting-up of the ETF from 9 September 1986 to the end of May 1987, in the concerted practices found in Article 4(3)(a) of the contested decision from 9 September 1986 to 15 March 1987 and in the agreement referred to in Article 4(3)(b) from 3 April 1987 to 3 April 1992.

3745 It therefore participated continuously in the single agreement relating to the ETF from 9 September 1986 to 3 April 1992.

5. Uniland

3746 Uniland objects to the Commission's finding that it is responsible for the infringement. It points out that the mere attendance by Mr Rumeu at two meetings on the ETF does not in any way

lead to the conclusion that it participated in an alleged overall agreement which lasted until 1993. It states that the Commission cannot merely assert that there was a single and continuous agreement involving all the participants, even where they did not participate individually in each of the practices adopted by the group.

3747 The Court points out that Uniland participated in the following constituent elements of the single agreement relating to the ETF: agreement on the setting-up of the ETF (see paragraphs 2695 to 2698); agreement on the setting-up of Interciment (see paragraphs 3069 to 3072); concerted practices referred to in Article 4(3)(a) of the contested decision (see paragraphs 3199 to 3204 above).

3748 It attended the meeting of Head Delegates and ETF representatives on 9 September 1986 in Baden-Baden, during which the creation, anti-competitive objective and activities of the ETF, the creation of Interciment and the negotiations in hand on the Ferruzzi situation were dealt with in turn.

3749 It therefore knew that the agreements and concerted practices in which it participated at that time formed part of an overall strategy designed to eliminate imports to Western Europe, primarily those from Greece.

3750 In those circumstances, the Commission was justified in considering that Uniland had participated in the single agreement relating to the ETF (contested decision, recital 65, paragraph 3(c), 10th subparagraph). The fact that Uniland did not participate in all the constituent elements of that single infringement cannot exonerate it of responsibility in it (see, to that effect, the case-law cited in paragraph 3724 above).

3751 Uniland participated in the agreement on the setting-up of the ETF from 9 September 1986 to the end of May 1987; the agreement on the setting-up of Interciment from 9 September 1986 to 7 November 1988; and in the concerted practices found in Article 4(3)(a) of the contested decision from 9 September 1986 to 15 March 1987.

3752 It therefore participated continuously in the single agreement relating to the ETF from 9 September 1986 to 7 November 1988.

6. Italcementi

3753 Italcementi claims that the Commission did not specify the date and place of adoption of the Zurich/Céligny document or the parties which purportedly adopted it. It claims, furthermore, that the various ETF participants acted independently of each other. Any activities pursued by some participants with the object or effect of restricting competition could therefore render only those participants liable.

3754 The Court points out that Italcementi participated in all the constituent elements of the single agreement relating to the ETF: agreement on the setting-up of the ETF (see paragraphs 2746 and 2747); agreement on the setting-up of Interciment (see paragraphs 3008 to 3017); concerted practices and agreement referred to in Article 4(3) of the contested decision relating to the measures to defend the Italian market (see paragraphs 3265 to 3270 and 3345 to 3384).

3755 There is no doubt that it was aware of the overall strategy designed to eliminate imports to Western Europe, primarily those from Greece. Its responsibility in the single infringement relating to the ETF is clearly established.

3756 Italcementi participated in the agreement on the setting-up of the ETF from 28 May 1986 to the end of May 1987; in the agreement on the setting-up of Interciment from 9 June 1986 to 7 November 1988; in the concerted practices found in Article 4(3)(a) of the contested decision from 17 June 1986 to 15 March 1987; and in the agreement referred to in Article 4(3)(b) from 3 April 1987 to 3 April 1992.

3757 It therefore participated continuously in the single agreement relating to the ETF from 28 May 1986 to 3 April 1992.

7. Cementir

3758 Cementir denies having participated in a single agreement concluded in the context of the ETF.

3759 It should be recalled that Cementir participated in two constituent elements of the single agreement relating to the ETF, namely the concerted practices and the agreement referred to in

Article 4(3) of the contested decision relating to the measures to defend the Italian market against imports of cement from Greece (see paragraphs 3284 to 3289 and 3345 to 3386).

3760 It took part in those two infringements in particular with the two other major Italian cement producers, Unicem and Italcementi, which, as is apparent from the analysis set out in paragraphs 3742, 3743, 3754 and 3755, were fully aware of the overall anti-competitive strategy of which the measures to defend the Italian market formed part. Unicem and Italcementi must necessarily have informed Cementir of the anti-competitive background against which those measures took place. Cementir must therefore have known that the concerted practices and the agreement in which it participated at that time originated in an overall plan designed to eliminate imports of cement into Western Europe, especially from Greece.

3761 Cementir's responsibility in the single agreement relating to the ETF is therefore established. The fact that Cementir did not participate in all the constituent elements of that single infringement cannot exonerate it of such responsibility (see, to that effect, the case-law cited in paragraph 3724 above).

3762 Cementir participated in the concerted practices found in Article 4(3)(a) of the contested decision from 9 September 1986 to 15 March 1987 and in the agreement referred to in Article 4(3)(b) from 3 April 1987 to 3 April 1992. It must therefore be concluded that it participated continuously in the single agreement relating to the ETF from 9 September 1986 to 3 April 1992.

D — Infringement of the principle of equal treatment

3763 Asland claims that the Commission did not give the same treatment to all the undertakings allegedly involved in the ETF activities. The Commission argued, first, that mere involvement in a specific measure implied participation in the single and continuous ETF agreement and, secondly, that participation in that agreement was merely in the form of involvement in one or other specific measure. Asland cites the example of Rugby and Castle, where the fact that they were mentioned in the contracts to purchase cement and clinker from Greece did not lead the Commission to regard them as parties to the single and continuous agreement in the framework of the ETF.

3764 The Court points out that the only infringement alleged against Rugby and Castle 'within the framework of the Cembureau or European Task Force' (contested decision, recital 65, paragraph 3(c), penultimate and last subparagraphs), namely the concerted practice with Blue Circle referred to in Article 4(4)(a), has not been upheld (see paragraphs 3402 to 3435 above).

On the other hand, it is established that Asland did participate in the agreement on the setting-up of the ETF (see paragraphs 2687 to 2691 above).

3765 Asland attended the meeting of 28 May 1986 in Rome, in the course of which it was agreed to react collectively to the decision of the Greek cement industry to export cement into Western Europe by a combination of dissuasive and persuasive measures.

3766 It knew, therefore, that the agreement in which it participated formed part of an overall plan designed to eliminate imports to Western Europe, primarily those from Greece.

3767 In those circumstances, the Commission was justified in taking the view that Asland had participated in the single agreement relating to the ETF (contested decision, recital 65, paragraph 3(c), seventh subparagraph). The fact that Asland participated in only one of the constituent elements of that single infringement cannot exonerate it of responsibility in it (see, to that effect, the case-law cited in paragraph 3724 above).

3768 Asland participated in the agreement on the setting-up of the ETF from 28 May 1986 to the end of May 1987. That same period must be regarded as the duration of its participation in the single agreement relating to the ETF.

Conclusions

3769 It is apparent from the whole of the foregoing (see paragraphs 2504 to 3768) that:

— Article 4(1) of the contested decision must be annulled in its entirety so far as it concerns Cementir;

— Article 4(1) must be annulled with regard to CBR, BDZ, Oficemen, Aker and EUROC in so far as it finds that they participated in the agreement on the setting-up of the ETF before 9 June 1986 and after 31 May 1987;

— Article 4(1) must be annulled with regard to Aalborg, Unicem, Uniland and Irish Cement in so far as it finds that they participated in the agreement on the setting-up of the ETF before 9 September 1986 and after 31 May 1987;

— Article 4(1) must be annulled with regard to Cembureau, Dyckerhoff, SFIC, Ciments Français, Heidelberger, Lafarge, Asland, Italcementi, Holderbank, and Blue Circle in so far as it finds that they participated in the agreement on the setting-up of the ETF after 31 May 1987;

— Article 4(3)(a) must be annulled with regard to CBR, Dyckerhoff, Aalborg, BDZ, Unicem, Uniland, Oficemen, Irish Cement, Aker, EUROC and Cementir in so far as it finds that they participated in concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular, before 9 September 1986;

— Article 4(4)(a) must be annulled in its entirety so far as it concerns Rugby, Castle and Blue Circle;

— Article 4(4)(b) must be annulled in its entirety so far as it concerns Titan and Blue Circle;

— Article 4(4)(c) must be annulled in its entirety so far as it concerns Titan and Holderbank;

— Article 4(4)(d) must be annulled in its entirety so far as it concerns Heracles and Holderbank;

— Article 4(4)(e) must be annulled in its entirety so far as it concerns Lafarge and Titan;

— Article 4(2) must be annulled in its entirety so far as it concerns Heidelberger, Unicem, Asland and Cementir;

— Article 4(2) must be annulled with regard to Uniland in so far as it finds that it participated in the agreement on the setting-up of the joint trading company Interciment before 9 September 1986 and after 7 November 1988;

— Article 4(2) must be annulled with regard to CBR, Dyckerhoff, SFIC, Ciments Français, Lafarge, BDZ, Oficemen, Italcementi, Holderbank, Aker, EUROC and Blue Circle in so far as it finds that they participated in the agreement on the setting-up of the joint trading company Interciment after 7 November 1988;

— Article 4(3)(a) must be annulled in its entirety so far as it concerns Ciments Français, Heidelberger and Asland;

— Article 4(4)(f) must be annulled in its entirety so far as it concerns Lafarge and Heracles;

— Article 4(4)(g) must be annulled in its entirety so far as it concerns CBR, Heracles and Titan;

— Article 4(4)(h) must be annulled in its entirety so far as it concerns Titan, Aker and EUROC.

3770 The remainder of the pleas examined must be rejected.

X — *The pleas of infringements of Articles 85(1) and 190 of the Treaty and of the rights of the defence in that the Commission finds that there were concerted practices within the framework of the ECEC contrary to Article 85(1) of the Treaty and that the various applicants concerned participated in them (Article 5 of the contested decision)*

Preliminary observations

3771 Article 5 of the contested decision finds that FIC, ENCI, Dyckerhoff, SFIC, Aalborg, Alsen-Breitenburg, Nordcement, Unicem, Castle, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI infringed the provisions of Article 85(1) of the Treaty 'by participating, within the framework of the ECEC, in concerted practices relating to the exchange of information, the supply and demand situation in the importing third countries, the export prices chargeable, the import situation in the member countries and the supply and demand situation on the home markets and designed to prevent incursions by competitors on respective national markets in the Community'. The Commission found that the infringement commenced on 14 March 1984, except in the case of Castle, Oficemen and ATIC, for which it fixed a commencement date of 1 January 1986. The Commission found that all the applicants concerned participated in the infringement until 22 September 1989.

3772 All the applicants referred to in Article 5 of the contested decision dispute that there was an infringement and they participated in it. ENCI, Aalborg, Alsen-Breitenburg, Nordcement, Unicem, Castle and ATIC also complain of an infringement of their rights of defence because of inadequate access during the administrative procedure to the Commission's file, which denied them allegedly exculpatory evidence concerning the objection upheld in Article 5 of the contested decision. Furthermore, ENCI and Italcementi consider that this objection was not set out sufficiently clearly in the SO. Dyckerhoff, Unicem and Cementir also submit that the statement of reasons for the finding of the infringement is insufficient and thus contrary to Article 190 of the Treaty.

Contested decision

3773 The ECEC and the concerted practices found to have existed within the framework of that committee are the subject-matter of recitals 30 to 34, 58 and 60 of the contested decision.

3774 The Commission first of all sets out the background to the establishment of the ECEC (recital 30). It states that it is apparent from the Blue Circle note of 9 April 1981 — not 4 April 1981 as the contested decision wrongly indicates — (recital 30, paragraph 1; documents 31.126/11338 to 11340) that the ECEC and the EPC were set up following Cembureau's decision to cease running an export committee itself.

3775 The setting-up of the ECEC was decided at a meeting held in Paris on 23 January 1979 (recital 30, paragraph 2). The Commission refers to the statutes setting up the ECEC of 6 December 1979 (recital 31, paragraph 2; documents 33.126/16786 to 16789) and of 26 September 1986 (recital 31, paragraph 2; documents 33.126/12516 to 12518) and states that according to the statutes the aim of the ECEC was to promote, on an informal basis, cooperation between the European producers concerned with the exports of grey cement to all countries with the exception of the Western European countries and the United States.

3776 The Commission then refers to the various undertakings and associations of undertakings which it considers to be members of the ECEC, namely FIC, ENCI, Dyckerhoff, SFIC, Aalborg, Alsen-Breitenburg, Nordcement, Unicem, Castle, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI. Referring to the handwritten notes of Mr Leboeuf, of Ciments Français, relating to a meeting of the Steering Committee of the ECEC in Brussels on 13 and 14 April 1989 (recital 31, paragraph 3; documents 33.126/18201 to 18204), it explains that 'it was countries which were ECEC members and which decided as they pleased who was to represent them from among the associations or the companies'.

3777 The Commission also emphasises the close links between the ECEC and the EPC (recital 32). It refers in that regard to the statutes of the ECEC of 6 December 1979, which provided that two members of the Steering Committee of the ECEC had to be elected from among the members entitled to two or three votes in the Plenary Assembly of the ECEC, that is to say, the large exporters, members of the EPC (recital 32, paragraphs 1 and 2). It adds that even if the statutes of 26 September 1986 no longer envisaged a special role for the large exporters in the Steering Committee of the ECEC, EPC information nevertheless continued to be communicated to the ECEC after September 1986 (recital 32, paragraph 3).

3778 The Commission describes various activities which were performed in the framework of the ECEC, namely exchanges of statistics on exports to non-member countries of Cembureau (recital 33, paragraph 1); examination of the supply and demand situation in importing non-member countries (recital 33, paragraph 2); recommendation of reference prices for the exports (recital 33, paragraph 3); examination of the import situation in the member countries of Cembureau (recital 33, paragraph 4); and examination of the supply and demand situation on home markets (recital 33, paragraph 5).

3779 Lastly, it refers to the dissolution of the ECEC (recital 34).

3780 In the part of the contested decision containing the legal assessment of the activities of the ECEC the Commission explains that, in order to ensure that the principle of not transhipping to home markets was complied with, means of channelling the production surpluses had to be found. If there were no outlets for the production surpluses outside the Community there was a very great risk of the principle of non-transhipment to home markets being violated (recital 58, paragraph 2).

3781 The Commission then refers to three facts (see paragraph 3793 et seq. below) as proof that 'the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets' (recital 58, paragraphs 3 to 5).

3782 It concludes (recital 58, paragraph 6):

'The concerted practices described in recital 33 relating to examination of the internal situation in member countries and to exports to third countries constitute infringements of Article 85(1) from 14 March 1984 to 22 September 1989, these being the dates of the first and last meetings of which the Commission is aware. Through these practices, the ECEC members waived the pursuit of any autonomous business policy, setting up a system of solidarity and monitoring aimed at preventing any incursions by competitors on to respective home markets within the Community.'

The unlawful nature of the activities of the ECEC referred to in Article 5 of the contested decision

3783 FIC, ENCI, Dyckerhoff, SFIC, Aalborg, Alsen-Breitenburg, Nordcement, Unicem, Castle, Oficemen, Irish Cement, Italcementi, Cementir and AGCI do not dispute that exchanges of information took place within the ECEC. However, they stress the fact that the activities of the ECEC aimed to defend the interests of the European cement industry on export markets outside Europe. They consider that such cooperation, which relates solely to markets outside the Community, does not fall within the scope of application of Article 85(1) of the Treaty. They add that none of the documents referred to in recitals 30 to 34, 58 and 60 of the contested decision prove the existence of any link between the ECEC's activities and a rule that there should be no transhipment to European home markets. The Commission's contention necessarily implies that any cooperation on exports between competing undertakings is unlawful.

3784 The Commission, on the other hand, considers that the activities of the ECEC described in recital 33 of the contested decision distorted competition within the Community (contested decision, recital 58) and affected trade between Member States (contested decision, recital 60). According to the Commission, 'the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets' by channelling the production surpluses (contested decision, recital 58, paragraphs 2 to 5). Consequently, in Article 5 of the contested decision the ECEC's activities were held to be concerted practices contrary to Article 85(1) of the Treaty in that they were designed 'to prevent incursions by competitors on respective national markets in the Community'.

3785 The Court points out that where concerted practices in regard to exports to countries that are not members of the Community have as their object or effect the prevention, restriction or distortion of competition within the Community and they are liable to affect trade between Member States, they fall within the scope of application of Article 85(1) of the Treaty (*Suiker Unie and Others* v *Commission*, cited in paragraph 651 above, paragraphs 580 and 599 to 601, and *CRAM and Rheinzink* v *Commission*, cited in paragraph 1335 above, paragraphs 24 to 31).

3786 In the present case, it is therefore necessary to examine whether, as the Commission alleges, the facts found in the contested decision enabled the conclusion to be drawn that the object of the members of the ECEC in that export committee was to reinforce the rule that there should be no transhipment to European home markets. If that was the case, the Commission was entitled to find that the ECEC's activities were concerted practices contrary to Article 85(1) of the Treaty.

3787 In order to examine that question it is necessary to assess whether the Commission proved that the cooperation within the ECEC was designed 'to prevent incursions by competitors on respective national markets in the Community' (Article 5 of the contested decision).

3788 Article 1 of the ECEC statutes of 6 December 1979 and Article 1 of the statutes of 26 September 1986 provide that the object of the ECEC is as follows: 'To promote on an informal basis cooperation between Western European Cement Manufacturers interested in export to countries outside Western Europe, excluding White, Coloured, Aluminous and Oil Well Cements' (documents 33.126/16786 to 16789 and 12516 to 12518). Article 2 of those same statutes states, as regards the 'Area of Operations' that the ECEC 'does not discuss or concern itself in any way with exports by members ... to west European countries or the United States of America' (same documents).

3789 The minutes of the meeting in Paris on 23 January 1979 (contested decision, recital 30, paragraph 2; documents 33.126/12751 and 12752) confirm that the object of the ECEC is 'the promotion of export and the exchange of commercial information'. An internal memorandum of Ciments Français of 7 March 1989 states also that 'the ECEC confines itself to an exchange of statistical information and forecasts by country, dealing solely with tonnages outside Cembureau' (contested decision, recital 35, paragraph 6; documents 33.126/4466 and 4467).

3790 It follows that the object of the cooperation within the ECEC was the promotion of exports of various types of grey cement excluding those to Western Europe and the United States of America. It is not therefore apparent from the above documents that the real object of the members of the ECEC was to reinforce the rule that there should be no transhipment to European home markets.

3791 The Commission acknowledges that 'there is in the documents setting up the ECEC no direct link between the home market rule and the channelling of exports' (contested decision, recital 58, paragraph 3). It states, however, that the lawfulness of the activities of the ECEC must be assessed in their context. It claims that it is clear from several documents that in order to be able to apply the rule of non-transhipment to home markets, it was indispensable to know what flows of cement were intended for exports to non-member countries, so as to ensure the channelling of production surpluses. In the contested decision (recital 58, paragraph 2) the Commission refers in that regard to Blue Circle's internal memorandum of 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334). In the present proceedings, it relies, moreover, on Vicat's notes concerning the ECEC meeting of 11 and 12 September 1985 (contested decision, recital 33, paragraph 3; documents 33.126/6139 to 6142).

3792 However, the Court finds that the Blue Circle memorandum of 1 December 1983 emanates from an undertaking which was not a member of the ECEC and that its content does not display any direct link with the ECEC's activities. Although it refers to a link between the rule that there should be no transhipment to home markets and the channelling of production surpluses, it cannot be presumed, on the basis of the mere existence of an export committee, that its members intended, through their activities in it, to 'prevent incursions by competitors on respective national markets in the Community' (Article 5 of the contested decision). As to the Vicat notes of 11 and 12 September 1985, they prove only that export prices were recommended in the ECEC, a matter which the applicants concerned do not dispute, and that at that time supply exceeded demand on the export markets, a circumstance which caused prices to fall on those markets. Those notes are not, however, of such a nature as to show that the members of the ECEC intended to channel their production surpluses in order to reinforce the rule that there should be no transhipment to European home markets.

3793 The Commission submits that the link between the ECEC's activities and the rule that there should be no transhipment to European home markets is apparent from the following three facts (contested decision, recital 58, paragraph 3): first, the members of the ECEC were direct or indirect members of Cembureau. Consequently, they were all subject to the obligation to comply with the home market principle. Second, the members of the EPC, except for Blue Circle, were indirect members of the ECEC through their national associations. The EPC's activity therefore influenced the conduct and activity of the ECEC and its members. The EPC's object was specifically the protection of home markets. Third, it is evident from the documents referred to in recital 33, paragraphs 4 and 5, of the contested decision that the ECEC's activities were not confined to the overseas export markets. According to the Commission, at their meetings the members of the ECEC discussed imports and supply and demand in the member countries. The members of the ECEC thus themselves established a link between home markets and overseas export markets.

3794 It must be examined whether the Commission was entitled to conclude, on the basis of that evidence, that the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets.

A — The ECEC's members' direct or indirect membership of Cembureau

3795 In the contested decision the Commission states that the members of the ECEC were direct or indirect members of Cembureau. In the course of the present proceedings, it has pointed to the historical link between Cembureau and the ECEC, which, it claims, is apparent from the abovementioned Blue Circle memorandum of 9 April 1981.

3796 The Court finds that that memorandum proves that there was no institutional link between Cembureau and the ECEC. The ECEC was established following Cembureau's decision to cease running an export committee itself (see paragraph 3774 above). Although it is correct that the members of the ECEC were all direct or indirect members of Cembureau, that fact does not in itself prove that the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets.

3797 The Commission was not justified in stating as follows in the contested decision (recital 58, paragraph 3(a)) in regard to the members of the ECEC, on the ground that they were direct or indirect members of Cembureau:

'They are consequently all under the obligation to comply with the home market principle. Their conduct is accordingly influenced by this obligation, in that they have to channel their production surpluses to third countries.'

3798 In making that statement the Commission merely presumed what it had to prove, namely the existence of a link between the activities of the ECEC and the rule that there should be no transhipment to home markets. Furthermore, it cannot be ruled out *a priori* that some direct and indirect members of Cembureau had established cooperation within the framework of the ECEC that was unconnected to a rule that there should be no transhipment to European home markets. The Court points out in that regard that the ECEC was set up in 1979, four years before the conclusion of the Cembureau agreement at the Head Delegates meeting of 14 January 1983.

3799 Admittedly, for the parties to the Cembureau agreement which took part in the activities of the ECEC after the conclusion of that agreement, the information exchanged during ECEC meetings concerning third country markets helped them to channel their production surpluses to non-European destinations and as such therefore facilitated the implementation of the Cembureau agreement. Amongst the members of the ECEC are several direct members of Cembureau (FIC, SFIC, Aalborg, Oficemen, Irish Cement, ATIC, Italcementi, Cementir and AGCI), whose participation in the Cembureau agreement is not in any doubt, as they participated in the meetings of the Head Delegates at which the Cembureau agreement was concluded and/or confirmed (see paragraphs 1342 to 1403 above).

3800 However, that finding does not mean that the cooperation organised within the framework of the ECEC between all its members had as its object the reinforcement of the rule that there should be no transhipment to home markets. The Court points out in that regard that the members of the ECEC include Unicem and several indirect members of Cembureau, whose participation in the Cembureau agreement has not yet been proved. The proof that those undertakings adhered to the Cembureau agreement is based on their participation in a measure implementing that agreement (see paragraphs 1305 and 1404 to 1417 above), a measure whose object was identical to that of the Cembureau agreement (contested decision, recitals 46, paragraphs 1 and 2, and 65, paragraph 3, first subparagraph). However, by relying on the presumed accession of those undertakings to the rule on non-transhipment to home markets because of their direct or indirect membership of Cembureau in order to prove the unlawful nature of the ECEC's activities, the Commission in fact adopted a circular argument. In it, the accession of undertakings to the Cembureau agreement is considered to be shown by their participation in an agreement or concerted practice having the same object as the Cembureau agreement, whereas the same object is proved on the basis of presumed accession to the rule on non-transhipment to home markets.

3801 In order to find that the conduct referred to in Article 5 of the contested decision was unlawful the Commission therefore had to prove that the activities of the ECEC were designed to reinforce the home market rule, without relying on a presumption of accession to that rule by virtue of the ECEC members' direct or indirect membership of Cembureau. Only on that condition could the participation of Unicem and the relevant indirect members of Cembureau in the activities of the ECEC be considered to be a clear sign of their accession to the common rule of not transhipping to internal markets.

3802 Lastly, if the two other facts adduced by the Commission in recitals 30 to 34, 58 and 60 of the contested decision were to prove that the cooperation within the framework of the ECEC had in fact aimed 'to prevent incursions by competitors on respective national markets in the Community' (Article 5 of the contested decision) and, accordingly, that the cooperation organised within the ECEC and the Cembureau agreement had the same object, the ECEC members' direct or indirect membership of Cembureau would constitute a relevant fact when determining whether the ECEC's activities were a measure implementing the Cembureau agreement.

B — Links between the ECEC and the EPC

3803 In the contested decision the Commission emphasises the links allegedly existing between the ECEC and the EPC. First, the Steering Committee of the ECEC ensured a link between the ECEC and the EPC. The Commission refers in that regard to the statutes of the ECEC of 6 December 1979 which provided that two members of the ECEC's Steering Committee were to be elected from amongst the members entitled to two or three votes in the plenary assembly of the ECEC, that is to say, from amongst the large exporters, who were members of the EPC. In order to prove the existence of an institutional link between the ECEC and the EPC it stated during the present proceedings, first, that the two export committees had a common origin, as is

apparent from the Blue Circle memorandum of 9 April 1981 (contested decision, recital 30, paragraph 1; documents 33.126/11338 to 11340) and, second, the fact that the ECEC and the EPC had a joint secretariat, namely the ECMEC. It also places weight on the fact that information concerning the EPC was communicated to the ECEC (contested decision, recital 32, paragraph 2). Thus, the record of the meeting in Paris on 23 January 1979 (contested decision, recital 30, paragraph 2; documents 33.126/12751 and 12752) states: 'The largest exporters will continue to meet from time to time and their points of view on commercial problems will be shared with the other members of the [ECEC] through their representatives on this Committee.' In the contested decision (recital 32, paragraphs 2 and 3) the Commission quotes some examples of such exchanges of information. Even if there were no longer any 'institutional link' between the ECEC and the EPC by virtue of the ECEC's statutes of 26 September 1986 which no longer provided for a special role for the large exporters in the Steering Committee of the ECEC, it is apparent, according to the Commission, that from time to time EPC information continued to be communicated to the ECEC even after 26 September 1986 (contested decision, recitals 32, paragraph 3, and 58, paragraph 3(b)).

3804 Since the Commission considered that the EPC's rule was non-transhipment to internal markets, it takes the view that the links between the EPC and the ECEC 'contaminated' the latter's activities.

3805 The Court must first examine whether the various items of evidence on which the Commission relied in the contested decision (recital 32) enable the conclusion to be reached that the links between the EPC and the ECEC were such that the EPC must have influenced the ECEC's conduct.

3806 In that regard, the Court finds, having regard to the evidence to which the Commission refers in the contested decision, that the members of the ECEC always took the view that the characteristics and identity of their export committee were independent of those of the EPC.

3807 The minutes of the meeting of the ECEC of 22 March 1985 (contested decision, recital 32, paragraph 2; documents 33.126/14289 to 14294) states:

'The identity and character of ECEC is different from EPC or CMA [see paragraph 1040 above] or even Cembureau. ECEC has served us well by providing the forum for members to meet each other, discuss business together and exchange information on prices and statistics as well as give us a better assessment of competitive market situations.'

3808 The minutes of the meeting of the ECEC of 23 January 1986 (contested decision, recital 32, paragraph 2; documents 33.126/12667 to 12674) confirm:

'EPC feels that they are a completely separate body .... EPC takes the view that they like to have few members as restricted numbers of participants facilitate discussion.'

3809 It is thus apparent that the special features of the ECEC in comparison with the EPC were highlighted by the members of the ECEC themselves.

3810 Moreover, the documents in the file and in particular the minutes of the meetings of the Steering Committee of the ECEC of 21 February 1985 (contested decision, recital 32, paragraph 2; documents 33.126/14266 and 14267) and 22 January 1986 (*ibidem*; documents 33.126/12614 to 12616) and of the ECEC meeting of 23 January 1986 (*ibidem*; documents 33.126/12667 to 12674) reveal the existence of some tension between the ECEC and the EPC. They show that the members of the ECEC sought to establish cooperation with the EPC which was refused by the members of the EPC. The memorandum of Ciments Français, a member of the EPC, of 28 May 1986 (contested decision, recital 32, paragraph 3; documents 33.126/18218 and 18219) explains that the relations between the ECEC and the EPC were 'difficult' and that there was even a 'lack of confidence' between the two committees. A limited concession was nevertheless made to the ECEC. Thus, the abovementioned Ciments Français memorandum mentions that a request was made to the chairman of the EPC that Mr Gac, secretary of the ECMEC, which constituted a joint secretariat of the ECEC and the EPC (contested decision, recital 30, paragraph 3) be 'authorised to give the ECEC information relating generally to the members of the ECEC that had no commercial consequence (conditions regarding prices, competition, etc.) that was brought together at the level of countries and not at that of individual companies'. However, the same note states that it is undesirable that 'a representative of the Policy [namely the EPC] reports on the activity of that body [to the ECEC] because one organisation does not depend on the other and it is not appropriate to make it materialise'.

3811 In those circumstances, the Commission cannot allege that the existence of a link between the ECEC and the EPC at the level of the Steering Committee of the ECEC and the existence of a joint secretariat to the two committees influenced the ECEC's activities.

3812 It is still necessary to examine whether the information concerning the EPC which was actually communicated to the ECEC shows that the object of the ECEC was non-transhipment to internal markets. Recital 32, paragraphs 2 and 3, of the contested decision refers in that regard to various records of meetings of the ECEC and of its Steering Committee, namely the records of the ECEC's meetings of 14 March 1984 (documents 33.126/14257 to 14262), 11 September 1984 (documents 33.126/14303 to 14309), 14 December 1984 (documents 33.126/14310 to 14315), 22 March 1985 (documents 33.126/14289 to 14294), 23 January 1986 (documents 33.126/12667 to 12674) and 23 September 1988 (documents 33.126/12627 to 12634), the minutes of the ECEC Steering Committee's meetings of 21 February 1985

(documents 33.126/14266 and 14267), 22 January 1986 (documents 33.126/12614 to 12616 and 12667 to 12674), 10 June 1986 (documents 33.126/12607 to 12610) and the handwritten notes of Italcementi concerning the meeting of the ECEC's Steering Committee on 22 September 1988 or on the ECEC meeting of 23 September 1988 (documents 33.126/3418 to 3421).

3813 First of all, the record of the ECEC meeting of 14 March 1984 states, in the chapter 'Report from the Policy Committee', that the ECEC found that 'business had sharply increased in the course of the year in the Mediterranean and had improved in the Red Sea Markets but declined in the Gulf. Other Markets recorded a substantial improvement'. The same document states: 'Relations between East and West are difficult ... The contacts between individual companies, however, ... were very useful and certainly helped to achieve an improved price level. There was an East-West meeting in Singapore ...'. In the light of those statements, the Court finds that the information communicated by the EPC to the ECEC during the ECEC meeting of 14 March 1984 referred exclusively to exports to non-Community countries. In any event, it is not possible to discern any link in that document between the information communicated during that meeting and any reinforcement within the ECEC of the rule that there should be no transhipment to internal markets.

3814 The record of the ECEC meeting of 11 September 1984 indicates that there was little to report in regard to the EPC. Only the date of the next EPC meeting was given. The record of the ECEC meeting of 14 December 1984 mentions, in regard to the EPC, only the fact that a meeting took place between the chairmen of the ECEC and of the EPC concerning the relations between the two committees. Those documents do not demonstrate that the activities of the ECEC aimed to reinforce the rule that there should be no transhipment to internal European markets.

3815 The record of the ECEC meeting of 22 March 1985 contains an item on the EPC. It is clear from it that a report was made on the situation of the export markets and that discussions took place on the formation of the CMA and on the future of the EPC after the formation of the CMA. However, no information reported during that meeting was brought into the context of the internal European market.

3816 The record of the Steering Committee of 21 February 1985 mentions that at 'the last EPC meeting held on 14 February 1985 pressure of time prevented a discussion of the relationship between ECEC and EPC ... The participants authorised Mr Couniotakis to continue his correspondence with the chairman of EPC, to bring about a closer, reciprocal cooperation of [the] two organisations'. The information communicated during that meeting is not of such a nature as to show that the underlying rule of cooperation in the ECEC was the reinforcement of the rule that there should be no transhipment to home markets.

3817 As the Commission states in the contested decision (recital 32, paragraph 2), the records of the meeting of the Steering Committee of the ECEC on 22 January 1986 and of the meeting of the ECEC on 23 January 1986 show that there was apparently some tension between the ECEC and the EPC (see paragraph 3810 above). It emerges from the record of the ECEC's Steering Committee of 10 June 1986 that the chairman of the ECEC tried to overcome the reluctance of the EPC to communicate information to the ECEC. However, none of those records show that during the meetings in question information was communicated concerning the EPC, information which would show that the cooperation within the ECEC aimed to reinforce the rule that there should be no transhipment to European home markets.

3818 Even though the new statutes of the ECEC of 26 September 1986 did not provide for any special role of the large exporters in the Steering Committee, some information of the EPC was, as the Commission states (contested decision, recital 32, paragraph 3), still being communicated to the ECEC after 1986.

3819 Thus, the record of the ECEC meeting of 23 September 1988 indicates that, under a general agreement between the ECEC and EPC chairmen, information on the meetings with Far East producers were available to ECEC members. As to the handwritten Italcementi notes on the ECEC Steering Committee meeting on 22 September 1988 or on the ECEC meeting of 23 September 1988, they confirm that EPC information had been communicated to the ECEC. Italcementi noted: 'EPC — 25% in the first three months — 1988 trend — Total EPC 10 mil. Hispacement, Heracles, Valenciana, Titan˜ 7 mil. — Ciments Français, Lafarge, Norcem, Cementos del Mar, Hornos Ibéricos, Rezola, Cementa, Blue Circle, Halkis˜ 3 mil.' and 'Hispacement 1.1 mil.; Heracles 2.8 mil. ton; Titan 1.8 mil.; Valenciana 1 mil. — All destinations 10 mil.' ('EPC — 25% nei primi tre mesi — 1988 trend — Total EPC 10 mil. Hispacement, Heracles, Valenciana, Titan˜ 7 mil. — Ciments Français, Lafarge, Norcem, Cementos del Mar, Hornos Ibéricos, Rezola, Cementa, Blue Circle, Halkis˜ 3 mil.' and 'Hispacement 1.1 mil.; Heracles 2.8 mil. ton; Titan 1.8 mil.; Valenciana 1 mil. — All destinations 10 mil.') As the Commission observes (contested decision, recital 32, paragraph 3, these are data exchanged in the EPC which were communicated to the ECEC. There is an explicit reference to the EPC in the handwritten notes of Italcementi, a member of the ECEC but not of the EPC.

3820 It is, however, apparent from the minutes of the ECEC meeting of 23 September 1988 that during that meeting the ECEC members evaluated supply and demand on the export markets outside the Community for the years 1988 and 1989. In that context, the information communicated by the EPC to the ECEC that was contained in the handwritten Italcementi notes were of obvious use to the members of the ECEC since they gave an indication as to exports by EPC members in 1988. Nevertheless, neither the handwritten Italcementi notes nor the minutes of the ECEC meeting of 23 September 1988 support the conclusion that the ECEC's activities aimed to preserve internal markets through channelling surplus production. The documents in question do not contain any evidence of such a nature as to show that the information communicated by the EPC to the ECEC concerning the overseas export markets were connected with the protection of internal European markets.

3821 Even if it is accepted that non-transhipment to home markets was the rule underlying cooperation in the EPC, the documents referred to in recital 32 of the contested decision do not therefore support the conclusion that the links which existed between the ECEC and the EPC had influenced the activities of the ECEC in such a way that the members of the ECEC had adopted the rule of not transhipping to internal markets for their activities within the ECEC.

C — ECEC's activities not confined to the overseas export markets

3822 The Commission submits that the activities of the ECEC were not confined to the overseas export markets. In the contested decision it acknowledges (recital 58, paragraph 3(c)): '... The ECEC's main activities are the compiling and distribution of information on sales in the various export markets in third countries.' However, it considers (*ibidem*) that '[Those activities are] closely connected to the ECEC members' concerns regarding home markets. Knowledge of such data reassures the ECEC members that production surpluses are being effectively channelled. The ECEC members are thus assured that the surpluses will not by and large go to the European markets.' In support of its arguments the Commission refers to the documents cited in recital 33, paragraphs 4 and 5, of the contested decision.

3823 The Court must examine whether the latter documents show a concern on the part of the ECEC members to channel production surpluses in order to 'reinforce the rule that there should be no transhipment to home markets' (contested decision, recital 58, paragraph 5).

3824 As regards the documents referred to in recital 33, paragraph 4, of the contested decision, the minutes of the ECEC meeting of 22 March 1985 (documents 33.126/14289 to 14294) states: 'Blue Circle buys 400 000 of bulk from DDR. East German marketing is aggressive and price of bags may come down to US $ 14-15 f.o.b.'.

3825 The Commission cannot, however, rely on those minutes in order to prove that the cooperation within the ECEC aimed to reinforce the rule that there should be no transhipment to home markets through the channeling of production surpluses. The minutes only make it clear that Blue Circle is an importer of cement. The extract quoted is not about the need to export surplus production in order to ensure compliance with the rule that there should be no transhipment to home markets.

3826 Furthermore, the Commission cannot allege in general terms (contested decision, recital 33, paragraph 4) as follows: 'At the following plenary meetings (documents 33.126/12617 to 12674), each member reports on cement imports into his country, usually from the East European countries.' The minutes of the ECEC meetings of 18 April 1986 (docu-

ments 33.126/12665 and 12666), 11 March 1988 (documents 33.126/12635 to 12641), 23 September 1988 (documents 33.126/12627 to 12634), 14 April 1989 (documents 33.126/12622 to 12626) and 22 September 1989 (documents 33.126/12617 to 12621) do not contain anything to show that during those meetings the ECEC members exchanged information on cement imports into their countries. However, at the ECEC meetings of 23 January 1986 (documents 33.126/12667 to 12674), 18 April 1986 (documents 33.126/12660 to 12664), 26 September 1986 (documents 33.126/12654 to 12659), 27 March 1987 (documents 33.126/12648 to 12653) and 25 September 1987 (documents 33.126/12642 to 12647), some members of the ECEC gave an account of imports into their country of cement from Eastern Europe, Asia and Tunisia.

3827 The Court finds that none of the minutes cited in the previous paragraph prove a link between imports from non-member countries and the principle of non- transhipment to home markets. Thus, none of those minutes refers to the need to export production surpluses or to take retaliatory measures against the imports. Furthermore, it is clear from those documents that the discussions relating to imports from non-member countries took place in the context of the competition which the exports from those countries represented for exports from countries of the ECEC on the overseas export markets. In any event, the mere fact that on some occasions the situation of imports from non-member countries was examined does not prove that 'the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets' (contested decision, recital 58, paragraph 5).

3828 As regards the documents referred to in recital 33, paragraph 5, of the contested decision, it is true, as the Commission submits, that some minutes refer to some information on the situation in the member countries. However, the mere mention of an item of information relating to an internal market of the Community at a meeting of the ECEC or of the ECEC Steering Committee does not necessarily prove that the activities of the ECEC aimed to 'reinforce the rule that there should be no transhipment to home markets' (contested decision, recital 58, paragraph 5) or, in other words, 'to prevent incursions by competitors on respective national markets in the Community' (Article 5 of the contested decision). The Court must therefore examine whether the Commission was entitled to conclude that the information exchanged regarding internal markets was linked to the principle of non-transhipment to home markets.

3829 In recital 33, paragraph 5 of the contested decision the Commission refers to five documents, namely the minutes of the ECEC Steering Committee of 26 March 1987 (documents 33.126/12594 to 12598) and 10 March 1988 (documents 33.126/12579 to 12581), the Italcementi notes on the ECEC Steering Committee meeting of 22 September 1988 or on the ECEC meeting of 23 September 1988 (documents 33.126/3415, 3416 and 3419), the Italcementi notes on the ECEC Steering Committee of 16 December 1988 (documents 33.126/3401 and 3402) and the minutes of the ECEC Steering Committee meeting of 13 April 1989 (documents 33.126/12566 to 12569).

3830 The minutes of the ECEC Steering Committee of 26 March 1987 state that in 1986 exports declined by 24%: 'The decline was particularly sharp in Egypt where our members delivered less than half of the 1985 volume. Saudi Arabia continued its downward trend. In West Africa the change was mainly in clinker which declined by 300 000 tonnes.' They also state that Spain, France and Turkey experienced a particularly sharp decline. In regard to Spain they observe: 'Spain enjoyed a sound demand in the home market which compensated partially for the lost exports. The Spanish industry has reduced its capacity.'

3831 The minutes of the Steering Committee of 10 March 1988 explain: 'The continuing Spanish decline [in exports] is a matter of policy. The Spanish producers feel that a continuing high level of production serves no useful purpose commercially or politically and therefore are determined to keep their export at a minimum.'

3832 The minutes referred to in the two preceding paragraphs do not support the conclusion that the members of the ECEC aimed to channel their production surpluses in order to reinforce the rule that there should be no transhipment to European home markets. They only contain information relating to one member country of the ECEC, namely Spain. If the object of the ECEC had been to channel production surpluses, the members of the ECEC Steering Committee, in the face of the considerable drop in the exports of ECEC members on the world markets to which the above minutes refer, would also have been inclined to discuss, at their meetings of 26 March 1987 and 10 March 1988, the other home markets of the Community and not merely the Spanish market, which was the very market which did not present any problem as regards the rule that there should be no transhipment to home markets because it enjoyed considerable domestic demand and was experiencing a reduction in capacity.

3833 The Court points out that according to its statutes the aim of the ECEC was cooperation between the European producers concerned with exports of various sorts of grey cement to the world markets (see paragraph 3788 above). In that context, the Spanish member of the Steering Committee wished to explain to the other members the reasons for the lower representation of the Spanish producers on the overseas export markets. In any event, the Commission does not explain in the contested decision how the exchange of information referred to in the extracts from the minutes of the ECEC Steering Committee of 26 March 1987 and 10 March 1988 was intended to reinforce the rule that there should be no transhipment to home markets.

3834 In those circumstances, the minutes of 26 March 1987 and 10 March 1988 do not prove that the activities of the ECEC were unlawful.

3835 The Italcementi notes on the meeting of the ECEC or of the ECEC Steering Committee of 22 and 23 September 1988 refer to the following:

— 'The floating silo which was in the port of Brest has moved off, apparently to Algeria following probable agreements with Lafarge: the Gizan floating silo is still in the port of Sète and is welcomed by the dockers who would like to take revenge for the fact that Lafarge has closed a cement plant in the region from which cement was exported' ('il silo flottante, che era all'ancora nel porto di Brest, a seguito di probabili accordi con Lafarge ha ripreso il mare diretto apparentemente verso Algeri; il silo flottante Gizan è sempre fermo in rada nel porto di Sète; detta unità sembrerebbe bene accolta dalla compagnia portuale, la quale vorrebbe nella fare uno sgarbo alla Lafarge rea di aver chiuso una cementeria in zona, dalla quale veniva esitato cemento in esportazione');

— 'Blue Circle is buying clinker from the Lebanon (Holderbank) for the United Kingdom; it is also buying in Belgium.' ('Blue Circle acquista clinker dal Libano (cementeria Holderbank) per U.K.; Tipo quasi a basso tenero in alkali acquista anche dal Belgio.')

3836 Those statements must be compared with the paragraph in the minutes of the ECEC meeting of 23 September 1988 (documents 33.126/12627 to 12634) which states, under the heading 'Importing Terminals':

'Mr Torrella requested that a revised list of floating terminals is prepared and distributed to members. The information on terminals is obviously held by individual members who were therefore requested to forward such information to the Secretariat. The information will be compiled and distributed to all members.'

3837 Although the Italcementi notes relating to the meetings of 22 and 23 September 1988 mention a fact concerning the Community market, namely that Blue Circle is importing into the United Kingdom cement from the Lebanon and Belgium, they are not of such a nature as to prove that the members of the ECEC intended, through their cooperation in that body, to reinforce the rule that there should be no transhipment to home markets by channelling their production surpluses. As Blue Circle was importing cement, it was clearly not experiencing problems of surplus production.

3838 The Italcementi notes on the ECEC Steering Committee meeting of 16 December 1988 state that the United Kingdom would have to import 2 million tonnes of cement and clinker in 1989. The author of the notes comments that if Italcementi were 'authorised to act like Intertrading' — which has been translated in the contested decision by 'authorised to act as a marketing company' — it could interpose itself in the supplies for the United Kingdom, for example with Yugoslav cement.

3839 During the present proceedings the Commission has stressed the use of the word 'authorised' in the Italcementi notes. It claims that they show that, in the framework of the ECEC, exports to the other member countries were subject to prior authorisation, which proves that the rule underlying cooperation in the ECEC was that there should be no transhipment to home markets.

3840 On the other hand, in its reply of 23 June 1998 to a written question from the Court Italcementi explained, with supporting documentary evidence, that it had set up Intertrading on 16 November 1988 in order to be present on the international cement trading market. However, at the time when the notes on the meeting of the ECEC Steering Committee of 16 December 1988 were drawn up, that is to say on 21 December 1988, Intertrading had not yet been registered in the register of companies, a precondition for carrying on business activities. At that time, therefore, Intertrading was not yet 'authorised' to operate.

3841 The explanation submitted by Italcementi must be accepted. The use of a capital letter in the name 'Intertrading' in the notes of the ECEC Steering Committee of 16 December 1988 shows that it is a reference to a company. Italcementi has proved that Intertrading was registered in the register of companies on 9 January 1989 (Appendix 3 to the reply of 23 June 1998). From that date that company was therefore 'authorised' to carry on commercial activities. Consequently, it cannot be inferred from the use of the word 'authorised' in the Italcementi notes on the meeting of the ECEC Steering Committee of 16 December 1988 that the object of the ECEC was to reinforce the rule that there should be no transhipment to European home markets.

3842 The Court finds next that the notes in question show that it was necessary for the United Kingdom to import cement in order to satisfy its internal demand, a necessity which implies that on that market supply was less than demand. The same notes also show that Italcementi was not suffering problems of surplus production either, since it saw an opportunity in that situation to export Yugoslav cement to the United Kingdom.

3843 They are not therefore of such a nature as to show that the object of the ECEC's activities was to channel production surpluses in order to reinforce the rule that there should be no transhipment to home markets.

3844 Finally, the minutes of the ECEC Steering Committee meeting of 13 April 1989 states:

'The French clinker exports are being reduced as the capacity is limited, while there is a strong demand in the attractive nearby markets. While the French exports to countries outside Western

Europe declined, the first quarter of 1989 recorded an 8% increase in combined local and export sales.'

3845 Similarly, the handwritten notes of Mr Leboeuf, of Ciments Français, relating to the plenary session of the ECEC of 14 April 1989 in Brussels (contested decision, recital 31, paragraph 3; documents 33.126/18201 to 18204) state that the decline in exports of cement in '1988 is more the consequence of a lack of availability in Europe on account of good national markets and a preference for favouring intra-European trade at better prices than on the overseas export markets, than it is of strong foreign competition'.

3846 The content of those two documents is at variance with the Commission's contention that 'the object and effect of the cooperation within the ECEC was to reinforce the rule that there should be no transhipment to home markets' (contested decision, recital 58, paragraph 5) by the 'channelling of production surpluses' (recital 58, paragraphs 2 and 3). The exports to the non-European markets were reduced and channelled towards Europe. No opinion is expressed on that state of affairs in the abovementioned documents concerning the meetings of 13 and 14 April 1989, although Mr Leboeuf's notes state that 'It may be ... that globally the total world demand for exports is difficult to satisfy, all the more because new production plants are becoming rare'.

3847 It follows that the Commission cannot allege, as it did in the contested decision, that the 'concerted action [in the ECEC] influenced [the] business decisions [of the members of the ECEC] regarding the home markets, since, if there had been no such concerted action and if they had not been certain of the quantities exportable and the prices chargeable, they could have decided to market more products in the Member States, thus altering the structure of intra-Community trade' (recital 58, paragraph 4) and that 'the ECEC members are thus assured that the surpluses will not by and large go to the European markets' (recital 58, paragraph 3). It is clear from the documents referred to in paragraphs 3844 and 3845 above that when the prices in Europe were higher than the prices on the overseas export markets, the members of the ECEC preferred intra-European trade.

3848 It follows from the foregoing that the Commission has not proved that the discussions which occasionally took place during the plenary meetings of the ECEC or the meetings of the Steering Committee of the ECEC on imports into the member countries from Eastern countries (contested decision, recital 33, paragraph 4) and on the home markets (recital 33, paragraph 5) were linked to the rule that there should be no transhipment to home markets. None of the documents refers, even implicitly, to a need to channel production surpluses. The references to the home markets of the Community either concern the problems of under production, since they show that some European producers (Blue Circle and Italcementi) were envisaging importing cement, or they provide explanations for a reduction in Spanish exports outside Europe. Furthermore, two documents, namely the minutes of the meeting of the ECEC Steering Committee of 13 April 1989 and the handwritten notes of Mr Leboeuf, of Ciments Français, relating to the plenary session of the ECEC of 14 April 1989 in Brussels are even at variance with the Commission's contention that 'the object and effect of the cooperation within the

ECEC was to reinforce the rule that there should be no transhipment to home markets' (contested decision, recital 58, paragraph 5) by 'channelling exports' (recital 58, paragraphs 2 and 3).

Conclusions

3849 The documents referred to in recitals 31 to 34, 58 and 60 of the contested decision, even considered as a whole, do not establish that the members of the ECEC aimed, in the framework of their cooperation within the ECEC, to channel their production surpluses in order to reinforce the rule that there should be no transhipment to home markets.

3850 Article 5 of the contested decision must be annulled inasmuch as the activities within the ECEC were considered in that article to be an infringement of Article 85(1) of the Treaty on the ground that they were designed to 'prevent incursions by competitors on respective national markets in the Community' (contested decision, recital 58, paragraphs 5 and 6), and it is not necessary to examine the other pleas and arguments of the applicants concerned.

XI — *Pleas of infringements of Articles 85(1) and 190 of the Treaty and of the rights of the defence in that the Commission finds that there was a concerted practice within the framework of the EPC contrary to Article 85(1) of the Treaty and that the various applicants concerned participated in it (Article 6 of the contested decision)*

Preliminary observations

3851 Article 6 of the contested decision states that Lafarge, Titan, Heracles, Halkis, Ciments Français, Blue Circle, Hispacement, Hornos Ibéricos, Valenciana and its subsidiary Cementos del Mar infringed the provisions of Article 85(1) of the Treaty 'by participating, within the framework of the EPC, in a continuous concerted practice involving the examination of the situation on Community markets, the sharing of third-country markets, the setting of prices for products intended for overseas export, the exchange of individualised data on export availabilities and on actual exports to third countries and designed to prevent incursions by competitors on respective national markets in the Community'.

3852 The Commission fixed the starting date of that infringement at 1 July 1981, except in the case of the Spanish undertakings, where the starting date was fixed at 1 January 1986. The

infringement continued until 19 May 1989 in the case of all the undertakings concerned, with the exception of Blue Circle and Ciments Français, where the dates on which the infringement came to an end were fixed at 12 October 1987 and 17 February 1989, respectively.

3853 Ciments Français (T-39/95), Lafarge (T-43/95), Valenciana (T-52/95), Heracles (T-57/95), Titan (T-64/95), Hornos Ibéricos (T-69/95), Blue Circle (T-88/95) and Halkis (T-104/95) deny both that the infringement in question existed and that they participated in it. Valenciana, Hornos Ibéricos and Blue Circle also complain that there was a breach of their rights of defence in so far as they were not given sufficient access to the Commission's file during the administrative procedure, which denied them allegedly exculpatory evidence relating to the objection upheld in Article 6 of the contested decision. Hornos Ibéricos and Halkis further contend that the statement of reasons for the finding of the infringement referred to in Article 6 of the contested decision is insufficient and thus contrary to Article 190 of the Treaty.

Contested decision

3854 The EPC and the concerted practice found to have existed within the framework of that committee are the subject-matter of recitals 30, 35 to 37, 59 and 60 of the contested decision.

3855 The Commission first describes the history of the establishment of the EPC (recitals 30 and 35). Cembureau abandoned its export committee owing to the '[Commission's] distaste for cartels of any sort' (contested decision, recital 30, paragraph 1; documents 33.126/11338 to 11340), which led to the formation of the 'London Club'. The Commission observes that in 1978 the large cement exporters felt that they should have separate meetings from the 'London Club' and established the EPC (recital 30, paragraph 2). The 'London Club' was an informal committee of chief executives (recital 35, paragraph 2).

3856 The Commission then refers to the various undertakings which it considers to have been members of the EPC, including Ciments Français, Lafarge, Valenciana, Heracles, Titan, Hornos Ibéricos, Blue Circle and Halkis (recital 35, paragraph 3). The Commission states that it does not have a copy of the EPC statutes and that, according to the statement by Mr Gac, the EPC appears never to have had any statutes (recital 34, paragraph 4).

3857 The objective pursued by the EPC is inferred by the Commission from various items of evidence referred to in recital 35, paragraphs 5 to 9, and recitals 36 and 37 of the contested decision.

3858 The Commission observes that according to a handwritten memorandum from Ciments Français (recital 35, paragraph 5; document 33.126/4365), in setting up the EPC 'the Chairmen wished to control the exporters'. The Commission maintains that this interpretation seems to be confirmed by the Blue Circle internal memorandum of 9 April 1981, referred to above, which states that within the EPC 'member companies would be represented at Chief Executive level'.

3859 The Commission acknowledges that the EPC's activities essentially concerned the export markets and that cooperation within the EPC related to market sharing, price fixing, the exchange of data, and the effort to conclude agreements with other exporting organisations with headquarters in Asia (recital 37). However, it maintains that some documents quoted in recital 35 of the contested decision and the documents quoted in recital 36 of the contested decision show that the EPC did not just deal with exports outside Europe but also with intra-European trade (recital 36, paragraph 1).

3860 In the part of the contested decision devoted to legal assessment of the EPC's activities, the Commission maintains, with reference to three factors (see paragraphs 3870 to 3873 below), that there is a link between the EPC's activities and the home market rule (contested decision, recital 59, paragraph 1).

3861 The Commission states (same paragraph, final subparagraph) that:

> '... the EPC's main activities are the compiling and distribution of information on members' sales on the various export markets in third countries. In addition the members share export markets, set or communicate to one another the prices charged or to be charged on the various markets. However, all of this is closely linked to the EPC members' concerns regarding home markets. Knowledge of such data reassures the EPC members that production surpluses are being effectively channelled. The EPC members are thus assured that the surpluses will not by and large go to the European markets.'

3862 Since non-transhipment to home markets was the rule underlying the EPC's activities, the Commission concludes (first subparagraph of recital 59, paragraph 2) that 'one of the EPC's objectives is to restrict competition within the Community'.

3863 The Commission concludes (recital 59, paragraph 3) that the cooperation within the EPC in the form of the activities referred to in recitals 36 and 37 of the contested decision constitutes a continuous concerted practice through which 'the EPC members waived the pursuit of an autonomous commercial policy, setting up a system of solidarity and monitoring designed to prevent incursions by competitors on respective home markets within the Community'.

Concerted practice designed to prevent incursions by competitors on respective home markets within the Community

3864 Ciments Français, Lafarge, Valenciana, Heracles, Titan, Hornos Ibéricos, Blue Circle and Halkis do not deny that they were members of the EPC. Nor do they deny the facts found in recital 37, paragraphs 3 to 6, of the contested decision, namely that the participants in the EPC shared overseas export markets, fixed prices for and exchanged data on their exports.

3865 The applicants concerned emphasise that their cooperation within the EPC was designed to increase export prices of cement. However, that cooperation was not linked to any home market rule. The EPC's activities were therefore concerned only with the markets of countries outside the Community and thus fell outside the scope of Article 85(1) of the Treaty. The applicants maintain that to follow the Commission's argument would be tantamount to accepting that any agreement on exports on the part of industries with surplus capacity constitutes an infringement of Article 85(1) of the Treaty.

3866 Blue Circle maintains that there was no question of channelling production surpluses within the framework of the EPC. In so far as the EPC met its objective of increasing export prices, the law of supply and demand had the effect of reducing the volume of exports.

3867 The Commission, on the other hand, considers that the EPC's activities distorted competition within the Community (contested decision, recital 59) and affected trade between Member States (contested decision, recital 60). According to the Commission, non-transhipment to home markets within the Cembureau countries was the underlying rule of cooperation on overseas exports within the EPC (contested decision, recital 35, paragraph 9, recital 37, paragraph 1 and recital 59, paragraph 2). The cooperation within the EPC described in recitals 36 and 37 of the contested decision was therefore found in Article 6 to constitute a continuous concerted practice, contrary to Article 85(1) of the Treaty, 'designed to prevent incursions by competitors on respective national markets in the Community'.

3868 As the Commission points out (contested decision, recital 37, paragraph 1), cooperation between undertakings on the export markets can be deemed an infringement of Article 85(1) of the Treaty only if such cooperation has as its object or effect the prevention, restriction or distortion of competition within the Community and if it is liable to affect trade between Member States (*Suiker Unie* v *Commission*, cited in paragraph 651 above, paragraphs 580 and 599 to 601, and *CRAM and Rheinzink* v *Commission*, cited in paragraph 1335 above, paragraphs 24 to 31).

3869 In order to determine whether the members of the EPC participated within the framework of that committee in a concerted practice contrary to Article 85(1) of the Treaty, it is therefore necessary to examine whether the Commission has proved that their cooperation within the EPC was designed 'to prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

3870 In the contested decision (recital 59, paragraph 1(a) to (c)), the Commission relies essentially on the following facts to establish a link between the EPC's activities and the rule that there should be no transhipment to home markets.

3871 The Commission first claims (paragraph 1(a)):

'[According to a Ciments Français memorandum] through the setting-up of the EPC "the Chairmen wanted to control exporters" (see paragraph 5 of recital 35) [document 33.126/4454]. Defining the WCC [see paragraph 21 above] by reference to the EPC, Ciments Français states that the WCC "is an informal club which is to white cement what the Export Policy Committee is to grey cement" [internal Ciments Français memorandum of 7 March 1989; documents 33.126/4466 and 4467]: the WCC rule is non-transhipment to home markets.'

3872 The Commission then refers (paragraph 1, first indent, and subparagraph (b)) to the historical association between Cembureau and the EPC and to the fact that the EPC members, through their national associations, are indirect members of Cembureau.

3873 Last, the Commission observes (paragraph 1(c)) that the internal problems of the Member States were examined on several occasions within the EPC. The EPC members themselves thus established a link between home markets and export markets.

3874 The Court must first examine whether the links between the EPC and Cembureau are evidence of the existence of a link between the EPC's activities and the rule that there should be no transhipment to home markets (A). It will then examine the Ciments Français internal memoranda (B) and the documents issuing from the EPC structure, which are said to show that the members of that committee had themselves established a link between home markets and the EPC's activities (C).

A — Links between the EPC and Cembureau

3875 In order to demonstrate that the EPC's activities were intended to ensure that there would be no transhipment to European home markets, the Commission refers to the historical link between Cembureau and the EPC (contested decision, recital 59, paragraph 1, first indent). It goes on to state that the EPC members, as indirect members of Cembureau, were all required to abide by the home market principle (same paragraph, subparagraph (b)).

3876 Ciments Français, Lafarge and Hornos Ibéricos contend that there was no institutional link between Cembureau and the EPC. It was the ECEC, not the EPC, that succeeded to the 'London Club' and, accordingly, there was no historical affiliation between Cembureau and the EPC (see paragraph 3855 above). Furthermore, the EPC members were hostile to Cembureau. The applicants referred to in Article 6 of the contested decision also point out that their status as indirect members of Cembureau does not support the Commission's argument in the present case.

3877 The Court finds that the Blue Circle memorandum of 9 April 1981 (contested decision, recital 30, paragraph 1; documents 33.126/11338 to 11340) shows that there was no institutional link between Cembureau and the EPC. The EPC and the ECEC were established following a decision by Cembureau that it would no longer run an export committee (see paragraph 3855 above). Accordingly, the Commission could not conclude from the existence of an historical affiliation between Cembureau and the EPC that Cembureau's activities after the establishment of the EPC, namely the conclusion of the Cembureau agreement at the meeting of Head Delegates held on 14 January 1983, influenced the EPC's activities.

3878 Furthermore, although it is true that the members of the EPC were all indirect members of Cembureau, that in itself does not show that the rule that there should be no transhipment to home markets was the rule underlying the cooperation within the EPC. The assertion in the contested decision that the members of the EPC, by their indirect membership of Cembureau, were 'required to abide by the home market principle' (contested decision, recital 59, paragraph 1(b)) must therefore be rejected. In that passage of the contested decision the Commission merely presumes what it is required to prove, namely that there was a link between the EPC's activities and the rule that there should be no transhipment to home markets. Nor can it be ruled out *a priori* that some indirect members of Cembureau had established within the framework of the EPC cooperation that had no connection with a rule that there should be no transhipment to home markets within the Cembureau countries. In that regard, it is accepted that the EPC was formed in 1978 (Mr Gac's answer of 30 March 1990 to a request from the Commission for information (contested decision, recital 35, paragraph 2; documents 33.126/16766 to 16777, in particular 16772), five years before the Cembureau agreement was concluded at the meeting of Head Delegates on 14 January 1983.

3879 It should further be pointed out that as far as concerns the members of the EPC, who were all indirect members of Cembureau, proof that they adhered to the Cembureau agreement is based

on their participation in a measure implementing that agreement (see paragraphs 1309, 1310, 1440 and 1441 above), whose object was identical to that of the Cembureau agreement (contested decision, recitals 46, paragraphs 1 and 2, and 65, paragraph 3, first subparagraph). However, by presuming the accession of those undertakings to the rule on non-transhipment to home markets by virtue of their direct or indirect membership of Cembureau and relying on it in order to prove the unlawful nature of the EPC's activities, the Commission in fact adopted a circular argument. The accession of undertakings to the Cembureau agreement is considered to be shown by their participation in an agreement or concerted practice having the same object as the Cembureau agreement, whereas the same object is proved on the basis of presumed accession to the rule on non-transhipment to home markets.

3880 In order to find that the conduct referred to in Article 6 of the contested decision was unlawful the Commission must therefore prove, without relying on a presumption of accession to that rule by virtue of the EPC's members' direct or indirect membership of Cembureau, that the EPC's activities were designed to comply with the home market rule. Only on that condition can the participation of the members of the EPC in the activities of that export committee be considered to be a clear sign of their accession to the common rule of not transhipping to internal markets.

3881 Last, if the other facts adduced in recitals 30, 35 to 37, 59 and 60 of the contested decision show that the members of the EPC sought 'to prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision) and, accordingly, that the cooperation within the EPC and the Cembureau agreement shared the same object, the EPC's members' indirect membership of Cembureau will constitute a relevant factor when the Court determines whether the EPC's activities were a measure implementing the Cembureau agreement (see paragraphs 4096 to 4101 below).

B — Ciments Français internal memoranda

3882 Valenciana states that the Ciments Français internal memoranda (documents 33.126/4454, 4466 and 4467) referred to in recitals 35, paragraphs 5 and 6, and 59, paragraph 1(b), of the contested decision are not persuasive evidence, since they do not emanate from the EPC or Valenciana and they can therefore be binding only on their author. Hornos Ibéricos claims that it cannot be presumed that both memoranda were written by the same person or within a short time of one another.

3883 The Court observes that the fact that Valenciana did not participate in the drafting of the memoranda referred to in the contested decision in connection with the infringement referred to in Article 6 of the contested decision does not mean that they are inadmissible against it (*Empresa Nacional Siderúrgica* v *Commission*, cited in paragraph 1053 above, paragraph 312). In this case it is not seriously disputed that the memoranda in question, which were found in the office of the sales director of Ciments Français, come from that company. Ciments Français is one of the founder members of the EPC and participated continuously in that committee from

1978 until 17 February 1989 (unchallenged reply from Mr Gac of 30 March 1990 to a request for information from the Commission (documents 33.126/16766 to 16777, in particular 16772)). In those circumstances, and irrespective of whether the memoranda in question were written by the same person and during the same period, the information which they contain must be regarded as reliable evidence on which the Commission was entitled to rely to demonstrate the illegality of the EPC's activities.

3884 Next, it should be pointed out that the undated Ciments Français memorandum (contested decision, recital 35, paragraph 6; document 33.126/4454) states '[The WCC] is a club: object: protection of home markets — rule: everyone respects his home markets and exports excess production under general consensus.' The other Ciments Français memorandum, dated 7 March 1989 (same paragraph; documents 33.126/4466 and 4467) states that the WCC is 'an informal club which is to white cement what the Policy is to grey cement'. None of the applicants concerned disputes that the reference to the 'Policy' in this memorandum is to the EPC.

3885 These Ciments Français memoranda therefore constitute objective evidence that the members of the EPC sought to reinforce the home market principle by channelling their production surpluses to non-member countries.

3886 Hornos Ibéricos claims, however, that the Commission misquoted the undated Ciments Français memorandum (document 33.126/4454) in the contested decision. That memorandum does not contain the passage set out in recital 35, paragraph 6, of the contested decision and in the SO (point 27) to the effect that '[The WCC] is a club: object: protection of home markets'.

3887 That argument must be rejected. The passage in question appears on the reverse of document 33.126/4454, a copy of both sides of which was in the Box (see paragraph 95 above) and it was correctly quoted both in the SO and in the contested decision.

3888 In the contested decision the Commission also concluded from the passage 'les Pdr. ont voulu contrôler les exportateurs' in the undated Ciments Français memorandum (document 33.126/4454) that 'the Chairmen wished to control the exporters'.

3889 Hornos Ibéricos considers that 'Pdr' might mean 'producers' rather than 'présidents' (Chairmen). The Commission deliberately mistranslated the abbreviation so that it could conclude

that the memorandum was consistent with the Blue Circle memorandum of 9 April 1981 (documents 33.126/11338 to 11340), which states that the companies were represented within the EPC at Chief Executive level.

3890 However, the question whether 'Pdr' referred to 'présidents' or 'producers' is not decisive. What matters is that the Ciments Français memorandum in question reflected a clear intention to control exports. When read together the two Ciments Français memoranda (documents 33.126/4454, 4466 and 4467) show that this control was necessary to ensure observance of the rule on non-transhipment to home markets.

3891 Those memoranda, read together, thus constitute objective evidence that the EPC's activities were designed 'to prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

3892 Ciments Français also contends that the sole intention of the author of the memorandum dated 7 March 1989 (document 33.126/4466 and 4467), in stating that the WCC was an informal club which was to white cement what the Policy was to grey, was to point out that the WCC, like the EPC, was also intended to bring together the principal companies which exported white cement.

3893 That argument must be rejected. The parallel nature of the WCC and the EPC is referred to by the author of the memorandum of 7 March 1989 in general terms. The undated Ciments Français memorandum (documents 33.126/4454) states unequivocally that the rule on non-transhipment to home markets was the rule underlying the WCC's activities. Having regard to the general nature of the parallelism between the two committees referred to in the memorandum of 7 March 1989, the two memoranda, read together, constitute objective evidence that the members of the EPC intended, through their cooperation within the EPC, to support the rule that there should be no transhipment to home markets. There is also a considerable amount of further evidence (see paragraphs 3894 to 3915 below) that corroborates the interpretation of the Ciments Français internal memoranda (documents 33.126/4454, 4466 and 4467) in the contested decision, namely that non-transhipment to home markets within the Cembureau countries was the rule underlying cooperation on overseas exports within the EPC.

C — Documents issuing from the EPC structure showing that the members of that committee had themselves established a link between domestic markets and the EPC's activities

3894 In the contested decision (recital 36, paragraph 1) the Commission states that some documents quoted in recital 35 and all the evidence mentioned in recital 36 'issuing from the EPC structure show that the EPC did not just deal with exports outside Europe but also with intra-European

trade'. It follows from those documents that the members of the EPC, who had themselves established a link between home markets and export markets, sought, through their cooperation within the EPC, to ensure that there were no transhipments to European home markets (contested decision, recital 59, paragraphs 1 and 2).

3895 The Court finds, first, that the documents prepared by Mr Gac on 1 September 1986, entitled 'EPC Beyond 1986' (contested decision, recital 36, paragraph 4; documents 33.126/12771 to 12773), and 4 November 1986, entitled 'Future of EPC' (contested decision, recital 36, paragraph 5; documents 33.126/12775 to 12778), constitute additional specific and consistent evidence that, through their cooperation within the EPC, the members of that committee sought to ensure compliance with the rule that there should be no transhipments to European home markets.

3896 In the document dated 4 November 1986, 'overcapacity in Western Europe' was regarded as a 'problem [looming] over the horizon of ... home markets'. The document dated 1 September 1986 states under '1st option — Maintenance of the status quo': 'The continuing decline in volume of business as well as intra-European friction produced by the Greek intention to export into West European markets, suggest that there is no further benefit in continuing EPC under the present agreement.'

3897 Accordingly, after observing that the Greek producers intended to dispose of part of their production on the Western European market, Mr Gac expressed doubt as to the ability of the EPC to survive. That shows that, at that time at least, the rule underlying cooperation on overseas exports within the EPC was the rule that there should be no transhipment to home markets.

3898 Hornos Ibéricos contends that the documents prepared by Mr Gac on 1 September and 4 November 1986 merely reflected his predictions of the EPC's future and merely revealed what was common knowledge, namely that there was overcapacity in the European cement industry at the time. Hornos Ibéricos further states that the document dated 4 November 1986 refers to the reluctance of the members of the EPC to address the issue of overcapacity in Western Europe.

3899 That argument must be rejected. Although the document prepared by Mr Gac on 4 November 1986 reveals that the problem of overcapacity was 'not tangible enough to become a subject of lively discussions', that document and the one dated 1 September 1986, and also numerous other documents (see paragraphs 3900 to 3915 below), establish a link between the EPC's activities and the need to channel production surpluses in order to protect the rule that there should be no transhipment to home markets. That link between the EPC's activities and the rule on non-transhipment to home markets explains why Mr Gac, after observing that the Greek producers intended to dispose of part of their production in Western Europe, considered it necessary to question the survival of the EPC. However, the fact that overcapacity itself, which was the problem underlying production surpluses, was not discussed within the EPC is not of

such a nature as to invalidate the finding that the members of the EPC intended, within the framework of that export committee, to channel their production surpluses in order to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

3900 Second, it is apparent from various documents quoted in recital 36 of the contested decision that the references to the European markets made at certain EPC meetings related to problems associated with intra-European trade.

3901 Thus the draft minutes of the EPC meeting of 18 November 1983 which were sent to Blue Circle (contested decision, recital 36, paragraph 2; documents 33.126/11365 to 11373) contain, on page 4, the following annotations, which are not in the official minutes (same paragraph; documents 33.126/14062 to 14068): 'The following concerns intra-European business and I am not sure it should be included in our Minutes? ... The UK market is under pressure from Spanish suppliers. Mr Manglano assured delegates that neither Valenciana nor Cementos del Mar are involved in any UK trade.' Valenciana therefore thought it necessary to assure the other participants in the EPC meeting that neither it nor its subsidiary Cementos del Mar was involved in exports to the United Kingdom.

3902 Hornos Ibéricos contends that the passage quoted from page 4 of the draft minutes sent to Blue Circle shows that the discussions on intra-Community trade did not form part of the objectives of the EPC.

3903 It is, however, necessary to determine what were the real activities of the EPC rather than merely to consider its 'official' objectives. It follows not only from the draft minutes of the EPC meeting of 18 November 1983 which were sent to Blue Circle, but also from other documents, that problems caused by intra-Community trade were discussed at EPC meetings.

3904 Thus the note which Mr Gac prepared on 29 August 1985 for the Chairman of the EPC, entitled 'memorandum for the EPC Steering Committee, Athens, 12 September 1985' (contested decision, recital 36, paragraph 3; documents 33.126/12804) mentions the 'seriousness of the threat that Spanish bulk will be supplied to the Bouri terminal in England'.

3905 Similarly, the note dated 14 May 1987 which Mr Marshall, Chairman of the EPC and an executive director of Blue Circle, sent to Sir John Milne, Chairman of Blue Circle, and to three other persons at Blue Circle, concerning the EPC meeting held on 13 May 1987 (contested

decision, recital 36, paragraph 6; documents 33.126/11344 and 11345) shows that problems caused by intra-Community trade were dealt with at EPC meetings. The note refers to Greek imports into the United Kingdom and to the Cembureau Task Force and observes that '... common sense is beginning to prevail, certainly in Titan. They respect the way we have dealt with them in the USA' (see paragraphs 3964 to 3966 below).

3906 Titan and Hornos Ibéricos claim, however, that Mr Marshall's note of 14 May 1987 is not an account of the discussions which took place at the EPC meeting of 13 May 1987 but a summary of a private meeting which Mr Marshall had on the fringe of that meeting. That point of view is supported by the fact that the official minutes of the meeting (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011) make no reference to the problems caused by Community trade.

3907 The Court observes that Mr Marshall's note of 14 May 1987 is not actually an official minute of the meeting of 13 May 1987. However, it relates discussions which took place at that meeting. It is headed 'European Export Policy Committee — Meeting on 13th May 1987'. The various subdivisions of the document (which are drafted in the third person, unlike the passage reproduced in paragraph 3909 below) contain information communicated at the meeting which Mr Marshall considered would be of use to Blue Circle's management, and the author's appraisal of that information.

3908 The Court considers that the fact that there is no reference to intra-Community trade in the official minutes of the meeting of 13 May 1987 (documents 33.126/13004 to 13011) is explained by the desire not to disclose what was discussed in that regard. Furthermore, the draft minutes of the EPC meeting of 18 November 1983 sent to Blue Circle contained information on intra-European trade (see paragraph 3901 above) which was also deliberately omitted from the official minutes of that meeting.

3909 A single passage in the note of 14 May 1987, namely the passage devoted to the 'Cembureau Task Force', describes private meetings held on the fringe of the EPC meeting of 13 May 1987. The style and content of that passage are different from those of the other passages in the note in question. In that passage, the Chairman of the EPC states: 'I was approached on two occasions to try to make sure that the Cembureau Task Force continues in operation as a means of keeping up our pressure on the Greeks. Scancem were particularly anxious and felt that ... some pressure could be brought to bear on the Greeks' (contested decision, recital 24, paragraph 3; documents 33.126/11344 and 11345). Not only the fact that the Chairman of the EPC was 'approached on two occasions' but also the purpose behind those approaches, namely to keep up pressure on the Greek members of the EPC, show that this passage from the note does not relate to discussions which took place during the EPC meeting of 13 May 1987 which the three Greek members attended (see paragraphs 3965 and 3966 below).

3910 Since the finding of an infringement in respect of the EPC meeting of 13 May 1987 is based solely on the passages from Mr Marshall's note describing discussions which did take place at that meeting (see paragraph 3905 above and contested decision, recital 36, paragraph 6), the argument put forward by Titan and Hornos Ibéricos must be rejected.

3911 Next, the record of the EPC meeting of 20 October 1988 drawn up by Ciments Français (contested decision, recital 36, paragraph 8; documents 33.126/18179 and 18180) mentions, inter alia, the status of the negotiations between Lafarge, Heracles and Titan over the supply of cement or clinker (see paragraphs 3967 and 3968 below).

3912 Titan and Hornos Ibéricos claim that this document is a minute of a private meeting on the fringe of an EPC meeting, namely a meeting between Lafarge and Ciments Français.

3913 That argument must be rejected. The record in question is entitled 'Policy Committee Meeting, Barcelona, 20 October 1988'. Furthermore, it contains information on a number of members of the EPC, such as Hispacement, Heracles, Titan and Valenciana, and refers to the fact that 'the members believe that there will be a drop of 5% in their sales to the USA'. It is not therefore a minute of a private meeting between representatives of Lafarge and Ciments Français.

3914 Last, the members of the EPC again discussed intra-European trade at the meeting of the Steering Committee on 15 February 1989 (contested decision, recital 36, paragraph 7; documents 33.126/13019 to 13021), when it was stated that 'Spain is under increasing pressure from importers'.

3915 It follows that various documents referred to in recital 36 of the contested decision and analysed in paragraphs 3901 to 3914 above show that at their meetings the members of the EPC themselves established a link between intra-European trade and the overseas export markets. This constitutes further specific and consistent evidence that the EPC's activities were designed to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

3916 Ciments Français, Lafarge, Valenciana and Hornos Ibéricos cannot claim that the references to intra-Community trade made at the EPC meetings were anodyne and fortuitous. Unlike those relating to the ECEC (see paragraphs 3803 to 3848 above), the documents relating to the EPC meetings show that within the EPC intra-Community trade was regarded as a problem. Thus, reference was made to a 'threat' ('memorandum for the EPC Steering Committee, Athens, 12 September 1985' (contested decision, recital 36, paragraph 3; document 33.126/12804)) and to 'pressure' (draft minutes of the EPC meeting of 18 November 1983 (same recital, paragraph 2; documents 33.126/11365 to 11373) and minutes of the EPC Steering Committee meeting of

15 February 1989 (same recital, paragraph 7; documents 33.126/13019 to 13021)) which caused 'intra-European friction' (document entitled 'EPC Beyond 1986' (same recital, paragraph 4; documents 33.126/12771 to 12773)).

3917 Furthermore, the fact that problems caused by intra-European cement trade were discussed at the EPC meetings shows that the EPC's members themselves took the view that those problems could be resolved in that forum. In the face of the problem which had arisen, the channelling of production surpluses to non-member countries seemed an obvious solution to the members of a committee concerned with overseas exports of cement. The principle of not transhipping to home markets and the channelling of exports went hand in hand (Blue Circle memorandum of 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334)).

3918 Moreover, it is apparent from the documents relating to the EPC meetings that the members of that committee did in fact discuss the channelling of production surpluses. At the EPC meeting on 13 May 1987 efforts by Blue Circle to channel Titan cement to the United States market were discussed (memorandum from the Chairman of the EPC to the Chairman of Blue Circle concerning the EPC meeting on 13 May 1987 (see paragraph 3905 above)). Furthermore, at the EPC meeting on 20 October 1988 (contested decision, recital 36, paragraph 7; documents 33.126/18179 and 18180) reference was made to the status of negotiations between Lafarge, on the one hand, and Heracles and Titan, on the other hand, over the supply of cement or clinker. Those negotiations form part of the attempts which Western European producers made to offer the Greek producers outlets for their production surpluses (see paragraphs 3397 to 3679 above) in exchange for an undertaking by the Greek producers to comply with the rule on non-transhipment to home markets (see paragraphs 3964 to 3968 below).

3919 It follows from all the specific and consistent evidence analysed above, therefore, that, as the Commission claims, 'non-transhipment to home markets [was] the rule underlying the cooperation on overseas exports' within the EPC (contested decision, recital 59, paragraph 2).

3920 Halkis maintains that the sole objective pursued in setting up the EPC in 1978 was to provide its members with the opportunity to discuss problems encountered on the export markets outside Western Europe.

3921 However, even supposing that the objective pursued by the setting-up of the EPC in 1978 was lawful, it is apparent from the specific documentary evidence referred to in recitals 30, 35 to 37 and 59 of the contested decision that the members of the EPC, in the framework of their activities within that committee, intended to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

3922 Lafarge and Hornos Ibéricos also claim that the Commission should have carried out a thorough economic analysis of the market in question, the undertakings concerned and the nature of the products before concluding that the rule that there should be no transhipment to home markets was the only plausible explanation for the EPC's activities.

3923 The Court observes that in the contested decision the Commission relied not on parallel conduct on the market but on the specific documentary evidence referred to in recitals 30, 35 to 37 and 59 of the contested decision and analysed in paragraphs 3882 to 3918 above which shows that non-transhipment to home markets was the rule underlying cooperation on overseas exports within the EPC. A more thorough economic analysis of the market in question would not therefore have been of such a nature as to shed a different light on that evidence. The argument must therefore be rejected.

3924 Last, the Commission was correct to classify the cooperation within the EPC designed to 'prevent incursions by competitors in respective national markets in the Community' as an infringement of Article 85(1) of the Treaty (Article 6 of the contested decision). Within the EPC, the members of that committee, or at the very least some of them, substituted for the risks of competition practical cooperation between themselves, with a clearly anti-competitive object (judgments in *Suiker Unie and Others* v *Commission*, cited in paragraph 651 above, paragraph 26, and *Woodpulp II*, cited in paragraph 106 above, paragraph 63).

3925 Lafarge, Hornos Ibéricos, Blue Circle and Halkis criticise the Commission for failing to show that the export activities complained of in connection with the EPC had had anti-competitive effects in the Community.

3926 However, concerted practices such as those found to exist in the present case are caught by Article 85(1) of the Treaty even where they have no anti-competitive effects on the market.

3927 First, it follows from the very wording of that provision that concerted practices are prohibited irrespective of any effect where, as in the present case (see paragraphs 3882 to 3923 above), they have an anti-competitive object.

3928 Next, although the very concept of concerted practice presupposes some conduct on the market, it does not necessarily mean that that conduct actually has the effect of restricting, preventing or distorting competition (see case-law cited in paragraph 1674 above).

3929 Lafarge, Hornos Ibéricos and Blue Circle also complain that the Commission failed to show that the export activities within the framework of the EPC to which it objected had affected trade between Member States.

3930 However, in prohibiting agreements or concerted practices whose object or effect is to restrict competition and which are of such a nature as to affect trade between Member States, Article 85(1) of the Treaty does not require proof that such agreements or practices have in fact significantly affected trade between Member States, which, moreover, is difficult to establish to a sufficient legal standard in most cases, but requires that it be established that the agreement or practice was capable of having that effect. The condition that trade between Member States be affected is satisfied where it is possible to foresee with a sufficient degree of probability on the basis of a set of factors of law or fact that the agreement or practice found to exist may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see the case-law cited at paragraph 1986 above). In the present case, having regard to the object of the EPC and the economic importance of its members, the conduct within that committee of which the Commission complains was in fact capable of having an appreciable effect on trade between Member States.

3931 Ciments Français contends that the discussions which took place within the EPC concerning the internal problems of the Community market were not prohibited by Article 85(1) of the Treaty, since they related to the questions of dumping and the legitimate concerns caused by the aid which the Greek State provided to its cement industry. Blue Circle emphasises that the overcapacity in Europe arose as a result of illegal State aid.

3932 The Court points out that the Commission has never denied that the Greek industry received a significant amount of State aid during the period taken into consideration by the contested decision (recital 24, paragraph 2; footnote 113). Nor has it denied that at the EPC meetings the members of that committee expressed their concern at dumped imports and State aid granted to Greek undertakings. As it correctly observed, however (contested decision, recital 36, paragraph 10), those facts 'cannot in any circumstances justify the adoption of private measures in addition to the possibility of bringing the matter to the knowledge of the competent authorities'. It is clear from the documents referred to in recitals 30, 35 to 37 and 59 of the contested decision and analysed in paragraphs 3882 to 3914 above that within the framework of the EPC activities were undertaken which were designed to support the rule on non-transhipment to European home markets by channelling production surpluses to third markets. These activities constituted a concerted practice prohibited by Article 85(1) of the Treaty, since they had as their object the restriction of competition within the Community and were capable of having an appreciable effect on trade between Member States. The argument put forward by Ciments Français must therefore be rejected.

3933 It follows from all the foregoing that the Commission was correct to conclude in the contested decision that within the framework of the EPC there was a concerted practice contrary to Article 85(1) of the Treaty.

Continuity of the concerted practice

3934 In the contested decision the Commission considers that the activities within the EPC were a continuous concerted practice from 1 July 1981 to 19 May 1989 (Article 6).

3935 The date 1 July 1981 is the date of the first EPC meeting of which the Commission was aware (contested decision, recitals 37, paragraph 3, and 59, paragraph 4; documents 33.126/11442 to 11446). However, that meeting is not among those to which the Commission refers in recitals 36 and 59, paragraph 1(c), of the contested decision in support of its argument that the rule on non-transhipment to European home markets was the rule underlying cooperation within the EPC. In any event, it cannot be concluded from the minutes of the EPC meetings of 1 and 2 July 1981 (documents 33.126/11442 to 11455) that the participants in those meetings sought to channel their production surpluses in order to reinforce the rule on non-transhipment to European home markets.

3936 Furthermore, none of the evidence referred to in the contested decision is of such a nature as to show that the activities of the EPC, which was set up in 1978, had already become unlawful in 1981. Thus the extract from the Blue Circle memorandum of 9 April 1981 (documents 33.126/11338 to 11340) quoted in recital 35, paragraph 5, of the contested decision, which states that the members of the EPC sought to 'keep supply in line with demand', concerned only the overseas export markets. In the same memorandum the author complains that 'the Greeks and Spanish have placed considerably more tonnage on the [overseas export] market with disastrous results'. If the EPC's object in 1981 had been to channel production surpluses to non-European markets the increased Greek and Spanish sales on those markets would not have been criticised.

3937 In those circumstances, the starting date of the concerted practice found to exist within the EPC must be taken to be 18 November 1983, the date of the first EPC meeting referred to in the contested decision at which the participants discussed problems linked with the intra-European cement trade (see paragraph 3901 above).

3938 The documents analysed in paragraphs 3904 to 3914 above concerning the activities of the EPC confirm that the concerted practice continued from 18 November 1983 to 19 May 1989. In that regard, it is necessary to refer to the 'memorandum for the EPC Steering Committee, Athens, 12 September 1985' (documents 33.126/12804), the note from the Chairman of the EPC to the Chairman of Blue Circle concerning the EPC meeting of 13 May 1987 (documents 33.126/11344 and 11345), the minutes of the EPC meeting of 20 October 1988 (documents 33.126/18179 and 18180) and the minutes of the meeting of the EPC Steering Committee of 15 February 1989 (documents 33.126/13019 to 13021).

3939 With all this specific and consistent evidence of the continuous nature of the concerted practice referred to in Article 6 of the contested decision, and in the absence of any evidence that the parties had put an end to the practice, the Commission was entitled to take the view that the concerted practice had lasted until 19 May 1989, the date of the last EPC meeting of which the Commission was aware and the holding of which has not been disputed by any of the applicants concerned.

Participation of the various applicants concerned in the concerted practice

3940 None of the applicants concerned denies having been a member of the EPC. It is apparent from all the evidence referred to in recitals 35 to 37 and 59 of the contested decision that, in the context of their cooperation within the EPC, its members sought to channel their production surpluses in order to 'prevent incursions by competitors on respective national markets' (contested decision, recital 59, paragraph 3, and Article 6).

3941 Heracles, Titan and Halkis contend that the Commission was not entitled to find that they participated in the infringement solely on the ground that they were members of the EPC, since the official objectives pursued by that committee related to overseas exports and were therefore lawful.

3942 The Court points out, however, that all the applicants referred to in Article 6 of the contested decision participated in one or other of the EPC meetings at which the participants expressly established a link between the rule on non-transhipment to European home markets and their cooperation on export markets (see paragraphs 3900 to 3914 above). They cannot therefore escape liability for an infringement of Article 85(1) of the Treaty by relying on the lawful 'official' objectives pursued by the EPC.

3943 Thus it is common ground that Ciments Français, Lafarge, Valenciana, Hornos Ibéricos, Blue Circle and Halkis participated in the EPC meeting of 18 November 1983 (contested decision, recital 36, paragraph 2; documents 33.126/11365 to 11373) and that Blue Circle, Ciments Français, Lafarge, Valenciana, Heracles, Titan, Hornos Ibéricos and Halkis attended the EPC meeting of 13 May 1987 (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011). Ciments Français, Lafarge, Cementos del Mar (Valenciana's subsidiary), Heracles, Titan, Hornos Ibéricos and Halkis participated in the EPC meeting of 20 October 1988 (contested decision, recital 36, paragraph 7; documents 33.126/12791 to 12799 and 12971 to 12977). Finally, Lafarge and Heracles participated in the EPC Steering Committee meeting of 15 February 1989 (contested decision, recital 36, paragraph 7; documents 33.126/13019 to 13021).

3944 It is necessary to ascertain whether those applicants have adduced evidence that they distanced themselves from what was agreed at those meetings (see paragraphs 3945 to 3972 below) which is such as to lead to the conclusion that, despite their presence at those meetings, they did not subscribe, or even give the impression to the other participants that they subscribed, to the unlawful objectives pursued within the framework of the EPC meetings which they attended (see the case-law cited at paragraph 1353 above).

3945 A number of applicants claim that they distanced themselves in such a way and rely on other special circumstances of such a nature as to bring their conduct within the EPC into line with Article 85(1) of the Treaty.

3946 Thus Ciments Français claims that it had only observer status within the EPC owing to the negligible quantities which it exported. It further states that the documents referred to in the contested decision contain no trace of any involvement on its part. It states that it has not been a member of the EPC since February 1989, that is to say, before the Commission's investigation was opened.

3947 That argument must be rejected. It follows from an internal Ciments Français memorandum dated 7 March 1989 (contested decision, recital 35, paragraph 6; documents 33.126/4466 and 4467) that the EPC was the 'club of the largest exporters in Cembureau'. Ciments Français, which confirms that it was a member of the EPC, cannot therefore claim that the quantities which it exported were negligible. Furthermore, it participated in various EPC meetings, in particular the meetings of 18 November 1983, 13 May 1987 and 20 October 1988, at which the aim was to prevent incursions by competitors on respective European national markets. As a result of its presence at those meetings it could not fail to have been aware of their express anti-competitive object. It does not even claim to have openly distanced itself from what was agreed at those meetings. By its presence it therefore subscribed to the objective pursued or, at the very least, gave the impression to the other participants that it subscribed to it (see the case-law cited in paragraph 1353 above). Its participation in the concerted practice is therefore established. As regards the duration of its participation, the Commission correctly took account of the fact that Ciments Français resigned from the EPC on 17 February 1989 (contested decision, recitals 35, paragraph 3, and 59, paragraph 4, and Article 6).

3948 Hornos Ibéricos claims that its participation in the EPC was dictated solely by its desire to obtain general information on the world cement markets and by economic necessities to do with guaranteed supplies of cement for new export markets and the profitability of its investments. It also observes that it was never a member of the EPC Steering Committee. In any event, it was not aware that the principal object of the EPC meetings was to ensure that there would be no transhipment to home markets.

3949 Furthermore, a number of items of evidence are inadmissible in its case. Hornos Ibéricos claims, in that regard, that the minutes of the EPC meeting of 18 November 1983 (contested decision,

recital 36, paragraph 2; documents 33.126/11365 to 11373) and Mr Gac's memorandum of 29 August 1985, entitled 'memorandum for the EPC Steering Committee, Athens, 12 September 1985' (contested decision, recital 36, paragraph 3; documents 33.126/12804), refer to activities of the Spanish producers directed against the United Kingdom, when Spain had not yet acceded to the Community at that time. The Commission was not entitled to rely on evidence prior to 1 January 1986 to find that Hornos Ibéricos participated in an infringement from that date.

3950 The Court points out that Hornos Ibéricos participated in various EPC meetings, in particular the meetings of 18 November 1983, 13 May 1987 and 20 October 1988, which aimed to prevent incursions by competitors on respective European national markets. It is true that the documents referred to in the preceding paragraph predate the accession of Spain to the Community. However, a number of other documents (EPC meeting of 13 May 1987 (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011) and EPC meeting of 20 October 1988 (same recital, paragraph 7; documents 33.126/12791 to 12799 and 12971 to 12977)) show that Hornos Ibéricos participated continuously in the concerted practice after 1 January 1986. Its presence at the various meetings in question meant that Hornos Ibéricos could not fail to be aware of their express anti-competitive object. It does not even claim to have openly distanced itself from what was agreed at those meetings. By its presence it therefore subscribed to the objective pursued or, at the very least, gave the impression to the other participants that it subscribed to it (see case-law cited in paragraph 1353 above). Its participation in the concerted practice referred to in Article 6 of the contested decision is therefore established.

3951 The Greek applicants contend that owing to their special position they could not be held liable for the infringement referred to in Article 6 of the contested decision, even on the assumption that other members of the EPC sought, within the framework of that export committee, to channel production surpluses in order to prevent incursions by competitors on respective national markets in the Community.

3952 Heracles and Titan rely, in particular, on the spectacular increase in their exports to the Community markets after 1986.

3953 The Court finds that the contested decision contains no evidence that Heracles and Titan participated before 1986 in an EPC meeting at which the participants discussed problems relating to the intra-European cement trade. Since it had not shown that Heracles and Titan were present at an EPC meeting which had an unlawful object, the Commission could not find that they participated in the infringement before that date. Since the Commission itself acknowledges that the EPC's main activities related essentially to export markets in non-member countries (contested decision, recital 59, paragraphs 1 and 2), an undertaking could not be found to have participated in the concerted practice designed to prevent incursions by competitors on respective national markets in the Community solely because it was a member of the EPC.

3954 Halkis participated in the EPC meeting of 18 November 1983 (documents 33.126/11365 to 11373). It has been established that the object of the participants in that meeting was to prevent incursions by competitors on respective European national markets (see paragraphs 3901 to 3903 above). As a result of its presence at the meeting in question Halkis could not fail to be aware of its express anti-competitive object. It does not even claim to have openly distanced itself from what was agreed at that meeting. By its presence it therefore subscribed to the objective pursued or, at the very least, gave the impression to the other participants that it subscribed to it (see case-law cited at paragraph 1353 above). Its participation on 18 November 1983 in the concerted practice referred to in Article 6 of the contested decision is therefore established.

3955 As regards the question whether the Greek producers participated in the concerted practice after 1986, the Court points out that the Commission acknowledges in the contested decision that '[a]t the end of 1985/early 1986, Greek producers looked towards Western Europe, especially to... the United Kingdom ... and ... Italy' (contested decision, recital 24, paragraph 1) and that, in order to cope with that 'Greek threat', the ETF was formed (contested decision, recital 24, paragraph 2).

3956 The Greek producers' exports to the Community markets were not seen by other producers merely as an attempt 'to avoid implementing the Cembureau agreement to which [the Greek producers] acceded' (contested decision, recital 65, paragraph 9(b)). By exporting to the Community markets they were regarded as openly distancing themselves from the rule on non-transhipment to home markets, the rule underlying the operations within the EPC.

3957 Thus in a Blue Circle internal memorandum of 24 October 1986 (document 33.126/1132), which was referred to by Titan and AGCI in their applications but not quoted in the contested decision, it was stated that, as regards the situation on the United Kingdom market, 'the Greeks are here to stay. Whilst political attention remains focused on the issue they cannot withdraw quietly and not being bound by the same rules of trading which limit our room for manœuvre they have everything to gain and nothing to lose by waiting'.

3958 The Commission put forward three explanations for the reference to the 'rules of trading' by which the Greek producers, unlike the United Kingdom producers, were not bound. It explained that the author of the Blue Circle memorandum meant to say that the Greek undertakings received State aid. The 'rules of trading' in question might also refer to the CPMA (see paragraph 91 above). Last, the Commission acknowledged at the hearing in Case T-64/95 that the reference to those rules might refer to the principle of non-transhipment to European home markets.

3959 Irrespective of the last explanation, the Court points out that the memorandum in question states that 'the Greeks are here [on the United Kingdom market] to stay'. In that memorandum

the Greek producers were therefore regarded by Blue Circle, a member of the EPC, as not subscribing to the rule on non-transhipment to home markets.

3960 Similarly, the document drawn up by Mr Gac on 1 September 1986, entitled 'EPC Beyond 1986' (contested decision, recital 36, paragraph 4; documents 33.126/122771 to 12773) shows that the Greek producers were no longer regarded as adhering to the fundamental rule on non-transhipment to home markets, the underlying rule of the EPC's activities. Since the members of the EPC sought, in particular, to channel their production surpluses to markets in non-member States in order to reinforce the rule on non-transhipment to European home markets, the conduct of the three Greek members of the EPC, Heracles, Titan and Halkis, led Mr Gac to question the survival of the EPC: 'the Greek intention to export into West European markets [suggests] that there is no further benefit in continuing EPC under the present agreement.'

3961 It follows from the foregoing analysis that at the very least from 1 September 1986, the date of Mr Gac's document, Heracles, Titan and Halkis did not adhere to the rule on non-transhipment to European home markets and, moreover, were not perceived by the other members of the EPC as bound by that rule. Their participation in the EPC's activities during that period cannot therefore be regarded as infringing Article 85(1) of the Treaty, since, in the eyes of the other participants, the three undertakings had openly distanced themselves from the anti-competitive purpose of the EPC's activities.

3962 It is necessary to examine whether the participation of the Greek members of the EPC in the EPC meetings referred to in the contested decision which were held after 1986 show that Heracles, Titan and Halkis adhered to the rule on non-transhipment to European home markets. It is common ground that the three undertakings attended the EPC meetings of 13 May 1987 (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011) and 20 October 1988 (same recital, paragraph 7; documents 33.126/12791 to 12799 and 12971 to 12977). Heracles also participated in the meeting of the EPC Steering Committee on 15 February 1989 (same paragraph; documents 33.126/13019 to 13021).

3963 None of the documentary evidence relating to those meetings shows, however, that the Greek producers participated in the EPC's activities with a view to '[preventing] incursions by competitors on ... national markets in the Community' (Article 6 of the contested decision).

3964 As regards, first, the EPC meeting of 13 May 1987, the note of 14 May 1987 from the Chairman of the EPC to the Chairman of Blue Circle and three other individuals at Blue Circle (documents 33.126/11344 and 11345) gives no indication that there had been any change in Halkis's conduct. As regards Heracles, the note states: 'A second ship is on its way from Heracles to Bourie in the UK.' Although it states, in regard to Titan, that 'common sense is

beginning to prevail', it is apparent that the other members of the EPC did not yet see Titan as being bound by the rule on non-transhipment to home markets. Thus the note mentions cement imports by Titan into Northern Ireland.

3965 Furthermore, on the fringe of the EPC meeting of 13 May 1987 (see paragraph 3909 above), the Chairman of the EPC stated (contested decision, recital 24, paragraph 3; document 33.126/11345): 'I was approached on two occasions to try to make sure that the Cembureau Task Force continues in operation as a means of keeping up our pressure on the Greeks. Scancem were particularly anxious and felt that ... some pressure could be brought to bear on the Greeks.'

3966 It follows that when the EPC meeting of 13 May 1987 was held the Greek members were still seen as a source of concern for the other members of the EPC, whence the suggestion that pressure be kept up on them. Accordingly, even though the other participants in the meeting sought to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision) (see paragraph 3905 above), that anti-competitive object was still not shared by the Greek producers at that time.

3967 As regards the meeting of 20 October 1988, the memorandum drawn up by Ciments Français (documents 33.126/18179 and 18180) describes, in particular, the status of the negotiations between Lafarge, Heracles and Titan over the supply of cement or clinker. It states: 'Lafarge is currently pursuing two sets of negotiations with the Greeks, which are very difficult owing to their finicky ways.' It also refers to 'bilateral discussions ... with the Greeks'.

3968 It should be pointed out that at that time the other European producers were seeking a commitment from the Greek producers that they would no longer make direct deliveries in Europe, in exchange for the purchase of significant quantities of cement by non-Greek European producers (see paragraph 3918 above). However, the Commission did not establish in the contested decision that the Greek producers had succumbed to the pressure brought to bear by the other European producers (see, in particular, paragraphs 3397 and 3679 above). Therefore, the fact that the Ciments Français memorandum relating to the EPC meeting of 20 October 1988 refers to 'negotiations with the Greeks' and to 'bilateral discussions ... with the Greeks' shows that the members of the EPC other than the Greek members continued at that time, within the framework of their meetings within the EPC, to 'prevent incursions by competitors on ... national markets' (Article 6 of the contested decision). The document in question does not, however, contain any evidence to establish that on 20 October 1988 the Greek producers adhered to the principle of non-transhipment to European home markets.

3969 Nor, last, is there anything in the minutes of the EPC Steering Committee meeting of 15 February 1989, in which Heracles participated, to indicate that the Greek producers were seen by the other participants to be complying with the rule on non-transhipment to European home markets.

3970 It follows from all the foregoing that the Commission was not entitled to find that Heracles and Titan participated in the infringement referred to in Article 6 of the contested decision before 1986 (see paragraph 3953 above). Furthermore, those two applicants openly distanced themselves from the rule underlying the EPC's activities in 1986 and there is no evidence that they adhered to the principle of non-transhipment to European home markets after that date. Since the activities within the EPC were classified in the contested decision as infringements of Article 85(1) of the Treaty on the ground that they were designed to 'prevent incursions by competitors on respective national markets in the Community', Article 6 of the contested decision must be annulled in so far as it concerns Heracles and Titan.

3971 On the other hand, Halkis's participation in the infringement referred to in Article 6 of the contested decision is established by its participation in the EPC meeting of 18 November 1983 (see paragraph 3954 above), since it has failed to show that the cooperation within the EPC was not of such a nature as to influence its conduct on the Community market. The fact that Halkis also openly distanced itself from the rule underlying the EPC's activities in 1986 will be taken into consideration when the Court determines the duration of its participation in the infringement (see paragraph 3980 below).

3972 Since the other applicants referred to in Article 6 of the contested decision did nothing to distance themselves from the rule in question, it must be concluded that the Commission was also entitled to find that Ciments Français, Lafarge, Valenciana, Hornos Ibéricos and Blue Circle participated in the infringement.

Duration of the participation in the infringement by applicants other than Heracles and Titan

3973 The Court has already found (see paragraph 3937 above) that the Commission has not established that the concerted practice referred to in Article 6 of the contested decision existed before 18 November 1983. After that date the continuous nature of the anti-competitive concerted practice is established until 19 May 1989 (see paragraph 3939 above).

3974 Hornos Ibéricos and Valenciana claim that the Commission has not shown that their participation in the EPC produced effects in the Community after 1 January 1986.

3975 Contrary to what those applicants claim, the Commission was not required to show that their participation in the EPC produced effects in the Community after 1 January 1986, since their participation in a concerted practice with an anti-competitive object was sufficient for the purposes of the application of Article 85(1) of the Treaty. Since their continuous participation in the concerted practice after 1 January 1986 was apparent from their presence at EPC meetings having an unlawful object (see paragraph 3943 above) and since they have adduced no evidence that the cooperation in the EPC was not of such a nature as to influence their conduct on the Community market, the Commission was entitled to fix 1 January 1986 as the starting date of their participation in the infringement.

3976 Blue Circle and Halkis dispute the dates on which their participation in the infringement is found to have ended.

3977 Blue Circle states that the last EPC meeting in which it participated was the meeting of 2 June 1987. The Commission could not therefore find that its participation in the infringement ceased on 12 October 1987.

3978 The file contains no evidence relating to the EPC meeting of 2 June 1987. However, it is apparent from the minutes of the EPC meeting of 13 May 1987 that Blue Circle participated in that meeting (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011). At that meeting Mr Marshall, the Chairman of the EPC, informed the other participants that 'this was the last meeting at which he represented Blue Circle'. The Court points out again (see paragraph 3905 above) that at that meeting the participants sought to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision). In the absence of evidence to the contrary, the Court finds that the unlawful collusion on 13 May 1987 influenced Blue Circle's competitive conduct on the Community market after that date. The Commission was therefore entitled to find that the infringement by Blue Circle came to an end on 12 October 1987, the date on which Blue Circle resigned from the EPC. By resigning Blue Circle openly distanced itself from the anti-competitive purpose of the EPC's activities.

3979 Last, as regards Halkis, in whose case the infringement was found to have ceased on 19 May 1989, it should be pointed out that Halkis participated in the EPC meeting of 18 November 1983, which proves that it participated in the concerted practice (see paragraph 3954 above). It has also been found that, from 1 September 1986 at least, the Greek producers were no longer seen by the other EPC members as adhering to the rule on non-transhipment to European home markets. Article 6 must therefore be annulled as against Halkis in so far as it finds an infringement of Article 85(1) of the Treaty after 1 September 1986.

3980 It follows from all the foregoing that Article 6 of the contested decision must be annulled as against Ciments Français, Lafarge, Blue Circle and Halkis in so far as it finds that there was an infringement of Article 85(1) of the Treaty before 18 November 1983 and as against Halkis in so far as it finds that the infringement continued after 1 September 1986.

Infringement of Article 190 of the Treaty

3981 In its reply Hornos Ibéricos claims that the Commission prevented it from effectively preparing its defence to the contested decision by failing to specify whether its participation in the EPC was deemed to have taken the form of an agreement or that of a concerted practice, although those two legal classifications are quite different, both in terms of their constituent elements and the standard of proof to be satisfied by the Commission.

3982 The Court points out, first of all, that this is a new plea, which is inadmissible under Article 48(2) of the Rules of Procedure. In any event, the plea is completely unfounded. It is unmistakeably clear from both recital 59 and Article 6 of the contested decision that the Commission accused the members of the EPC, including Hornos Ibéricos, of participating, within the framework of that committee, in a concerted practice.

3983 Halkis contends that the decision does not contain an adequate statement of reasons as regards the infringement referred to in Article 6.

3984 That plea must also be rejected. In recitals 30 and 35 to 37 of the contested decision the Commission sets out the facts and documentary evidence on which it relied in concluding in recital 59, first, that there existed within the EPC a continuous concerted practice of channelling production surpluses to non-member countries, in respect of which it then makes a finding of an infringement in Article 6 of the contested decision, and, second, that Halkis participated in that infringement.

Access to the file

A — Incriminating evidence

3985 Hornos Ibéricos claims that one page of the minutes of the EPC Steering Committee meeting of 15 February 1989, namely document 33.126/13020, was not in the file sent to it during the administrative procedure. It was therefore not in a position to submit its observations on that document.

3986 However, even disregarding document 33.126/13020, it is clear that the Commission provided proof in the contested decision that the infringement existed and that Hornos Ibéricos participated in it. The allegation that Hornos Ibéricos suffered a breach of its rights of defence during the administrative procedure must therefore be rejected (see paragraph 364 above).

3987 Blue Circle contends that there was insufficient reference in the SO to the minutes of the EPC meetings of 12 November 1981 (documents 33.126/11432 to 11440) and 10 November 1982 (documents 33.126/11417 to 11420) referred to in recital 37, paragraph 5, of the contested decision.

3988 However, even disregarding the documents to which Blue Circle refers, it follows from the reasoning set out in paragraphs 3882 to 3915 above that the Commission showed in the contested decision that the EPC's activities constituted an infringement. Moreover, the period to which those documents relate is no longer material to the infringement (see paragraphs 3973 to 3980 above).

B — Exculpatory evidence

3989 Valenciana, Hornos Ibéricos and Blue Circle submit a series of observations based on documents which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1987 concerning access to the file. Those documents would in their view have been of use during the administrative procedure for their defence against the objection upheld in Article 6 of the contested decision.

1. Case T-52/95 *Valenciana* v *Commission*

3990 First, Valenciana claims in its submissions of 10 February 1997 that a number of documents to which it had access following the measure of 2 October 1996 show that the EPC's activities did not in any way encroach on grey cement exports to Member States. On the contrary, when the EPC was in operation there was considerable trade in cement between the Member States. In particular, the Spanish undertakings exported large quantities of grey cement both to markets outside the Community and to the markets of the Member States of the Community. In that regard, the applicant refers to the document entitled 'Estimate of cement imports 1988 Great Britain' (document 33.126/1901), which shows that in 1988 producers in seven of the twelve Member States exported cement to the United Kingdom. Other documents confirm the existence of exports by Community producers, in particular exports by Spanish producers to France (SNFCC statistics on cement imports into France in 1985 and 1987 (documents 33.126/14958 and 14965)) and Italy (letter of 19 January 1989 from Lafarge to the directorate of foreign economic relations (document 33.126/14799)). Last, it is apparent from a number of documents in the file on Greece that for the purposes of cement exports the Member States were regarded by the members of the EPC in the same way as non-Community countries. In that regard, Valenciana relies on Cembureau statistics for May 1990 (document 33.126/19397) and AGCI statistics for 1989 (document 33.126/19418). It concludes that there was no agreement between the members of the EPC to exclude the Community markets from overseas exports. It also follows from the documents cited above that the Cembureau agreement referred to in Article 1 of the contested decision did not exist.

3991 The Court points out that in the SO (paragraphs 9 and 61) and the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence to establish the existence of the Cembureau agreement. The Commission also relied on specific documentary evidence to establish that the rule on non-transhipment to home markets was the rule underlying the cooperation on overseas exports within the EPC and to establish that Valenciana participated in the concerted practice within the framework of the EPC (SO, paragraphs 27 to 29 and 67; contested decision, recitals 30, 35 to 37 and 59).

3992 The documents on which Valenciana relies show that some cement was exported to European destinations. However, the Cembureau agreement did not prohibit 'traditional or even structural inter-State trade' (memorandum to the Chairman for the meeting of Head Delegates on 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729)), but was opposed to 'random' exports (notes on the meeting of Head Delegates of 19 March 1984 (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737)), namely uncontrolled or unregulated exports. Furthermore, none of the documents to which the applicant refers concerns the applicant's conduct on the market. It cannot therefore be established on the basis of those documents that the applicant made 'random' exports of grey cement to Community destinations during the period to which the contested decision relates. It follows that the documents examined are not of such a nature as to shed a different light on the

specific documentary evidence on which the Commission relied to establish that the Cembureau agreement existed and that Valenciana complied with the principle of non-transhipment to home markets within the framework of the EPC.

3993 It must be concluded, therefore, that the fact that Valenciana did not have access to documents 33.322/1901, 33.126/14799, 14958, 14965, 19397 and 19418 during the administrative procedure did not adversely affect its defence.

3994 Second, Valenciana relies in its observations of 22 December 1997 on a legal opinion of 24 October 1988 prepared for Blue Circle by a firm of lawyers (documents 33.126/11256 to 11259). It is apparent from that opinion that after Blue Circle had probably described the activities carried out within the ECEC and the EPC and made a detailed analysis of the minutes of those committees, those lawyers advised Blue Circle that if it joined those committees it would run the risk that the cooperation effected in those committees would be regarded as a violation of United States antitrust law. Valenciana considers that if a breach of Community competition law had been just as obvious the lawyers concerned would inevitably have drawn their client's attention to that risk. The legal opinion therefore indicates that the EPC's activities did not have as their object compliance with the rule on non-transhipment to home markets.

3995 That argument must be rejected. The opinion sought from the firm of lawyers in question clearly related to the application of United States antitrust law to the activities of the ECEC and the EPC at the time when Blue Circle was considering whether it was appropriate to (re)join one or other of those committees. However, in the legal opinion in question Blue Circle was warned in the following terms: 'membership in the EPC or the ECEC ... would expose the company and its US investments to significant risks under US criminal and civil law. You may also want to consider the implications of the European Community competition laws'. Even though the opinion was confined to United States law, therefore, the lawyers none the less thought it necessary to remind their client that it was in its interest to obtain advice on the application of Community competition law.

3996 Third, Valenciana relies in its observations of 22 December 1997 on a Lafarge internal memorandum of 25 April 1988 in which the possible advantages of an alliance between Lafarge and the Spanish cement manufacturer Uniland are analysed (documents 33.126/6916 to 6919): 'An alliance with Uniland may be of strategic interest in that it might discourage imports from producers in Barcelona; it would no doubt be unable to check attacks from Cementos del Mar or from Valencia.'

3997 Even though, as the Commission observes in its submissions of 17 February 1998, the content of the document is speculative, it reveals that another member of the EPC, Lafarge, no longer

saw Valenciana as being bound by the rule on non-transhipment to home markets, the rule underlying the activities of the EPC. The document in fact refers to the possibility of a 'random attack' by Valenciana.

3998 None the less, if Valenciana had had access to the document during the administrative procedure that would not have altered the outcome of that procedure as regards the starting date of its participation in the infringement. The fact that Valenciana might have been able to demonstrate during the administrative procedure, on the basis of the internal memorandum in question, that on 25 April 1988 it was seen to be no longer complying with the rule underlying the activities of the EPC would not have been of such a nature as to shed a different light on the specific documentary evidence referred to in the SO (paragraphs 27 to 29 and 67) and in the contested decision (recitals 30, 35 to 37 and 59), which show unequivocally that Valenciana participated in EPC meetings before 25 April 1988, in the framework of which the participants colluded in order to prevent incursions by competitors on respective national markets in the Community.

3999 It is common ground that Mr Manglano, from Valenciana, participated in the EPC meetings of 18 November 1983 (contested decision, recital 36, paragraph 2; documents 33.126/11365 to 11373) and 13 May 1987 (contested decision, recital 36, paragraph 6; documents 33.126/13004 to 13011). Any participation in meetings with a clearly anti-competitive object is covered by the concept of a concerted practice prohibited by Article 85(1) of the Treaty, unless the undertaking openly distances itself from what was agreed at the meetings. By its presence at those meetings, Valenciana, which does not even claim to have openly distanced itself from what was agreed at them, subscribed to the objective pursued at those meetings or, at the very least, gave the impression to the other participants that it did so (see case-law cited at paragraph 1353 above).

4000 Consequently, the Lafarge internal memorandum of 25 April 1988 would have been of use to Valenciana's defence against the objections upheld in Article 6 of the contested decision, but only to show that its participation in the concerted practice within the framework of the EPC was of shorter duration.

4001 In its submissions of 17 February 1998 the Commission observes that the fact that there was some crossborder trade does not invalidate its assertions. It points out that the contested decision refers to the existence of such trade. In that regard, it refers to the minutes of the EPC meeting of 18 November 1983 (documents 33.126/11365 to 11373) referred to in recital 36, paragraph 2, and to the document by Mr Gac entitled 'EPC Beyond 1986' (documents 33.126/12771 to 12773) referred to in recital 36, paragraph 4.

4002 However, the tension which existed within the EPC in relation to certain intra-Community trade is not capable of concealing the fact that the Lafarge memorandum of 25 April 1988 would have been of use to Valenciana's defence during the administrative procedure for the purpose of demonstrating that its participation in the infringement was of shorter duration.

4003 The Commission argues that the memorandum was confidential and maintains that it could not have been made available to Valenciana during the administrative procedure because of its confidential nature.

4004 That argument must be rejected. An undertaking's right to protection of its business secrets must be balanced against the safeguarding of the rights of the defence (Case T-30/91 *Solvay* v *Commission*, cited in paragraph 106 above, paragraph 88). There was nothing to prevent the Commission from concealing the confidential information in the passages of the Lafarge memorandum which were of use to Valenciana's defence.

4005 It follows from all the foregoing that by not making the Lafarge memorandum available to Valenciana during the administrative procedure the Commission infringed that party's rights of defence. None the less, since Valenciana had participated in the EPC meeting of 13 May 1987, which aimed to prevent incursions by competitors on respective European national markets, the Commission would have found that it had participated in the infringement until that date even if the applicant had had access to the internal memorandum in question during the administrative procedure. Since the document might have altered the Commission's assessment of Valenciana's participation in the infringement after 13 May 1987, Article 6 of the contested decision must therefore be annulled as regards Valenciana in so far as it finds that the infringement lasted beyond that date.

2. Case T-69/95 *Hornos Ibéricos* v *Commission*

4006 In its submissions of 10 December 1997 Hornos Ibéricos refers to two documents which in its view would have been of use for its defence against the objection relating to its participation in the activities of the EPC (Article 6 of the contested decision).

4007 First, it refers to a report to the Board of Directors of Hispacement of a visit by two employees of that company to the applicant on 26 June 1986 (documents 33.322/2906 to 2909). That report states, in regard to exports to Algeria: 'Hornos Ibéricos gave the impression that it was not for the time being prepared to give an undertaking to Conmex which might restrict its opportunities of increasing its exports. If it were forced to give such a commitment there would be a risk that it would not comply with it and would subsequently seek to put an interpretation on the commitment that would justify its conduct.' Hornos Ibéricos considers that if the alleged restrictions of exports to countries outside the Community had the object or effect of restricting competition within the Community, it would be necessary to accept, by contrary inference, that the clear approach which it took by not agreeing to restrict its exports also assumed a clear intention not to restrict competition within the Community. That approach also indicates that the applicant was firmly resolved to make its own decisions and to act independently.

4008 The Court points out that the Commission relied on specific documentary evidence in the SO (paragraphs 27 to 29 and 67) and in the contested decision (recitals 30, 35 to 37 and 59) to establish the concerted practice within the framework of the EPC referred to in Article 6 of the contested decision. The document to which Hornos Ibéricos refers has no connection with the activities of the EPC and, accordingly, is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in establishing the infringement. Furthermore, the Court finds that in the SO (paragraph 67) and in the contested decision (recital 59) the Commission considered that the activities of the EPC were not intended to restrict sales of cement on markets outside the Community but, on the contrary, to channel production surpluses to markets outside the Community in order to safeguard compliance with the rule on non-transhipment to European home markets. Far from refuting the Commission's argument, Hornos Ibéricos's refusal to place a limit on its sales to Algeria is therefore perfectly consistent with that argument.

4009 Second, Hornos Ibéricos refers to the minutes of an EPC meeting held in London on 13 February 1987 (documents 33.126/18181 to 18187). It points out that the intra-Community cement market was not on the agenda and was not raised during the discussions. It was thus not possible to infer from those minutes that the members of the EPC had knowingly examined the situation on the Community cement market in order to devise and implement a sales strategy of not supplying cement to customers in the Community.

4010 The Court observes that Hornos Ibéricos, as a member of the EPC, must have received a copy of the minutes of the EPC meeting of 13 February 1987. It would therefore have been able to rely on that document during the administrative procedure if it had thought it of use to its defence. Consequently, there can be no question of a breach of the rights of the defence (see paragraph 248 above). Furthermore, it should be pointed out that the Commission relied on specific documentary evidence in the SO (paragraphs 27 to 29 and 67) and in the contested decision (recitals 30, 35 to 37 and 59) to establish a link between the discussions held within the EPC and intra-Community trade. The fact that the minutes of the EPC meeting of 13 February 1987 do not mention the intra-Community market is not of such a nature as to shed a different light on that specific evidence, which shows the existence of a concerted practice within the framework of the EPC, the object of which was to channel production surpluses towards countries outside the Community in order to prevent incursions by competitors on respective national markets in the Community.

3. Case T-88/95 *Blue Circle* v *Commission*

4011 Blue Circle maintains that document 33.322/1485 would have been useful to its defence against the objection relating to its participation in the activities of the EPC (Article 6 of the contested decision).

4012 The Court points out that that document is identical to document 33.126/12751, which was in the Box (see paragraph 95 above) and to which Blue Circle had access during the administrative procedure.

4013 Blue Circle also claims that a series of documents (documents 33.322/1488 to 1507) relating to the ECEC corroborate its argument that the sole object of the export committees referred to in the contested decision was to increase prices for overseas exports, not, as the Commission has always maintained, to increase the volume of those exports. Those documents show the complete absence of any link between those export committees and the principle of non-transhipment to home markets. Blue Circle claims that document 33.322/1494 expressly states that 'under its constitution, the Committee does not discuss or concern itself in any way with exports by its members to West European countries. Any recommendations made by the Committee, therefore, could not apply to such exports.'

4014 The Court points out that the Commission did not raise against Blue Circle the objection upheld in Article 5 of the contested decision concerning the activities of the ECEC. As regards cooperation on overseas exports, Blue Circle was found liable only in respect of the activities of the EPC (Article 6 of the contested decision). It follows that the comments which Blue Circle makes on the basis of documentary evidence relating to the ECEC have no relevance to the infringements of which it is accused. In any event, the comments which Blue Circle might have been able to make on the basis of the documents referred to would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO (paragraphs 27 to 29 and 67) and in the contested decision (recitals 30, 35 to 37 and 59) in concluding that there was, within the EPC, a concerted practice 'designed to prevent incursions by competitors on respective national markets in the Community'.

Conclusions

4015 Article 6 of the contested decision must be annulled in its entirety so far as it concerns Heracles and Titan. It must be annulled with regard to Halkis in so far as it finds an infringement of Article 85(1) of the Treaty before 18 November 1983 and after 1 September 1986. It must also be annulled with regard to Ciments Français, Lafarge and Blue Circle in so far as it finds an infringement of Article 85(1) of the Treaty before 18 November 1983. It will also be annulled with regard to Valenciana in so far as it finds an infringement of Article 85(1) of the Treaty after 13 May 1987. The remaining pleas must be rejected.

XII — *Pleas alleging errors of assessment and infringements of Article 85(1) and 190 of the Treaty, the principle of equal treatment and the rights of the defence in that the Commission classified as a single and continuous agreement the infringement referred to in Article 1 of the contested decision and found that the various parties involved had participated in that single and continuous agreement*

4016 All the applicants claim that the Commission committed an error of assessment and/or an infringement of the provisions of Article 85(1) of the Treaty in finding that they participated in the infringement referred to in Article 1 of the contested decision. SFIC (T-36/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Alsen-Breitenburg (T-45/95), Nordcement (T-46/95), Rugby (T-53/95), Castle (T-56/95), Uniland (T-58/95), Oficemen (T-59/95), Italcementi (T-65/95), Hornos Ibéricos (T-69/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95) and Blue Circle (T-88/95) specifically dispute the classification of the infringement as a single and continuous agreement.

4017 SFIC, Vicat (T-37/95), Ciments Français (T-39/95), Asland (T-55/95), Uniland, Cimpor (T-61/95), SECIL (T-62/95), Italcementi, Aker, EUROC, Blue Circle and AGCI (T-103/95) complain that the method employed to attribute liability for the infringement referred to in Article 1 of the contested decision infringes the principle of non-discrimination. Furthermore, CBR (T-25/95), Dyckerhoff (T-35/95), SFIC, Vicat, Ciments Français, Heidelberger, Aalborg, BCA (T-54/95), Asland, Irish Cement (T-60/95), Italcementi, Holderbank (T-68/95), Aker, EUROC, Blue Circle, AGCI and Halkis (T-104/95) claim that there has been an infringement of Article 190 of the Treaty.

4018 Finally, all the applicants apart from BCA and Halkis claim infringement of their rights of defence in that they were not given sufficient access during the administrative procedure to the documents in the Commission's file relating to the objection upheld in Article 1 of the contested decision.

Contested decision

4019 The infringement referred to in Article 1 of the contested decision relates to the Cembureau agreement, which is described in the contested decision as a single and continuous agreement constituted by 'the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts' (contested decision, recital 46, paragraph 1, first subparagraph).

4020 Thus in the contested decision the exchanges of price information (Article 2), the Franco-Italian concerted practices (Article 3(1)), the Hispano-Portuguese agreement (Article 3(2)), the Franco-German agreements and concerted practices (Article 3(3)), the setting-up of the ETF and the various measures associated with that task force (Article 4), the activities of the ECEC (Article 5) and the activities of the EPC (Article 6) were all regarded as constituent elements of the single and continuous Cembureau agreement.

4021 In reaching that conclusion the Commission relies on two findings.

4022 First, it observes that the conduct referred to in Articles 2 to 6 of the contested decision pursue the same objective, 'namely the common rule on non-transhipment to home markets' (contested decision, recital 46, paragraph 2, second subparagraph).

4023 Second, the Commission observes that all the participants in the conduct referred to in Articles 2 to 6 of the contested decision were aware that their actions were part of a 'joint plan' (contested decision, recital 46, paragraph 2, third subparagraph). The Commission maintains that 'the situation is characterised by the accession of the European cement industry, directly or through the national trade associations, to a common rule and by the implementation of that rule, in the various specific cases, by those most directly involved' (contested decision, recital 46, paragraph 2, second subparagraph). The fact that the various addressees of the contested decision did not participate in all the measures which implemented the Cembureau agreement does not affect the classification of the infringement as a single and continuous agreement. The Commission observes (contested decision, recital 46, paragraph 2, third subparagraph) that '... it is the very essence of assistance by undertakings in accomplishing a joint plan that there should be different actions and actors which, however, interact to contribute to the common objective pursued.'

Participation by the applicants concerned in the single and continuous Cembureau agreement

4024 The Court must examine, first, whether the various types of conduct referred to in Articles 2 to 6 of the contested decision are manifestations of adherence to the objective of the Cembureau agreement concluded at the Head Delegates meeting of 14 January 1983 and, as such, constituent elements of a single Cembureau agreement. Second, it will be necessary to examine whether the participation by each undertaking or association of undertakings in the infringement was continuous and to determine the duration of such participation.

A — A single Cembureau agreement

4025 It is necessary first to ascertain whether, as the Commission claims, the conduct referred to in Articles 2 to 6 of the contested decision, on the one hand, and the Cembureau agreement, on the other, pursued the same objective (contested decision, recitals 46, paragraphs 1 and 2, and 48, paragraph 2). Next, it will be necessary to examine whether the Commission was correct to take the view that all the participants in the conduct referred to in Articles 2 to 6 of the contested decision were aware that their actions were part of a 'joint plan', namely the Cembureau agreement (contested decision, recital 46, paragraph 2, third subparagraph).

1. Identity of object between the measures called in question in Articles 2 to 6 of the contested decision and the Cembureau agreement

4026 All the applicants contend that the various types of conduct called in question in Articles 2 to 6 of the contested decision, or at least those in which they participated, did not pursue the same objective as the alleged Cembureau agreement. Each measure called in question in the contested decision pursued its own specific objective and did not form part of a pan-European agreement or concerted practice.

4027 In that regard, it should be pointed out that the types of conduct in question can only be regarded as constituent elements of the single Cembureau agreement if it is established that they formed part of an overall plan pursuing a common objective (*Rhône Poulenc* v *Commission*, cited at paragraph 1053 above, paragraph 126).

4028 It is necessary, therefore, first to examine whether, as the Commission claims, 'the common rule of non-transhipment to home markets ... governs and conditions all the other arrangements [referred to in Articles 2 to 6 of the contested decision], which were agreed in order to back up the rule and/or assist in its application' (contested decision, recital 46, paragraph 1, second subparagraph).

1.1. Exchanges of information (Article 2 of the contested decision)

4029 Ciments Luxembourgeois and SFIC claim that the exchanges of information organised within Cembureau were not classified in the contested decision as measures implementing the Cembureau agreement.

4030 That argument must be rejected. According to the actual wording of Article 2(1) and (2), those exchanges were designed to facilitate the implementation of the Cembureau agreement. Furthermore, recital 46, paragraph 1, first subparagraph, states that 'the whole of the arrangements' referred to in the contested decision constituted a 'single and continuous agreement'. Finally, Article 9 of the contested decision states that 'the infringement found in Article 1 ... was put into effect, in particular, by the conduct set out in Articles 2 to 6'. Consequently, when the Commission stated that Ciments Luxembourgeois, which had taken part in the exchanges of information referred to in Article 2(1) and (2) of the contested decision, had not 'put into effect any implementing measure' (contested decision, recital 65, paragraph 9(b), third indent; see also recital 65, paragraph 3, third subparagraph, indent (a)), its point was that Ciments Luxembourgeois, unlike all the other undertakings referred to in the contested decision, had not participated in any of the measures implementing the Cembureau agreement on the market that were referred to in recital 65, paragraph 3, first subparagraph, of the contested decision, that is to say, the conduct referred to in Articles 3 to 6. It certainly did not

take the view that the exchanges of information referred to in Article 2 of the contested decision were not a constituent element of the single Cembureau agreement.

4031 Furthermore, the Court has already held that the Commission was entitled to take the view that the specific exchanges of information referred to in Article 2(1) of the contested decision and the periodic exchanges of information referred to in Article 2(2) of the contested decision were designed, to the extent specified above in paragraphs 1501 to 1518 and 1576 to 1647 respectively, to 'facilitate the implementation of the [Cembureau] agreement'.

4032 Since the objective pursued by the exchanges of information corresponded to the objective of the Cembureau agreement, namely non-transhipment to home markets, it must be concluded that there was identity of object between the Cembureau agreement and the conduct referred to in Article 2 of the contested decision.

1.2. Franco-Italian concerted practices (contested decision, Article 3(1))

4033 The Commission distinguished three Franco-Italian concerted practices: one between Lafarge and Buzzi (Article 3(1)(a)), one between Ciments Français and Buzzi (Article 3(1)(b)) and one between Vicat and Buzzi (Article 3(1)(c)).

4034 As regards the concerted practice between Lafarge and Buzzi, the Commission found that these two undertakings had taken concerted action 'to restrict their autonomy of behaviour ... [in order] to share the market in the south of France' (contested decision, recital 48, paragraph 3, second subparagraph).

4035 The Commission refers in that regard to a record of a meeting between Mr Buzzi and Mr Saint-Hillier of Lafarge (contested decision, recital 20, paragraph 3; documents 33.126/6857 bis), which summarises Buzzi's position as follows:

'— The market belonged to Ciments Lafarge.

— No desire to enter Côte d'Azur to upset the market.

— They have had only two or three customers in 20 years.

— A war is pointless.

— Agreements must be concluded to avoid conflict.'

4036 It follows from the very words of that record that there was identity of object between the infringement referred to in Article 3(1)(a) of the contested decision and the Cembureau agreement, namely non-transhipment to home markets.

4037 As regards the concerted practice between Vicat and Buzzi, the Commission refers in the contested decision to a telex of 23 May 1986 from Buzzi to Vicat (contested decision, recital 20, paragraph 5; documents 33.126/6144), which states: 'We have received requests to supply cement not only from Nice but also Toulon. We replied in the negative to all such requests and intend to continue so doing.'

4038 The Court must therefore conclude, as the Commission did (contested decision, recital 20, paragraph 6) that the fact that Buzzi informed Vicat of its refusal to fill cement orders from the south of France, and that it intended to continue doing so, constituted market sharing between Buzzi and Vicat. Although Vicat and Buzzi are not expressly accused in Article 3(1)(c) of the contested decision of having participated in a concerted practice involving market sharing (see paragraph 1927 above), it is none the less the case that the extract from Buzzi's telex to Vicat of 23 April 1986 shows that the exchange of information objected to reflected the desire 'not to disrupt the market in the south of France' (contested decision, recital 48, paragraph 6, third subparagraph). The objective pursued by the conduct referred to in Article 3(1)(c) of the contested decision was therefore to help ensure compliance with the rule of non-transhipment to home markets.

4039 It follows that the concerted practice between Vicat and Buzzi and the Cembureau agreement also pursued the same objective.

4040 As regards, finally, the concerted practice between Ciments Français and Buzzi, it involved 'information on current prices and a forecast of price increases, with a view to the restriction of their autonomy of conduct' (contested decision, Article 3(1)(b)).

4041 The Court points out that, in contrast to the documents invoked in support of the infringements referred to in Article 3(1)(a) and (c), the only document on which the Commission relies to establish the infringement referred to in Article 3(1)(b), namely the fax dated 17 March 1988

from Ciments Français to Buzzi (contested decision, recital 20, paragraph 4; documents 33.126/11982 to 11987) does not express any intention on the part of those undertakings to observe any principle of non-transhipment to home markets. Nor does the Commission state anywhere in the contested decision that by the exchange of prices referred to in Article 3(1)(b) Ciments Français and Buzzi sought to observe such a principle. It merely states in recital 20, paragraph 6, of the contested decision that 'the reason why Ciments Français communicated its price list and forecast price increases and why Vicat sent its price list was so that Buzzi could align its cement prices in France on Ciments Français and Vicat prices'. The Commission goes on to state (same paragraph), in relation to the infringement referred to in Article 3(1)(c) of the contested decision, that 'the fact that Buzzi informed Vicat both of its refusal to fill cement orders from the south of France and that it intended to continue doing so constitutes sharing the south of France market'. However, it puts forward no similar explanation in relation to the infringement referred to in Article 3(1)(b) of the contested decision. Last, the Commission seeks to link that agreement once more with the Cembureau agreement when it claims that the Cembureau agreement also sought 'to align cross-frontier sales prices on local prices' (contested decision, recital 48, paragraph 1). The Court points out, however, that that aspect falls within the scope of the 'fair competition rules' (see contested decision, recital 47, paragraph 2), which the Commission accepts did not constitute the subject-matter of an objection in the contested decision (see, in particular, paragraph 1513 above).

4042 Consequently, it must be concluded that the Commission has failed to establish identity of object between the Cembureau agreement and the concerted practice referred to in Article 3(1)(b) of the contested decision.

1.3. The Hispano-Portuguese agreement (Article 3(2))

4043 The record drawn up by Cimpor of a meeting held on 22 July 1985 (contested decision, recital 21, paragraph 2; documents 33.322/155 to 157) states: 'The parties present, who may be regarded as the representatives of Spanish and Portuguese cement producers, expressed their clear support for the principle that there should be no cement movements from Spain to Portugal or from Portugal to Spain that are not instigated or controlled by the cement industry of either country.' Similarly, the admissible part of the Hispacement document (contested decision, recital 21, paragraph 2; documents 33.322/2901) refers to the fact that 'the Chairmen of the Portuguese cement companies met at the premises of Oficemen with their Spanish counterparts in December [1985], at which time it was decided to agree on a reciprocal ban on exports between the two countries'.

4044 It is unequivocally clear from those two documents that the objective pursued by the parties to the Hispano-Portuguese agreement referred to in Article 3(2) of the contested decision corresponded perfectly to the objective of the Cembureau agreement.

1.4. Franco-German agreements and concerted practices (contested decision, Article 3(3))

4045 The Franco-German agreements and concerted practices referred to in Article 3(3) of the contested decision consist of two elements. In Article 3(3)(a) the Commission finds that a number of French and German undertakings, and the French and German associations (SFIC and BDZ) participated 'in agreements and concerted practices involving the regulation of cement supplies from France to Germany and from Germany to France'. Article 3(3)(b) of the contested decision then states that BDZ and SFIC participated in a 'concerted practice involving the exchange of information designed to monitor compliance with the quantitative restrictions on exports between France and Germany and to monitor the destination of such exports in terms of the various German Länder'.

4046 As regards the infringement found in Article 3(3)(a) of the contested decision, and to the extent specified in paragraph 2469 above, it is apparent from the documents analysed in recital 22 of the contested decision that, following the exports by Cedest to the German Länder other than Saarland and the German producers' reaction in France, bilateral consultations took place with a view to limiting cross-frontier flows of cement. Thus the Lafarge internal memorandum dated 23 June 1982 (contested decision, recital 22, paragraph 4; documents 33.126/6592 to 6596) states: 'We clearly expressed the opinion that each party should remain within its borders.' In that regard, the memorandum refers to the 'Home market principle'. It also follows from a summary record by Ciments Français (contested decision, recital 22, paragraph 9; documents 33.126/4251 to 4253) that Dyckerhoff had informed Ciments Français that it did not intend selling in France.

4047 The letter which the Chairman of Ciments Français, who was also Chairman of SFIC, wrote to the Chairman of Heidelberger, who was also Chairman of BDZ (contested decision, recital 22, paragraph 10; documents 33.126/3574 to 3576) states, *inter alia*: '... Ted Brenke [of Heidelberger] expressed ... the opinion that if we were to renew our agreement, there would be a demand from the German side that the gap existing since 1984 between French and German deliveries be reduced. I told him that, if this demand were to be maintained, I saw very little hope in our reaching a further agreement. As you remember, there was no logical and, even less, ethical justification for this gap, which was not, in fact, the result of bilateral discussions between French and German interests ...'

4048 As the Commission maintains in the contested decision (recital 50, paragraph 4), and as also follows from the Court's assessment in paragraphs 2427 to 2433 above, the concerted practices involved in the pursuit of a solution on the limiting of sales by Cedest in Germany other than the Saarland, and the 1984 agreement, which was to be renewed and which is referred to in the letter of 22 September 1986, all had as their object 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9). It follows that the infringement found in Article 3(3)(a) of the contested decision pursued the same objective as the Cembureau agreement.

4049 As regards the infringement found in Article 3(3)(b) of the contested decision, it consists, to the extent specified in paragraphs 2471 to 2491 above, in a concerted practice involving an exchange of information between SFIC and BDZ designed to monitor compliance with quantitative restrictions on exports between France and Germany. It is therefore an infringement which supplements the infringement found in Article 3(3)(a) of the contested decision and which pursues the same objective. There is thus also identity of object between the exchange of information referred to in Article 3(3)(b) and the Cembureau agreement.

1.5. Elements of the single agreement relating to the ETF (Article 4 of the contested decision)

4050 The Court has already found (see paragraph 2537 above) that by means of the agreement on the setting-up of the ETF referred to in Article 4(1) of the contested decision the undertakings and associations concerned sought to 'eliminate imports to Western Europe, presently imports from Greece' (record of the ETF meeting held in Geneva on 19 August 1986 (contested decision, recital 25, paragraph 15; annex 15 to Aker's and EUROC's reply to the SO)). The objective pursued in setting up the ETF was therefore non-transhipment to European home markets.

4051 Next, the Court points out that the agreements and concerted practices referred to in Article 4(2) and (3) were inspired by the same anti-competitive purpose. The agreement on the setting-up of Interciment referred to in Article 4(2) was designed to implement dissuasive and persuasive measures *vis-à-vis* producers which, not feeling that they were bound by the rule on non-transhipment to European home markets, threatened the stability of the markets in the member countries of Cembureau (see paragraph 2978 above). The aim of the concerted practices identified in Article 4(3)(a) and the agreement referred to in Article 4(3)(b) was to prevent, with anti-competitive intent, imports by the Feruzzi/Calcestruzzi group of Greek cement (see paragraphs 3163 to 3356 above) and thus to restore order on the market by respecting national frontiers.

4052 In the light of the foregoing observations, it must be concluded that the infringements referred to in Article 4(1) to (3) had the same objective — which entitled the Commission to conclude that there was a single agreement relating to the ETF (see paragraph 3706 above) — and, furthermore, that that objective corresponded perfectly to the objective of the Cembureau agreement.

4053 On the other hand, since Article 4(4) of the contested decision must be annulled in its entirety (see paragraph 3769 above), as it has not been established that the purchases referred to in that provision were designed to prevent imports of Greek products into Western Europe, the conduct in question cannot be held to have been inspired by the rule on non-transhipment to home markets.

1.6. ECEC (Article 5 of the contested decision)

4054 The Court has already held that the Commission has not established that the ECEC's activities were designed to comply with the rule that there should be no transhipment to home markets, and that Article 5 of the contested decision must therefore be annulled (see paragraphs 3849 and 3850 above). Consequently, the activities within the ECEC cannot be regarded as a measure implementing the Cembureau agreement.

1.7. EPC (Article 6 of the contested decision)

4055 The Court has already held (see paragraph 3919 above) that the Commission was entitled to take the view that the cooperation within the EPC was designed to 'prevent incursions by competitors on respective national markets in the Community' (Article 6 of the contested decision).

4056 Since the aim of the cooperation within the EPC corresponded to the objective of the Cembureau agreement, namely that there should be no transhipment to home markets, it must be concluded that the objects of the Cembureau agreement and the conduct referred to in Article 6 of the contested decision were identical.

1.8. Conclusions

4057 It follows from the foregoing analysis that the conduct referred to in Article 2, Article 3(1)(a) and (c), (2) and (3), Article 4(1) to (3) and Article 6 of the contested decision all pursued the same anti-competitive object as the Cembureau agreement. The Commission was fully entitled to conclude that the objective of all this conduct was the common rule of non-transhipment to home markets (contested decision, recital 46, paragraph 2).

4058 On the other hand, since it has not been established that the conduct referred to in Article 3(1)(b), Article 4(4) and Article 5 of the contested decision pursued the same objective as the Cembureau agreement, that conduct cannot be regarded as elements of the infringement referred to in Article 1 of the contested decision.

2. The participants' awareness

2.1. Proof of participation by the various categories of applicants concerned

4059 All the applicants maintain that they were never aware of the Cembureau agreement supposedly concluded and confirmed at the Head Delegates meetings held on 14 January 1983, 19 March and 7 November 1984.

4060 As they observe, identity of object between the various bilateral and multilateral arrangements and the Cembureau agreement does not in itself suffice to show that the arrangements in which the applicants participated constituted measures implementing the Cembureau agreement (see, to that effect, the judgment in *Commission* v *Anic*, cited at paragraph 270 above, paragraph 203). If the applicants were not aware of the existence of a Cembureau agreement, those actions could not constitute the expression of their accession to or participation in that agreement.

4061 It is necessary, therefore, to examine whether the Commission was entitled to take the view in the contested decision (recital 46, paragraph 2) that the parties to the bilateral and multilateral agreements that had the same anti-competitive objective as the Cembureau agreement were aware that their conduct formed part of the joint plan adopted and confirmed at the Head Delegates meetings held on 14 January 1983, 19 March and 7 November 1984 (see paragraph 4023 above).

4062 In order to do so, it is necessary to distinguish two categories of applicants.

4063 As regards, first, Cembureau and its direct members, with the exception of Unicem, it has already been held that the Commission has established that they participated in the infringement referred to in Article 1 of the contested decision (see paragraphs 1400 to 1403 above). In the contested decision, proof that those associations and undertakings participated in the single Cembureau agreement is based not on their participation in a measure implementing that agreement but on their direct membership of Cembureau and their participation in one or more Head Delegates meetings at which the Cembureau agreement was concluded and/or confirmed (see paragraphs 1301 and 1302 above).

4064 Cembureau and its direct members, all of which, with the exception of Unicem, participated in one or more of those meetings (see paragraphs 1342 to 1353 above), must have been aware that their participation in one or more of the bilateral or multilateral arrangements with an object

identical to that of the Cembureau agreement took place within the framework of that agreement. Their participation in arrangements which pursued the objective of non-transhipment to home markets therefore constituted, on their part, the implementation of the Cembureau agreement and, accordingly, manifested their continuous adherence to the infringement referred to in Article 1 of the contested decision.

4065 Awareness is therefore established in the case of Cembureau, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Oficemen, Irish Cement, ATIC, Italcementi, Aker, EUROC, Cementir and AGCI. Accordingly, there is no need in the case of those parties to examine the various links (see paragraphs 4069 to 4073 below) which the Commission puts forward in the contested decision in order to establish a connection, in terms of their awareness, between the various bilateral and multilateral arrangements in which they participated and the Cembureau agreement.

4066 As regards, second, the indirect members of Cembureau, and Unicem and Buzzi, the Court has pointed out that in the contested decision (recitals 45, paragraphs 10 and 13, and 65, paragraph 3) proof of their participation in the infringement referred to in Article 1 is based on their participation in one or more measures implementing the Cembureau agreement (see paragraphs 1439 to 1448 above). Participation by those parties in a measure implementing the Cembureau agreement shows that they acceded to the agreement concluded and confirmed at the Head Delegates meetings.

4067 Those applicants observe that even if the Head Delegates present at the relevant meetings had concluded a Cembureau agreement, the contested decision does not establish that the Head Delegates concerned informed them of the existence of that agreement. The fact that they may have participated in a local agreement cannot therefore be regarded as a manifestation of their accession to the Cembureau agreement.

4068 It is particularly important, therefore, to show awareness in the case of those applicants. If the Commission fails to show that they knew, or must necessarily have known, that the bilateral and multilateral arrangements pursuing the same objective as the Cembureau agreement in which they participated were part of a pan-European agreement on non-transhipment to home markets and the regulation of sales from one country to another, they cannot be held to have participated in the single infringement referred to in Article 1 of the contested decision.

2.2. Links adduced as evidence in the contested decision

4069 In the contested decision the Commission relies on a number of factors to show that the participation of the addressees of the contested decision in a multilateral or bilateral arrangement having the same object as the Cembureau agreement must be regarded as a manifestation of their participation in the Cembureau agreement.

4070 First, the Commission states (contested decision, recital 65, paragraph 3(b)): 'The undertakings Blue Circle, CBR, Ciments Français, Lafarge, Dyckerhoff, Heidelberger, Titan, ENCI, Asland and Cimpor, though not direct members of Cembureau, represented their national associations as Head Delegates at the meetings organised by Cembureau on 14 January 1983, 19 March 1984 and 7 November 1984: there is thus no doubt as to the participation of these undertakings in the [Cembureau] agreement.'

4071 Second, the Commission considers that at the Head Delegates meetings the associations which were direct members of Cembureau entered into 'commitments ... in the interests of their members' and that, 'in point of fact, the cement producers are the real actors, acting through their trade associations' (contested decision, recital 44, paragraph 5; see also recital 46, paragraph 2, second subparagraph).

4072 Third, the Commission refers to the letter convening the meeting of Head Delegates on 14 January 1983 (contested decision, recital 19, paragraph 2; documents 33.126/11552 and 11553) and to the draft introductory statement of the Chairman for the same meeting (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) and concludes (contested decision, recital 46, paragraph 2, fourth subparagraph; see also recital 50, paragraph 3, fourth subparagraph): 'Cembureau and its members ... acknowledge that the frictions due to inter-member trade are of common interest, because they constitute "infringements" of the common "rules of the game". Such bilateral situations are, thus, a specific manifestation of the general agreement not to tranship to home markets.' It continues (contested decision, recital 46, paragraph 2, fifth and sixth subparagraphs): 'It is not necessary ... that each bilateral or multilateral situation should have been discussed explicitly at the Cembureau meetings, although such discussion can be demonstrated in the case of some of them ... It is evident from the Cembureau documents that only those situations which it had obviously not been possible to resolve through direct contacts between the parties concerned were discussed at the meetings. For example, the "hot spot" between Italy and Switzerland, included in the memorandum to the chairman of the meeting of Head Delegates held on 19 March 1984 ... does not seem to have been discussed at the meeting because "the dispute ... was about to be resolved" ... It follows that the implementation of the general agreement covers not only the situations specifically mentioned in the Cembureau documents, but also those which were apparently resolved through direct contacts between the parties concerned, as in the case of the situations involving France and Italy, and Spain and Portugal.'

4073 Fourth, and last, the Commission refers in the context of the ETF and the EPC to the existence of an institutional link between the ETF and Cembureau (contested decision, recital 24) and between the EPC and Cembureau (contested decision, recital 59, paragraph 1, first subparagraph) to demonstrate that the conduct referred to in Articles 4 and 6 of the contested decision constituted measures implementing the Cembureau agreement.

2.3. Proof of the participation of the indirect members of Cembureau and of Unicem and Buzzi in the Cembureau agreement through their participation in a measure implementing that agreement

4074 The Court has already held that the Commission has not established that the conduct referred to in Article 3(1)(b), Article 4(4) and Article 5 of the contested decision constituted constituent elements of the Cembureau agreement (see paragraph 4058 above). Furthermore, Article 3(3)(a) and Article 6, must be annulled in so far as they relate to Cedest (see paragraphs 2384 and 2385 above) and to Heracles and Titan (see paragraph 3970 above) respectively.

4075 It follows that the finding in the contested decision that certain indirect members of Cembureau, namely ENCI, Cedest, Nordcement, Alsen-Breitenburg, Rugby, Castle, Heracles and Titan, participated in a measure implementing the Cembureau agreement is not established. In Cedest's case, the conduct referred to in Article 3(3)(a) of the contested decision is, according to the contested decision, the only manifestation of its accession to the Cembureau agreement. The same applies to Rugby's participation in the conduct referred to in Article 4(4)(a) of the contested decision and to the participation of ENCI, Nordcement and Alsen-Breitenburg in the conduct referred to in Article 5 of the contested decision. Castle's participation in the arrangements referred to in Article 4(4)(a) and Article 5 of the contested decision is also the only manifestation of its participation in the Cembureau agreement. Last, the conduct referred to in Article 4(4) and that referred to in Article 6 of the contested decision constitute the only 'measures implementing' the Cembureau agreement in which Heracles and Titan are alleged to have participated.

4076 The indirect members of Cembureau are expressly stated in the contested decision to have participated indirectly in the Cembureau agreement 'through their participation in the various arrangements and measures agreed on to supplement the general agreement and/or assist in its implementation' (contested decision, recital 45, paragraph 10). For that reason, Article 1 covers only the undertakings which (contested decision, recital 65, paragraph 3) 'clearly manifested their accession to the [Cembureau] agreement by participating [in a measure implementing that agreement]'.

4077 Since the Commission has failed to show that ENCI, Cedest, Nordcement, Alsen-Breitenburg, Rugby, Castle, Heracles and Titan participated in a measure implementing the Cembureau agreement, it is not entitled, according to its method employed in the contested decision to

attribute liability, to find that those undertakings, all indirect members of Cembureau, participated in the infringement referred to in Article 1 of the contested decision.

4078 The Commission cannot claim, as it has done in these proceedings, that the participation of ENCI and Titan in the Cembureau agreement is established in any event because a member of the staff of those undertakings participated in the Head Delegates meeting of 14 January 1983 at which that agreement was concluded. It must be pointed out in that regard that, as presented in the contested decision, that circumstance did not suffice to support a finding that an indirect member of Cembureau participated in the infringement referred to in Article 1 (see paragraph 1441 above). Proof that an indirect member of Cembureau participated in the Cembureau agreement is based solely on its participation in one or more measures implementing the Cembureau agreement. For that reason, indirect members of Cembureau whose staff had attended one or more Head Delegates meetings were regarded, like the other indirect members but unlike the direct members, as having 'participated indirectly in the [Cembureau] agreement, through their participation in the various arrangements and measures agreed on to supplement the general agreement and/or assist in its implementation' (contested decision, recital 45, paragraph 10). For that reason, too, Ciments d'Obourg, which was an indirect member of Cembureau and whose staff had attended the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 4), is not referred to in Article 1 of the contested decision, since the Commission did not find that it had participated in one of the measures implementing the Cembureau agreement.

4079 Article 1 of the contested decision must therefore be annulled in so far as it concerns ENCI, Cedest, Nordcement, Alsen-Breitenburg, Rugby, Castle, Heracles and Titan.

4080 The Court must next consider whether the Commission was entitled to find that the other indirect members of Cembureau, namely CBR, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Valenciana, Asland, Uniland, Cimpor, SECIL, Holderbank, Hornos Ibéricos, Blue Circle and Halkis, acceded to the single and continuous Cembureau agreement through their participation in one or more of the bilateral or multilateral arrangements referred to in the contested decision which had the same object as the Cembureau agreement. It must do likewise in the case of Unicem, a direct member of Cembureau which did not participate in any of the Head Delegates meetings, and that of Buzzi, which was neither a direct nor indirect member of Cembureau.

4081 In the case of those undertakings the Court must therefore determine whether the links referred to in paragraphs 4069 to 4073 above are of such a kind as to establish a connection between their participation in an agreement or concerted practice that had the same object as the Cembureau agreement and the Cembureau agreement itself, a connection which would show that their participation constituted a manifestation of their accession to the Cembureau agreement.

2.3.1. Presence of a member of staff at the Head Delegates meetings at which the Cembureau agreement was concluded and/or confirmed

4082 The Commission relies on the presence of a member of staff of certain indirect members of Cembureau at the Head Delegates meetings in order to show that they participated in the Cembureau agreement (contested decision, recital 65, paragraph 3(b)). A Head Delegate who represented the national association was indeed normally a senior executive of an undertaking in the cement sector in the country in question. The Court points out, however, that, from the angle of the contested decision, the presence of a member of the staff of an indirect member of Cembureau did not in itself suffice to establish that that indirect member participated in the Cembureau agreement (see paragraph 1441 above). Nevertheless, in the case of indirect members which participated in one or more of the bilateral or multilateral arrangements referred to in the contested decision, such presence is a relevant factor in showing that their participation in such an individual arrangement must be regarded as accession to the Cembureau agreement.

4083 It is not disputed that a member of staff of the following undertakings, all indirect members of Cembureau, attended the Head Delegates meeting of 14 January 1983 at which the Cembureau agreement was concluded: Mr Van Hove of CBR, Mr Gruner of Dyckerhoff, Mr Poitrat of Ciments Français, Mr Schuhmacher of Heidelberger, Mr Bertrán of Asland, Mr Toscano Jr of Cimpor and Sir John Milne of Blue Circle. That fact is also confirmed by the list of those attending the meeting of 14 January 1983 (contested decision, recital 19, paragraph 4; document 33.126/11581). Nor is it disputed that those undertakings delegated a member of their staff to attend at least one of the two Head Delegates meetings at which the Cembureau agreement was confirmed (contested decision, recital 19, paragraphs 8 and 13; documents 33.126/11699, 11752 and 11753).

4084 It is also common ground that a member of the staff of Lafarge, Mr Collomb, attended the Head Delegates meetings of 19 March and 7 November 1984, at which the Cembureau agreement was confirmed (contested decision, recital 19, paragraphs 8 and 13; documents 33.126/11699, 11752 and 11753).

4085 Even though, as CBR, Ciments Français and Asland state, the persons referred to in paragraphs 4083 and 4084 above might have been present in their capacity as Head Delegates or as experts at the meetings at which the Cembureau agreement was concluded and/or confirmed, it is none the less the case that, through the presence of one of their senior executives at the meetings, the undertakings concerned necessarily became aware of the existence of the Cembureau agreement and of its content.

4086 In those circumstances, it must be concluded that those indirect members of Cembureau were aware that their participation in a bilateral or multilateral agreement or concerted practice having the same object as the Cembureau agreement constituted the implementation by them of the Cembureau agreement.

4087 Thus CBR's participation in the infringements referred to in Article 4(1) to (3)(a), Dyckerhoff's participation in the infringements referred to in Article 3(3)(a) and Article 4(1) to (3)(a), Ciments Français's participation in the infringements referred to in Article 3(3)(a), Article 4(1) and (2) and Article 6, Heidelberger's participation in the infringements referred to in Article 3(3)(a) and Article 4(1), Lafarge's participation in the infringements referred to in Article 3(1)(a) and (3)(a), Article 4(1) to (3)(a) and Article 6, Asland's participation in the infringement referred to in Article 4(1), Cimpor's participation in the infringement referred to in Article 3(2) and Blue Circle's participation in the infringements referred to in Article 4(1) to (3)(a) and Article 6 of the contested decision manifested their accession to the Cembureau agreement.

4088 The Commission was therefore fully entitled to find in the contested decision that CBR, Dyckerhoff, Ciments Français, Heidelberger, Lafarge, Asland, Cimpor and Blue Circle participated in the single infringement referred to in Article 1 of the contested decision. The duration of their participation will be examined below.

2.3.2. Other links

4089 In the case of Unicem, the indirect members of Cembureau whose staff did not attend one of the Head Delegates meetings, and Buzzi, which is neither a direct nor an indirect member of Cembureau, any connection between a bilateral or multilateral agreement or concerted practice on non-transhipment to home markets in which they participated and the Cembureau agreement must be established on the basis of other evidence. Since it has already been possible to conclude from the foregoing analysis that the finding of infringement made in Article 1 of the contested decision cannot be upheld as against ENCI, Cedest, Nordcement, Alsen -Breitenburg, Rugby, Castle, Heracles and Titan, the other links on which the Commission relied in the contested decision are relevant only as against the following nine undertakings: Unicem (a direct member of Cembureau), Vicat, Halkis, Holderbank, SECIL, Uniland, Hornos Ibéricos, Valenciana (indirect members of Cembureau) and Buzzi (neither a direct nor indirect member of Cembureau).

4090 As regards the bilateral and multilateral agreements and practices having the same object as the Cembureau agreement, the Court points out that, according to the Commission, the fact that the undertakings concerned, with the exception of Unicem and Buzzi, are indirect members of Cembureau and the fact that instances of bilateral friction were discussed at the Head Delegates meetings lead to the conclusion that the agreements and practices were measures implementing the Cembureau agreement. As regards the infringements referred to in Articles 4 and 6 of the contested decision, the Commission also refers to the institutional link between Cembureau and the ETF and between Cembureau and the EPC.

4091 As regards the discussions of instances of bilateral friction, the Court finds that only one of these instances can be linked with a bilateral or multilateral agreement or practice referred to in the contested decision, namely the Franco-German agreements and concerted practices

(contested decision, Article 3(3)). According to the contested decision, 'exports from France to Germany' were discussed at the Head Delegates meeting on 19 March 1984 (memorandum to the Chairman for the meeting of 19 March 1984; contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729). The other instances of bilateral friction referred to in the documents concerning the Head Delegates meetings, in particular the memorandum to the Chairman for the meeting of 19 March 1984 and the notes on that meeting (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) did not give rise to a bilateral or multilateral agreement or practice in respect of which a finding of infringement was made in the contested decision.

4092 It follows that the fact that some instances of bilateral friction were discussed at the Head Delegates meeting does not prove that the nine undertakings referred to above participated in the Cembureau agreement. It is apparent from the contested decision that none of those undertakings participated in the Franco-German agreements or concerted practices.

4093 Furthermore, the Commission correctly observes in the contested decision (recital 46, paragraph 2, fifth and sixth subparagraphs) that the Cembureau agreement makes provision, where necessary, for bilateral or multilateral discussions between the parties directly concerned, so that only cement transfers between members which were 'hot spots' for which no solution had been found locally were discussed at the Head Delegates meetings (see draft introductory statement by the Chairman for the meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) and notes on the meeting of 19 March 1984 referred to in paragraph 4091 above).

4094 However, even though the fact that there is no evidence that frictions underlying agreements and concerted practices with the same object as the Cembureau agreement were discussed at the Head Delegates meetings does not in itself mean that those agreements and practices were not measures implementing the Cembureau agreement, the fact that no reference was made at those meetings to frictions relating to the agreements and practices between France and Italy and Spain and Portugal, to the ETF or to the EPC clearly cannot constitute positive proof of a link between those agreements and practices and the Cembureau agreement.

4095 As regards the alleged institutional link between Cembureau, on the one hand, and the ETF and the EPC, on the other, the Court finds that the Commission fails to explain how such a link shows that the nine undertakings referred to above in the final sentence of paragraph 4089 were aware of the Cembureau agreement, a condition which must be satisfied before their participation in the infringements referred to in Articles 4 and 6 of the contested decision can be regarded as proof that they acceded to that agreement.

4096 On the other hand, indirect membership of Cembureau is a relevant criterion of connection with the Cembureau agreement. As the Commission correctly observes, the real actors on the market are the undertakings, not the trade associations which are the direct members of

Cembureau (contested decision, recital 44, paragraph 5). Those associations must therefore be deemed to have informed their members of the conclusion and confirmation of the Cembureau agreement following the Head Delegates meetings of 14 January 1983, 19 March and 7 November 1984. At the meeting of 14 January 1983, moreover, the Chairman of Cembureau expressly invited the Head Delegates present to 'spread words of wisdom around [them]' (draft introductory statement by the Chairman for the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)).

4097 Furthermore, on the cement market any action on one market may have an impact on the most distant markets, as indicated in the passage from the Zurich/Céligny document (contested decision, recital 25, paragraph 3; documents 33.126/18772 to 18779; see paragraph 2539 above), which states, on the subject of Greek exports to the United Kingdom and Italy: 'Clearly the current situation constitutes a threat to the whole of Europe and not only to the countries under immediate attack.' As the success of the rule of non-transhipment to home markets adopted and confirmed at the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 depended on its general implementation, the national associations which were the direct members of Cembureau must have informed their members of the existence and subject-matter of the Cembureau agreement.

4098 It follows that all the indirect members of Cembureau must have been aware of the existence and subject-matter of that agreement. Even though in the present case the fact that the indirect members of Cembureau were represented at the Head Delegates meetings cannot in itself be used as a criterion for the imputation of liability for the infringement referred to in Article 1 of the contested decision (see paragraphs 563 and 564 above), indirect membership of Cembureau none the less shows that the participation of an undertaking in a bilateral or multilateral agreement having the same object as the Cembureau agreement constituted implementation of the Cembureau agreement and thus implied accession to that agreement.

4099 Among the nine applicants referred to in the final sentence of paragraph 4089 above are the following indirect members of Cembureau: Vicat, Valenciana, Uniland, SECIL, Holderbank, Hornos Ibéricos and Halkis. When those undertakings participated in a bilateral or multilateral agreement having the same object as the Cembureau agreement they were necessarily aware that in doing so they were taking part in the pan-European agreement which had been concluded and confirmed at the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984.

4100 Accordingly, Vicat's participation in the infringement referred to in Article 3(1)(c), SECIL's participation in the infringement referred to in Article 3(2), Uniland's and Holderbank's participation in the infringements referred to in Article 4(1) to (3)(a), and the participation of Valenciana, Hornos Ibéricos and Halkis in the infringement referred to in Article 6 of the contested decision manifested their accession to the Cembureau agreement.

4101 The Commission was therefore fully entitled to find in the contested decision that Vicat, Valenciana, Uniland, SECIL, Holderbank, Hornos Ibéricos and Halkis participated in the single infringement referred to in Article 1 of the contested decision. The duration of their participation in the infringement will be considered below.

2.3.3. The particular case of Unicem and Buzzi

4102 It cannot be held that Unicem was represented at the Head Delegates meetings at which the Cembureau agreement was concluded and confirmed (see paragraphs 1404 to 1416 above).

4103 The Court has already held that the Commission has proved that Unicem participated in the following infringements within the framework of the ETF:

— the setting-up of the ETF (contested decision, Article 4(1); see paragraphs 2682 and 2683 above);

— concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a); see paragraphs 3252 and 3253 above);

— an agreement having as its aim the prevention of imports of Greek cement by Calcestruzzi (contested decision, Article 4(3)(b); see paragraph 3396 above).

4104 For reasons analogous to those set out in paragraphs 4096 to 4098 above in relation to the indirect members of Cembureau, Unicem was necessarily aware, as a direct member of Cembureau, that by participating in the various activities referred to in Article 4(1) and (3)(a) and (b), the object of which was identical to that of the Cembureau agreement (see paragraphs 4050 to 4052 above) it was implementing that agreement.

4105 It should further be pointed out that, in the course of the infringement referred to in Article 4(1) of the contested decision, Unicem had direct contacts with representatives of Blue Circle, Oficemen and Lafarge, which either directly participated in or delegated a member of their staff to participate in the Head Delegates meetings at which the Cembureau agreement was

concluded and/or confirmed. Unicem participated with Mr Marichal of Lafarge, Mr Andia of Oficemen, and Mr Shepherd of Blue Circle, in the subgroup 'Exchange of defensive experiences' set up at the Head Delegates meeting of 9 September 1986 (minutes of the meeting of 9 September 1986 (contested decision, recital 25, paragraph 22; documents 33.126/18849 to 18862) and Lafarge document of 25 March 1987 (contested decision, recital 25, paragraph 47; documents 33.126/4858 to 4861)). Similarly, as regards the infringement referred to in Article 4(3)(b), it must be pointed out that Cementir and Italcementi, the other two parties to the agreement which aimed to prevent imports of Greek cement by Calcestruzzi, are direct members of Cembureau and were represented at the meetings at which the Cembureau agreement was concluded and/or confirmed.

4106 As the Commission correctly observes, Unicem's ignorance of the Cembureau agreement is also irreconcilable with the following passage from the telex sent to Titan by Italcementi on 13 May 1987 (contested decision, recital 27, paragraph 8; document 33.126/19204): 'With reference to the contract between Titan and Calcestruzzi related to cement supplies in Italy and also to the proposed meeting requested by M/S. Calcestruzzi itself to take place in Luxembourg on May 24, 1987, I wish to inform you that we, the cement Manufacturers, will clearly take part [in] said meeting since we are the parties involved at top level. Therefore, Messrs Pesenti, Testore and Carella (in charge of Italcementi, Unicem and Cementir respectively) will gladly be available for the meeting after the General Assembly of Cembureau, with the aim to find a solution to the problem, object of our discussions, with the same spirit that for many years has [bound] the cement industries of various European countries.'

4107 It follows that a link between the measures taken by Unicem within the framework of the ETF and the Cembureau agreement is established. The Commission was therefore entitled to find in the contested decision that Unicem participated in the single infringement referred to in Article 1 of the contested decision. The duration of its participation in that infringement will be considered below.

4108 Buzzi, which is neither a direct nor an indirect member of Cembureau, participated in two infringements the object of which was identical to that of the Cembureau agreement: the concerted practice with Lafarge referred to in Article 3(1)(a) of the contested decision (see paragraphs 1868 and 4036 above) and the concerted practice with Vicat referred to in Article 3(1)(c) of the contested decision (see paragraphs 1959 and 4039 above).

4109 In this case, however, the Court must ascertain whether Buzzi knew, or ought to have known, when it participated in those Franco-Italian concerted practices that it was taking part in the pan-European agreement concluded and confirmed at the Head Delegates meetings on 14 January 1983 and 19 March and 7 November 1984. As the Commission also acknowledged at the hearing in Case T-51/95, identity of object between the bilateral or multilateral agreements and concerted practices and the Cembureau agreement does not in itself suffice to show such accession (see also paragraph 4060 above). Only if Buzzi's knowledge of the existence of the Cembureau agreement was sufficiently firm could its participation in the

Franco-Italian concerted practices concerned constitute the expression of its accession to that agreement.

4110 The Court points out that in the contested decision the Commission relies on a number of factors to show that the undertakings which participated in a bilateral or multilateral agreement were aware of the Cembureau agreement (see paragraphs 4069 to 4073 above). However, the Commission does not invoke any of those factors in Buzzi's case (contested decision, recitals 20 and 48).

4111 In order to demonstrate that Buzzi was aware of the Cembureau agreement the Commission refers solely to the fact that it had contacts within the framework of the Franco-Italian concerted practices with certain parties to the Cembureau agreement (contested decision, recital 48, paragraph 2). The Commission further states: 'What is important is the objective [of the Franco-Italian concerted practices in which Buzzi participated], which coincides with that of the general agreement' (contested decision, recital 48, paragraph 2).

4112 As the Court has already pointed out, however, the fact that objectives coincide is not sufficient to establish that an undertaking participated in the Cembureau agreement. Furthermore, none of the documents on which the Commission relied to demonstrate the identical objects of the Franco-Italian concerted practices and the Cembureau agreement (see paragraphs 4033 to 4042 above) contains any evidence that Buzzi was aware of the Cembureau agreement. In the absence of such evidence, the fact that Buzzi had contacts with certain undertakings whose participation in the Cembureau agreement is established is not sufficient to demonstrate that it was aware of that agreement.

4113 It follows that although Buzzi's participation in the bilateral concerted practices referred to in Article 3(1)(a), (b) and (c) has been established (see paragraphs 1819 to 2035 above), the Commission has not shown that its participation constituted accession to the Cembureau agreement, a pan-European agreement distinguished by its particular gravity (contested decision, recitals 48 and 65, paragraph 5). Accordingly, Article 1 of the contested decision must be annulled in so far as it relates to Buzzi.

2.4. Conclusions

4114 It follows from all the foregoing that the Commission has established that CBR, Cembureau, FIC, VNC, Ciments Luxembourgeois, Dyckerhoff, SFIC, Vicat, Ciments Français, Heidelberger, Lafarge, Aalborg, BDZ, Unicem, Valenciana, BCA, Asland, Uniland, Oficemen, Irish Cement, Cimpor, SECIL, ATIC, Italcementi, Holderbank, Hornos Ibéricos, Aker, EUROC, Cementir, Blue Circle, AGCI and Halkis participated in the Cembureau agreement. By participating, as the case may be, in the conduct referred to in Article 2, Article 3(1)(a) and (c), (2) and (3),

Article 4(1) to (3) and Article 6 of the contested decision those undertakings and associations implemented the Cembureau agreement. The Commission was therefore fully entitled to regard the bilateral and multilateral agreements and concerted practices as constituent elements of the Cembureau agreement and to classify that agreement in the contested decision as a single agreement (recital 46).

3. General arguments questioning the use of the concept of a 'single agreement'

4115 First, FIC, SFIC, Vicat, Ciments Français, Lafarge, Unicem, Uniland, Oficemen, Cimpor, SECIL, Hornos Ibéricos and Blue Circle claim that the Commission used circular reasoning to demonstrate the existence of the single Cembureau agreement. Certain types of conduct which were allegedly innocent or only of a local dimension were described by it as anti-competitive on the ground that they were connected with a hypothetical single agreement; at the same time the Commission relied on that conduct to prove the existence of the Cembureau agreement.

4116 That argument must be rejected. The Commission did not infer the existence of the Cembureau agreement from the existence of the bilateral or multilateral arrangements referred to in Articles 2 to 6 of the contested decision but did so from the specific documentary evidence referred to in recitals 18, 19 and 45 of the contested decision (see paragraphs 862 to 1095 above), which show that at the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 a concurrence of wills emerged concerning the principle of non-transhipment to home markets and the regulation of sales from one country to another. In the contested decision, proof of the existence of the Cembureau agreement does not therefore in any way depend on the existence of the measures implementing the Cembureau agreement. Similarly, the Commission relied each time on documents to establish that the conduct described in Articles 2, 3 and 4(1) to (3) of the contested decision was unlawful. As regards the infringement referred to in Article 6 of the contested decision, the Commission's reasoning is circular only in so far as it infers the unlawful nature of the EPC's activities from the fact that all the members of the EPC are indirect members of Cembureau and therefore required to comply with the rule of non-transhipment to home markets (see paragraph 3879 above). However, the other evidence adduced by the Commission supports its conclusion that the EPC's activities infringed the provisions of Article 85(1) of the Treaty, since they were designed to 'prevent incursions by competitors on respective national markets in the Community' (see paragraphs 3882 to 3933 above). It follows that in the contested decision proof of the unlawful nature of the measures referred to in Articles 2, 3, 4(1) to (3) and 6 of the contested decision is not based on a theoretical connection with the Cembureau agreement but rather on specific documentary evidence.

4117 Second, Vicat, Heidelberger, Italcementi and Blue Circle claim that in having recourse to the single agreement theory the Commission reduced and even reversed the burden of proof by dispensing with the need to establish the existence of unlawful conduct on the part of each addressee of the contested decision. The Commission presumed that all the conduct of the European cement producers had been adopted in application of the Cembureau agreement, thus formulating a presumption of guilt. Blue Circle further observes that it is apparent from various

passages in the contested decision that the Commission considered that it was under no obligation to prove the various infringements but that it was for the defendant undertakings to show that the allegations in the SO were untrue.

4118 Those arguments must be rejected. The various infringements complained of in the SO and upheld in the contested decision, and the participation therein of the various applicants concerned, were established not on the basis of a presumption of guilt but on the basis of specific documentary evidence.

4119 Nor does the fact that in the contested decision the Commission considers that Blue Circle's arguments and those of the other addressees of the contested decision do not invalidate the findings which it had made in the SO on the basis of documentary evidence in any way show that it reversed the burden of proof.

4120 Third, Heidelberger, Uniland and Oficemen question the classification as a single agreement of the measures adopted within the framework of Cembureau, since the operative part of the contested decision reveals that the participants in the various infringements were not at all identical. They maintain that certain infringements are attributed to Cembureau and its members (contested decision, Article 2(1) and (2)), others to some direct members and some indirect members of Cembureau (contested decision, Article 3(2) and (3) and Article 4(1) to (3)), and still others to indirect members of Cembureau (contested decision, Article 3(1) and Article 6) or to undertakings not affiliated to Cembureau (the case of Buzzi, contested decision, Article 3(1)).

4121 Aker and EUROC observe that it has not been established in relation to any of the presumed bilateral or multilateral infringements on individual markets that the undertakings concerned considered that they were applying a Cembureau agreement, that they penalised other undertakings if they failed to comply with that agreement, that they threatened to bring cases of 'unfair competition' before Cembureau, that they ascribed their conduct to a Cembureau agreement or that they invoked that agreement. They further emphasise that in many cases the conduct concerned was seen only on local or regional markets.

4122 The Court points out that the Commission has established that the Cembureau agreement was concluded at the Head Delegates meeting of 14 January 1983, the object of the agreement being non-transhipment to home markets and the regulation of sales from one country to another (see paragraphs 862 to 1095 above). The success of that agreement depended on its being applied generally. Having regard to the interdependence of the various national markets, any action on one market might spread to the most distant markets. For that reason the Cembureau agreement provided, in the case of uncontrolled exports in Europe, for 'multi- or bi-lateral discussions' to be held to ensure observance of the 'rule of the game' (draft introductory

statement by the Chairman for the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)). Thus the application of the Cembureau agreement was ad hoc and local.

4123 Therefore, as the Commission maintains, the fact that various undertakings played different roles in the pursuit of a common objective does not mean that there was no identity of participants (contested decision, recital 46, paragraph 2, third subparagraph). Each party whose participation in the Cembureau agreement is established contributed, at its own level, to the pursuit of the common objective by participating in one or more of the implementing measures referred to in the contested decision, aware that the other participants in the Cembureau agreement would take similar measures when their national frontiers were threatened. Thus the actions undertaken by various parties to the Cembureau agreement interacted to support the common object pursued, namely general observance of the rule of non-transhipment to home markets and the regulation of sales from one country to another.

4124 The fact that none of the documents relating to the bilateral and multilateral agreements makes express reference to the Cembureau agreement is not of such a nature as to call that assessment into question. In that regard, the Court points out that the Cembureau agreement is not a formal agreement but an informal concurrence of wills on 'non-transhipment to home markets and the regulation of sales from one country to another, i.e. market-sharing' (contested decision, recital 45, paragraph 9) (see paragraph 998 above).

4125 The arguments put forward by Heidelberger, Uniland, Oficemen, Aker and EUROC must therefore be rejected.

4126 Fourth, Heidelberger and Hornos Ibéricos submit that, unlike in the case of the facts in the *Polypropylene* cases (see, for example, *Hercules Chemicals* v *Commission*, cited at paragraph 140 above, paragraph 263, and *BASF* v *Commission*, cited at paragraph 1852 above, paragraph 244 et seq.), the alleged parties to the Cembureau agreement did not participate in a system of regular meetings. They consider that a single agreement requires at least the organisation of regular meetings or various contacts at which all the participants are generally or at least regularly present and the objectives of the arrangements and the procedures for implementing them are examined.

4127 That argument must be rejected. The infringement constitutes a single agreement by virtue of the identical nature of the objective pursued by each participant in the Cembureau agreement, not by virtue of the methods of implementing that agreement. In that regard, the Court points out that the objective of the Cembureau agreement was simple: the principle was 'everyone stays at home'. Unlike the arrangement which formed the subject-matter of the *Polypropylene* cases, the objective of which was to increase prices on the market, it was not necessary to hold

regular meetings in order to implement the Cembureau agreement. All that was required to comply with that agreement was that each participant should not become involved in unregulated cement exports to other European countries and that 'multi- or bi-lateral discussions [be] held' to ensure that the 'rule of the game' was observed (draft introductory statement of the Chairman for the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585)).

4128 Fifth, Heidelberger, Unicem, BCA, Italcementi, Aker, EUROC, Cementir and Blue Circle maintain that as a result of the single agreement theory they were held to be collectively responsible for all the matters established in the contested decision, including those in respect of which they were not specifically accused. The Commission thus infringed the principle that liability for an infringement of Article 85(1) of the Treaty is of a personal nature (Opinion of Judge Vesterdorf acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited at paragraph 1053 above, at II-953).

4129 However, the personal nature of liability for infringements of Article 85 of the Treaty does not prevent the Commission from classifying various forms of conduct by a number of parties as a single infringement if, as in the present case, it established that those parties regarded their participation in that conduct as their contribution to an overall plan linking the entire cement industry. The individual participation of the applicants concerned in the single Cembureau agreement has been established by the Commission (see paragraph 4114 above).

4130 Sixth, Italcementi and Cementir criticise the Commission for having used the concept of a single infringement to conclude that they participated in the infringement referred to in Article 1 of the contested decision purely because they were members of Cembureau.

4131 That argument is based on a misreading of the contested decision and must be rejected. Proof of the participation of Italcementi and Cementir, both direct members of Cembureau, in the single Cembureau agreement is based not only on their membership of Cembureau but also, and above all, on their participation in the Head Delegates meetings at which the Cembureau agreement was concluded and/or confirmed (see paragraphs 1302 and 1342 to 1353 above).

4132 Seventh, Blue Circle complains that the Commission established the existence of a single Cembureau agreement by relying on the three documents identified in recital 18 of the contested decision, namely the two Blue Circle internal memoranda, one dated 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334) and the other undated (contested decision, recital 18, paragraph 3; documents 33.126/11335 to 11337), and the statement of the Chairman of Heracles (contested decision, recital 18, paragraph 5; documents 33.126/19875 to 19877).

4133 That argument must be rejected. In concluding that the various types of conduct had originated in a single agreement (contested decision, recital 46), the Commission relied on the fact that the conduct identified in Articles 2 to 6 of the contested decision and the content of the Cembureau agreement, as disclosed in particular by the three documents to which the applicant refers and by the documents referred to in recitals 19 and 45 of the contested decision, had identical objects, and also on the fact that the parties participated, with full knowledge of the Cembureau agreement, in the conduct referred to in Articles 2 to 6 of the contested decision.

4134 Eighth, Italcementi, Aker, EUROC, Cementir and Blue Circle claim that by deciding to drop the national objections the Commission contradicted its single-infringement theory.

4135 The Court points out that the Commission never claimed in the SO that the national objections referred to therein came within the single and continuous Cembureau agreement (see paragraph 119 above). Only the 'arrangements adopted within the framework of Cembureau and the bilateral and multilateral meetings and contacts' described in points 59 to 62 and 66 to 68 of the international chapters of the SO were deemed by the Commission to constitute a single and continuous agreement (SO, point 59). Consequently, the Commission did not contradict itself by dropping the national objections at the end of the administrative procedure while maintaining its theory based on the existence of a single and continuous agreement.

4136 Ninth, Oficemen claims that the fact that the Commission relied on the criterion of identical participants to establish the link between a specific agreement and the Cembureau agreement has the effect, owing to the large number of alleged participants in the Cembureau agreement, of linking with the Cembureau agreement virtually any agreement or concerted practice implemented by European cement producers. The same conclusion necessarily follows in regard to the criterion of objective identity, owing to the Commission's wide definition of the content of the Cembureau agreement.

4137 That argument must be rejected. The Commission did not presume that the entire cement industry had acceded to the Cembureau agreement in order to establish a link between the various measures which implemented the Cembureau agreement and the agreement itself. It has showed that the 'implementing measures' referred to in the contested decision, with the exception of the conduct referred to in Article 3(1)(b), Article 4(4) and Article 5, had as their object non-transhipment to home markets and thus pursued the same aim as the Cembureau agreement. The very object of the Cembureau agreement and the measures implementing that agreement is unequivocally clear from the documentary evidence referred to in the contested decision. By participating in a measure having the same object as the Cembureau agreement the various applicants demonstrated their accession to the Cembureau agreement, an agreement of which they were aware.

4138 Tenth, and last, Aker and EUROC claim that the heterogeneous nature of the conditions of competition and the local dimension of the markets in the Community are incompatible with the Commission's theory of the existence of a single agreement on a European scale.

4139 That argument must be rejected. An economic analysis of the cement market cannot hide the inescapable reality of the documentary evidence on which the Commission properly relied in concluding that the Cembureau agreement existed. Nor can it conceal the identical object of various 'implementing measures' and the Cembureau agreement, which enabled the Commission to classify that agreement as a single agreement linking all those which, like Aker and EUROC (see paragraphs 4063 to 4065 above), had participated in those measures in full knowledge of the Cembureau agreement.

4. Particular circumstances showing that the various bilateral and multilateral agreements and concerted practices were not measures implementing the single Cembureau agreement

4140 Some of the applicants claim that various circumstances relating to the bilateral or multilateral agreements and concerted practices in which they participated are at variance with the Commission's argument that those arrangements constituted measures implementing the Cembureau agreement.

4141 Thus Lafarge claims that in not attributing to it the infringements relating to the exchanges of price information found in Article 2 of the contested decision, even though those infringements were supposed to have been designed to facilitate the implementation of the Cembureau agreement to which it is said to have acceded, the Commission contradicts itself and shows that there is no link between those exchanges and the Cembureau agreement.

4142 That argument must be rejected. The exchanges of price information found in Article 2(1) and (2) of the contested decision were alleged against Cembureau and all its direct members. Quite apart from the identity of object between the two infringements (see paragraph 4032 above), the link between the exchanges of information and the Cembureau agreement is clear from the fact that Cembureau and its direct members participated in the exchanges of information with full 'knowledge' of the Cembureau agreement, since it was those very members — with the exception of Unicem — which concluded and then confirmed the Cembureau agreement at the Head Delegates meetings referred to in recital 19 of the contested decision. The conduct identified in Article 2 may therefore be regarded as measures implementing the Cembureau agreement by Cembureau and its direct members, other than Unicem (see paragraphs 1695 to 1699 above). The fact that that conduct was not attributed to the indirect members of Cembureau — and in particular not to Lafarge — which were accused of having acceded to the Cembureau agreement is not of such a nature as to undermine that approach.

4143 Furthermore, Cembureau, FIC, SFIC, Lafarge, BCA, Oficemen, Cimpor, SECIL, ATIC, Aker, EUROC and Blue Circle claim that the periodical information exchanges referred to in Article 2(2) of the contested decision cannot be regarded as a measure implementing the Cembureau agreement, since the contested decision itself (recital 16, paragraph 8) states that those exchanges commenced in 1980.

4144 The Court points out, however, that the fact that the information exchanges commenced before the Cembureau agreement was adopted is not in any way of such a nature as to invalidate the finding that those exchanges were designed to facilitate the implementation of the Cembureau agreement following its conclusion (see paragraphs 1625 to 1647 above).

4145 As regards the infringements referred to in Article 3(1) of the contested decision, Vicat contends that the 'Franco-Italian' relations were never referred to at the Head Delegates meetings as a 'hot spot'.

4146 Similarly, as regards the infringement referred to in Article 3(2) of the contested decision, Cimpor, SECIL and Oficemen contend that the trade in cement between Spain and Portugal was never regarded at the Head Delegates meetings as a source of bilateral friction. Nor is it apparent from the documents in the file that the Hispano-Portuguese cement trade was discussed within Cembureau or one of the committees or working groups referred to in the contested decision.

4147 However, as the Commission submits (contested decision, recital 46, paragraph 2, fifth and sixth subparagraphs), the fact that there is no evidence that certain instances of bilateral or multilateral friction were discussed at the Head Delegates meetings at which the Cembureau agreement was concluded or confirmed does not mean that the bilateral or multilateral agreements and concerted practices concluded in response to such friction did not constitute measures implementing the Cembureau agreement. In that regard, it is apparent from the draft introductory statement by the Chairman for the Head Delegates meeting of 14 January 1983 (contested decision, recital 19, paragraph 5; documents 33.126/11583 to 11585) that in the interest of 'modifying market developments' it was essential, 'each time it [was] necessary, that multi- or bi-lateral discussions [be] held, as and when the need [arose]'. Therefore the mechanism of the Cembureau agreement provided, where necessary, for bilateral or multilateral discussions between the parties directly concerned, not for discussion within Cembureau. Thus only cement transfers between members described as 'hot spots' for which no solution had been found locally were discussed at the Head Delegates meetings.

4148 The argument must therefore be rejected.

4149 Oficemen further claims that the link between the Hispano-Portuguese agreement and the Cembureau agreement is based on pure speculation and circular reasoning. In substance, the Commission merely stated that the fact that the Hispano-Portuguese agreement was not discussed within Cembureau did not prove that it was not linked with the Cembureau agreement, since that agreement assumed that only conflicts which had not been resolved through direct contacts were to be discussed at Cembureau level (contested decision, recital 46, paragraph 2, fifth and sixth subparagraphs). However, the Commission inferred that feature of the Cembureau agreement from the very fact that the Hispano-Portuguese agreement had not been discussed within Cembureau.

4150 That argument, too, must be rejected. The link between the Hispano-Portuguese agreement and the Cembureau agreement is based on the finding that the parties to the Hispano-Portuguese agreement, which were all aware of the Cembureau agreement, must have realised that in participating in that agreement, which pursued the same objective as the Cembureau agreement, they were implementing the joint plan adopted and confirmed at the Head Delegates meetings.

4151 Furthermore, the Commission did not base its conclusion that the Cembureau agreement did not necessarily require that 'each bilateral or multilateral situation should have been discussed explicitly at the Cembureau meetings' (contested decision, recital 46, paragraph 2, fifth subparagraph) on the finding that the Hispano-Portuguese agreement had never been discussed at Cembureau level. That conclusion was based on various documentary extracts which showed that, in order to modify market developments, priority had first and foremost been given to the bilateral or multilateral discussions and that only 'hot spots' which could not be resolved solely through direct contacts between the parties concerned were to be discussed at Cembureau level (see contested decision, recital 46, paragraph 2, final subparagraph).

4152 As regards the infringement referred to in Article 3(3) of the contested decision, Dyckerhoff, SFIC, Lafarge, Oficemen, Aker, EUROC and Blue Circle contend that the Franco-German agreements and concerted practices, if established, could not be regarded as being linked with the Cembureau agreement, since they were implemented before 1983. They therefore have no connection with the agreement concluded at the meeting of 14 January 1983, as they predated that meeting.

4153 However, even though the Franco-German agreements and concerted practices predated the Cembureau agreement, the link between them is apparent not only from the fact that they had the same object and all the undertakings and associations whose participation in the infringements referred to in Article 3(3) is established had delegated a member of their staff to attend the Head Delegates meetings at which the Cembureau agreement had been concluded and/or confirmed, but also from the documents relating to the Head Delegates meeting of 19 March 1984. Thus, in the statement for the President concerning that meeting (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), the breach of the rule of non-transhipment to home markets at Franco-German level was described as a 'hot spot', which shows that the Franco-German agreements and practices were regarded by the Head Delegates themselves as a constituent element of the Cembureau agreement.

4154 The parties to the Franco-German agreement were therefore aware that their participation in the agreements and practices, in accordance with the 'rule of the game' adopted at the Head Delegates meeting of 14 January 1983, was thereafter seen by the other parties to the Cembureau agreement as a manifestation of their accession to that agreement.

4155 As regards the infringements referred to in Article 4(1) to (3) of the contested decision, Lafarge relies on the allegedly restricted object of the ETF — to meet the threat of allegedly unlawfully subsidised exports from Greece — to dispute the link between the ETF and its implementing measures, on the one hand, and the Cembureau agreement, on the other, an agreement which pursued a wider objective.

4156 The Court points out in that regard that, although the ETF was principally set up to deal with the Greek problem, it had a wider purpose than that attributed to it by Lafarge, since its purpose was to 'evaluate measures to eliminate imports to Western Europe' (minutes of the ETF meeting of 19 August 1986 in Geneva (contested decision, recital 25, paragraph 15; annex 15 to Aker's and EUROC's reply to the SO)) or to 'examine possible "dissuasive" and "persuasive" measures to counter the arrival of cheap cement on European markets' (summary of statements and conclusions of the meetings of the Head Delegates and representatives of the Task Force at Baden-Baden on 9 September 1986 (contested decision, recital 25, paragraph 22; documents 33.126/11849 to 18862)). The ETF and the Cembureau agreement therefore had perfectly identical objects, also in terms of their geographical scope.

4157 Ciments Français, Heidelberger, Lafarge, Irish Cement, Italcementi, Aker and EUROC further dispute the relevance of the various elements which the Commission puts forward in recital 24, paragraph 3, of the contested decision in order to establish the link between the ETF and Cembureau. They claim that there was no institutional link between Cembureau and the ETF.

4158 Ciments Français claims, in reliance on the judgment in *AITEC* v *Commission*, cited at paragraph 2554 above (paragraphs 141 and 142), that the Commission could not, without infringing the principle of proportionality, take the view that the single agreement on the ETF was a serious application of the Cembureau principle, without first carrying out an examination of the foreseeable effects on competition and inter-State trade of the subsidies granted to Greek cement producers.

4159 However, since it has been established that the infringements referred to in Article 4(1) to (3) of the contested decision and the Cembureau agreement pursued the same object and that the participants in those infringements were aware that they were implementing the Cembureau agreement, it is irrelevant, for the purposes of determining a link between the ETF agreement and the Cembureau agreement, whether the ETF maintained links of affiliation and institutional links with Cembureau, as maintained by the Commission on the basis of the various factors which it puts forward in recital 24, paragraph 3, of the contested decision.

4160 Furthermore, irrespective of whether the State aid granted to the Greek industry distorted competition and affected trade between Member States, the Commission was entitled to conclude that, in view of the number of participating undertakings and associations and the perfect identity between the ETF agreement and the Cembureau agreement, the private measures taken in the context of the single agreement concerning the ETF were a serious application of the Cembureau agreement.

4161 Last, Lafarge and Blue Circle claim that the concerted practice referred to in Article 6 of the contested decision, if established, could not be regarded as being linked with the Cembureau agreement, since that concerted practice was implemented well before 1983. Because it predated the agreement concluded at the meeting of 14 January 1983, the cooperation within the EPC therefore had no connection with that agreement.

4162 That argument has become devoid of purpose, since Article 6 of the contested decision must be annulled in so far as it finds an infringement of Article 85(1) of the Treaty before 18 November 1983 (see paragraph 3980 above). It has been established that from that date, certain members of the EPC sought, through their cooperation within that committee, to achieve the objective of the Cembureau agreement.

4163 Lafarge further observes that none of the documents relating to the EPC makes any reference to the content of the Cembureau agreement.

4164 The Court points out that it has been shown that certain members of the EPC sought, within the framework of that export committee, to reinforce the rule on non-transhipment to home markets by channelling production surpluses to third countries and that they thus sought to implement the Cembureau agreement (see paragraphs 4055, 4056, 4086, 4087 and 4100 above). The fact that none of the documents relating to the EPC makes express reference to the Cembureau agreement, which is not a formal agreement (see paragraph 4124 above), is not of such a nature as to call that assessment in question.

5. Particular circumstances showing that some applicants had distanced themselves from the single Cembureau agreement or that their participation in that agreement did not constitute an infringement of Article 85(1) of the Treaty

4165 CBR, Unicem and Blue Circle claim that they did not participate in the bilateral contacts referred to in Article 3 of the contested decision that were discussed at the Head Delegates meetings noted by the Commission. Unicem claims that the statement made at the Head Delegates meeting of 19 March 1984 to the effect that 'pressure due to inter-member trade had slackened considerably through improved bilateral contacts' (notes on the meeting, dated

2 April 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737) should constitute exculpatory evidence in its case, since it never participated in bilateral contacts of that type.

4166 Those arguments are irrelevant, since the Commission was entitled to find that the undertakings concerned participated in the infringement referred to in Article 1 of the contested decision through their participation in constituent elements of the single agreement relating to the ETF (see paragraphs 4087 and 4104 above).

4167 Next, CBR claims that it distanced itself from the Cembureau agreement through the intermediary of its national association, FIC. It refers, first, to the minutes of the meeting of FIC's board of directors of 1 September 1987 (annex 3 to the application), from which it takes two passages. The first passage (pages 2 and 3 of the minutes), which concerns the 'European cement industry strategic planning seminar, Aldermaston, 2 and 3 October 1987', states that 'it is not Cembureau's task to draw up or recommend policies for the European cement industry or to monitor its economy'. The second (p. 6 of the minutes), which is on the topic 'Structure of the European cement industry and foreseeable capacity 1990–2000', states, in relation to a questionnaire submitted by Cembureau on production capacities: 'It would have the effect of collating the confidential strategic data of the member companies in order to draw up a European cement strategy, which Cembureau must not do. The Board [of FIC] therefore sees no point in responding. Mr Latteur is requested to prepare a draft reply to Cembureau, summarising the main criticisms made at the meeting of that inappropriate initiative and declining to respond on behalf of Belgian cement manufacturers.'

4168 CBR then refers to what was said by the Belgian Head Delegate, Mr Van Hove, who stated at the Head Delegates meeting of 19 March 1984, in relation to 'random exports', that it was pointless to continue the discussion within Cembureau (notes on the meeting, dated 2 April 1984; contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737). That observation, according to CBR, reflected the position adopted by CLC (see paragraph 799 above) on 17 March 1983 regarding intra-Community trade, according to which 'it [was] not permitted to adopted a common approach at the level of the CLC, or even between cement industries and/or companies' (annex 7 to the application; p. 5 of the minutes of the CLC meeting of 17 March 1983), a position which had itself been discussed and approved in an earlier discussion held at the FIC (see annexes 8, 9 and 9b to the application).

4169 CBR maintains that what Mr Van Hove said at the Head Delegates meetings reflected a permanent desire to support any action which Cembureau might take within the limits laid down by Article 85 of the Treaty.

4170 The Court points out, however, that CBR, as an indirect member of Cembureau, was aware of the existence and content of the Cembureau agreement (see paragraph 4098 above). Furthermore, a member of CBR's staff, Mr Van Hove, attended the three Head Delegates meetings at which the Cembureau agreement was concluded and confirmed (contested decision, recital 19, paragraph 4, documents 33.126/11581; contested decision, recital 19, paragraph 8, document 33.126/11699; contested decision, recital 19, paragraph 13, documents 33.126/11752 and 11753)).

4171 In the contested decision the Commission was entitled to rely on CBR's participation in infringements within the framework of the ETF in order to establish its accession to the Cembureau agreement. When CBR participated in the agreements and concerted practices referred to in Article 4(1) to (3)(a) of the contested decision, which had the same object as the Cembureau agreement, it was necessarily aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings and that it would in future be seen by the other participants to the Cembureau agreement as adhering to that agreement.

4172 None of the evidence put forward by CBR is of such a nature as to vitiate that finding. The documents on which it relies make no reference to a position adopted by CBR. They cannot therefore be interpreted as showing that CBR openly distanced itself from the content of the Cembureau agreement to which it adhered.

4173 For the sake of completeness, the Court observes that the most that can be inferred from the extract from the minutes of the CLC meeting of 17 March 1983 is that the members of the CLC felt concerned by cement imports and exports between the Member States of the Community. Far from showing that CLC renounced the principle of non-transhipment to home markets which had been adopted two months earlier at the Head Delegates meeting of 14 January 1983, those documents clearly show that the members of CLC continued to discuss possible ways of resolving that problem. Furthermore, the arguments which CBR derives from the extracts from the minutes of the meeting of the Board of Directors of FIC of 1 September 1987 and from what the Belgian Head Delegate had to say at the Head Delegates meeting on 19 March 1984 must be rejected for the reasons set out in paragraphs 1366 to 1368 above.

4174 Dyckerhoff, Uniland, Holderbank, Hornos Ibéricos and Halkis maintain that they had no interest in participating in an agreement such as the Cembureau agreement.

4175 However, those applicants must have been aware of the Cembureau agreement, since they are indirect members of that association (see paragraph 4098 above). Furthermore, a member of the staff of Dyckerhoff, Mr Gruner, and of Holderbank, Mr Schrafl, attended the Head Delegates meeting of 14 January 1983 at which the Cembureau agreement was concluded (contested decision, recital 19, paragraph 4; document 33.126/11581). Accordingly, when the applicants concerned participated in bilateral and multilateral agreements and concerted practices having the same object as the Cembureau agreement (Dyckerhoff participated in the

agreements and concerted practices referred to in Article 3(3)(a) and Article 4(1) to (3)(a); Uniland and Holderbank participated in the agreements and concerted practices referred to in Article 4(1) to (3)(a)), they were necessarily aware that they were implementing the joint plan adopted and confirmed at the Head Delegates meetings and that they would in future be seen by the other participants to the Cembureau agreement as adhering to that agreement. Accordingly, it cannot avail them to allege that they had no interest in participating in the Cembureau agreement.

4176 Vicat disputes the existence of a link between the concerted practice in respect of which it and Buzzi are criticised and the Cembureau agreement. It maintains that the exchange of information on tariffs noted in recital 20, paragraph 5, of the contested decision was effected on each occasion at the initiative of Buzzi, which was neither a direct nor an indirect member of Cembureau, and whose initiatives cannot therefore be regarded as implementing instructions from Cembureau designed to ensure compliance with the rule on non-transhipment to home markets.

4177 Vicat further maintains that, contrary to what should have been the result of application of the Cembureau agreement, Buzzi's sales in southern France increased between 1980 and 1987 and that Buzzi's prices in that geographical area were always significantly lower than Vicat's. Last, it points out that at the end of 1987 it bought out Buzzi's largest French customer, which would not have been necessary if Buzzi and it had actually set up a concerted practice designed to ensure compliance with the Cembureau agreement.

4178 Those arguments must be rejected.

4179 As an indirect member of Cembureau, Vicat was necessarily aware of the content and existence of the Cembureau agreement (see paragraph 4098 above). Furthermore, it follows from a Vicat memorandum of 22 July 1982 (contested decision, recital 22, paragraph 1; documents 33.126/6055 to 6057) on the Franco-German agreements and concerted practices that Vicat was aware that the markets were interdependent. It considered that Cedest's activity in Germany was 'spoiling the climate which [could] only result in conflict, a conflict which [was] liable to spread'. Consequently, when it participated in the concerted practice referred to in Article 3(1)(c), which had the same object as the Cembureau agreement, it was necessarily aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings and that it would in future be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4180 Vicat considers, finally, that in taking the fact that the Chairman of SFIC was present at Head Delegates meetings to mean that SFIC participated in the Cembureau agreement, the Commission contradicts the approach it adopted in points 143 and 207 of Decision 89/515/

EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) (OJ 1989 L 260, p. 1).

4181 The Court finds that by that argument Vicat is disputing SFIC's liability for the Cembureau agreement, not its own. It follows that its argument is of no relevance to Case T-37/95 *Vicat* v *Commission* and that it must be rejected.

4182 Ciments Français claims that it was never aware of any Cembureau agreement. Even if it had been informed that such an agreement existed it would not have been able to express its disagreement with it, since it was not a member of Cembureau. It observes that by exonerating the Spanish undertakings on the ground that only their association was involved in the Hispano-Portuguese agreement referred to in Article 3(2) of the contested decision and by also exonerating 18 Spanish and German undertakings, even though they were members of their national associations, which were still held liable in relation to the Cembureau agreement, the Commission itself acknowledged that it could not demand proof that an undertaking disagreed with acts carried out by an association.

4183 The Court points out, however, that Ciments Français was necessarily aware of the Cembureau agreement, since it was an indirect member of that association (see paragraph 4098 above). Furthermore, as the applicant acknowledged at the hearing, a member of its staff, Mr Poitrat, attended the Head Delegates meeting of 14 January 1983 at which the Cembureau agreement was concluded (contested decision, recital 19, paragraph 4; document 33.126/11581). Consequently, when it participated in bilateral and multilateral agreements and concerted practices having the same object as the Cembureau agreement, namely those referred to in Article 3(3)(a), Article 4(1) and (2) and Article 6 of the contested decision, it was necessarily aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings and that, since it failed to show that it distanced itself from that plan, it would in future be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4184 The Commission did not ask Ciments Français to prove that it had distanced itself from the acts of the national association of which it was a member. On the contrary, it established that Ciments Français acceded to the Cembureau agreement by participating in a number of measures which implemented that agreement. Since Ciments Français did nothing to distance itself from the content of the Cembureau agreement, the Commission was entitled to find that it participated in the infringement referred to in Article 1 of the contested decision.

4185 Last, Ciments Français cannot rely on the discriminatory treatment which it claims to have suffered in comparison with various German and Spanish undertakings, as its participation in the infringement referred to in Article 1 of the contested decision was properly established (see, in that regard, *Woodpulp II*, cited at paragraph 106 above, paragraph 146).

4186 Lafarge claims that the implementing measures in which it took part have no connection whatsoever with the alleged Cembureau agreement. In the absence of any evidence that it acceded to the general instructions issued by the Cembureau organs, it considers that the Commission cannot find that it participated in an 'agreement' not to tranship to home markets.

4187 That argument must be rejected. Lafarge must have been aware of the Cembureau agreement, since it was an indirect member of that association (see paragraph 4098 above). Furthermore, a member of Lafarge's staff, Mr Collomb, attended the Head Delegates meetings of 19 March and 7 November 1984 at which the Cembureau agreement was confirmed (contested decision, recital 19, paragraphs 8 and 13; documents 33.126/11699, 11752 and 11753). Consequently, when Lafarge participated in bilateral and multilateral agreements and practices having the same object as the Cembureau agreement, namely the agreements and concerted practices referred to in Article 3(1)(a) and (3)(a), Article 4(1) to (3)(a) and Article 6, it was necessarily aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings, which the Commission correctly classified as an agreement within the meaning of Article 85(1) of the Treaty (see paragraphs 1071 to 1078 above) and that it would in future be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4188 Heidelberger claims that the fact that no member of its staff was present at the Head Delegates meeting of 19 March 1984 shows that it did not participate in the Cembureau agreement. It further maintains that four documents clearly show that it has always endeavoured to export as much as possible and that it has never either observed or applied any agreement not to tranship to home markets. Those four documents are therefore at variance with its alleged participation in the Cembureau agreement.

4189 Heidelberger refers in that regard to:

— the memorandum to the Chairman of Cembureau for the Head Delegates meeting of 19 March 1984 (contested decision, recital 19, paragraph 9; documents 33.126/11728 and 11729), in particular the extract which states that the 'hot spots' include 'exports from Germany to the United Kingdom and Ireland' and 'exports from France to Germany';

— the notes on the Head Delegates meeting of 19 March 1984, in particular the passage on '"random" additional exports [from Germany] to the Netherlands and Belgium' (contested decision, recital 19, paragraph 10; documents 33.126/11733 to 11737);

— the undated Blue Circle internal memorandum entitled 'Import threat' (contested decision, recital 18, paragraph 3; documents 33.126/11335 to 11337), more specifically the extract referring to imports into the United Kingdom from West Germany;

— the statement by Mr Schuhmacher recorded in the handwritten note relating to the Head Delegates meeting of 7 November 1984 (contested decision, recital 19, paragraph 15; document 33.126/11765), to the effect that '[it does] not [make] sense to get into contact with companies which could enter into [the] market'.

4190 Heidelberger further observes that it was not mentioned in the documents establishing the existence of the Cembureau agreement and considers that it cannot therefore be accused of having participated in that agreement.

4191 Those arguments must be rejected. Heidelberger must have been aware of the Cembureau agreement, since it was an indirect member of that association (see paragraph 4098 above). Furthermore, its Chairman, Mr Schuhmacher, attended the Head Delegates meetings of 14 January 1983 and 7 November 1984 at which the Cembureau agreement was concluded and confirmed (contested decision, recital 19, paragraphs 4 and 13; documents 33.126/11581, 11752 and 11753). Consequently, by participating in bilateral and multilateral agreements and concerted practices having the same object as the Cembureau agreement, namely those referred to in Article 3(3)(a) and Article 4((1), it must have been aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings and that it would in future be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4192 None of the evidence put forward in paragraphs 4188 to 4190 above is of such a nature as to invalidate that finding. There is nothing in the documents describing intra-Community imports from Germany to show that Heidelberger breached the Cembureau agreement by making intra-Community exports. Furthermore, the fact that Mr Schuhmacher considered that it made no sense to get into contact with companies which might penetrate the market does not prove that he did not subscribe to the agreement not to tranship to home markets which had been concluded in his presence at the Head Delegates meeting of 14 January 1983, but proves rather that he may have disapproved of bilateral contacts as a means of seeking to ensure compliance with that agreement.

4193 Unicem maintains that the fact that an agreement not to tranship to domestic markets might have been in its interest because the closing of the Italian market might have been advantageous to it does not mean that it was involved in the Cembureau agreement. The Commission's approach, whereby it seeks to create a kind of strict liability of all members of an association for measures adopted by the organs of that association, without requiring any additional evidence of guilt, is contrary to the principles laid down in case-law (judgment in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, paragraph 32; Opinion of Advocate General Sir Gordon Slynn in *BNIC*, cited at paragraph 1320 above, at p. 392; Opinion of Judge

Vesterdorf acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited at paragraph 1053 above, at pp. II-875 to II-953).

4194 The Court points out that the mere fact of being a member of Cembureau does not of itself suffice to render Unicem liable for the manifestly unlawful decision taken by the Head Delegates in its absence (see paragraph 1413 above). For that reason, in order to assess its participation in the Cembureau agreement, Unicem was treated in the same way as an indirect member of Cembureau.

4195 The Commission has in fact established that Unicem demonstrated its adherence to the Cembureau agreement by participating in measures adopted within the framework of the single agreement relating to the ETF (see paragraph 4104 above). Consequently, Unicem's argument that the members of Cembureau were held objectively liable for Cembureau's conduct must be rejected.

4196 Valenciana claims that, in the absence of any link between Cembureau and the EPC, the Commission could not find that its participation in the EPC meant that it had participated in the Cembureau agreement.

4197 That argument must be rejected. As an indirect member of Cembureau, Valenciana must have been aware of the Cembureau agreement (see paragraph 4098 above). Regardless of whether the EPC maintained links with Cembureau, Valenciana, by participating in the EPC's activities, which have been shown to have pursued the same objective as the Cembureau agreement (see paragraphs 4055 and 4056 above), was aware that it was implementing the joint plan adopted and confirmed at the Head Delegates meetings and that in future it would be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4198 Asland and Uniland observe that, in view of the special position of the Spanish cement industry compared with the other Community cement industries at the time when the Commission believes the Cembureau agreement to have been concluded, the Spanish producers cannot be criticised for having participated in that agreement. They point out that Spanish exports to the Community markets provoked considerable reaction on the part of the European cement industry, in particular the Irish industry (see contested decision, recital 19, paragraph 5), which led to anti-dumping complaints being lodged with the Commission by the CLC. Furthermore, it follows from the Blue Circle internal memorandum referred to in recital 18, paragraph 2, of the contested decision that the United Kingdom producers did not contemplate taking any steps other than lodging anti-dumping complaints to deal with Spanish exports. Uniland further observes that the Spanish producers increased their exports to Ireland in spite of the pressure brought to bear on them. Finally, Uniland rejects the various documents, all dating from 1984, on which the Commission relies in its statement of defence when it asserts that the withdrawal of the anti-dumping complaints against the Spanish producers followed their participation, and

in particular Uniland's participation, in the Cembureau agreement. Uniland observes that it was Spain's accession to the Community on 1 January 1986 that was the decisive factor in the withdrawing of the complaints.

4199 Those arguments must also be rejected. Asland and Uniland must have been aware of the Cembureau agreement, since they were indirect members of that association (see paragraph 4098 above). Furthermore, a member of Asland's staff, Mr Bertrán, attended the Head Delegates meetings on 14 January 1983 and 19 March 1984 at which the Cembureau agreement was concluded and confirmed (contested decision, recital 19, paragraphs 4 and 8; documents 33.126/11581 and 11699). Consequently, when Asland and Uniland participated in 1986 in agreements and concerted practices having the same object as the Cembureau agreement within the framework of the ETF (Asland participated in the infringement referred to in Article 4(1) of the contested decision; Uniland participated in the infringement referred to in Article 4(1), (2) and (3)(a) of the contested decision), they must have been aware that they were implementing the joint plan adopted and confirmed at the Head Delegates meetings and that in future they would be seen by the other participants in the Cembureau agreement as adhering to that agreement.

4200 The various factors put forward by the applicants concerned, which relate to a period prior to their participation in 'their' measures implementing the Cembureau agreement, are not of such a nature as to call that assessment into question. In any event, the Cembureau agreement did not prohibit all exports between Member States; it was only opposed to 'random' exports (see paragraphs 1120 and 1121 above).

4201 CBR, Ciments Français and Asland maintain that the Head Delegates represented, at the very most, their respective national associations, at the Head Delegates meetings, not individual undertakings. The Commission was therefore not entitled to find that they participated in the Cembureau agreement purely on the ground that a member of their staff was present at the meetings concerned.

4202 Asland further observes that the Commission's approach to the Cembureau agreement, pursuant to which the Commission considered that Mr Bertrán's conduct at the Head Delegates meetings in 1983 and 1984 rendered two separate legal persons, Asland and Oficemen, both liable, contrasts with its approach to the Hispano-Portuguese agreement, in regard to which the Commission considered that the natural persons representing Oficemen did not also act on behalf of the various undertakings to which they belonged.

4203 The Court points out, however, that those arguments are based on a misreading of the contested decision. Evidence of the participation in the Cembureau agreement of the applicants

concerned, all indirect members of Cembureau, was based not on the presence of a member of their staff at the Head Delegates meetings but on their participation in measures which implemented the Cembureau agreement (see paragraphs 1308 to 1310, 1440 and 1441 above).

4204 Furthermore, the fact that the Commission chose not to impugn the Spanish undertakings in connection with the Hispano-Portuguese agreement referred to in Article 3(2) of the contested decision is not of such a nature as to exonerate the applicants concerned from their full liability for participating in the infringement referred to in Article 1 of the contested decision, provided that their participation was properly established (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 146).

4205 Cimpor and SECIL claim that the Commission used the Cembureau agreement to explain why they made no sales in Spain and that it used that fact and the existence of an alleged Hispano-Portuguese agreement to show that they had acceded to the Cembureau agreement.

4206 SECIL observes that it was not mentioned in the documents establishing the existence of the Cembureau agreement and considers that it cannot therefore be accused of having participated in that agreement.

4207 The Court points out, however, that in the contested decision only Cimpor's and SECIL's participation in the Hispano-Portuguese agreement referred to in Article 3(2), not the fact that they had made no sales in Spain, was regarded as a manifestation of their accession to the Cembureau agreement. The existence of the Hispano-Portuguese agreement and Cimpor's and SECIL's participation in that agreement were established on the basis of specific documentary evidence (see paragraphs 2053 to 2092 above). That agreement pursued the same objective as the Cembureau agreement, an agreement of which Cimpor and SECIL must have been aware in their capacity as indirect members of Cembureau (see paragraphs 4043, 4044 and 4098 above). Furthermore, at the material time ATIC, a direct member of Cembureau, had only two members, Cimpor and SECIL (letter of 29 June 1998 from ATIC to the Court Registry). Furthermore, a member of Cimpor's staff attended the three Head Delegates meetings at which the Cembureau agreement was concluded and confirmed (contested decision, recital 19, paragraphs 4, 8 and 13; documents 33.126/11581, 11699, 11752 and 11753).

4208 Consequently, when Cimpor and SECIL participated in the Hispano-Portuguese agreement they must have been aware that they were implementing the joint plan concluded and confirmed at the Head Delegates meetings and that in future they would be seen by the other participants in the Cembureau agreement as acceding to that agreement.

4209 The fact that there is no reference to SECIL in the documents establishing the existence of the Cembureau agreement is not of such a nature as to call that assessment in question.

4210 Halkis claims that its membership of the Greek association was purely formal, since it played no substantial role in adopting the decisions of that association. In order to challenge its participation in the Cembureau agreement, it emphasises that the agreement and its implementing measures ran counter to its interests.

4211 It further relies on the fact that its conduct provoked strong reactions on the part of a number of undertakings, associations and European governments. It observes that its name is not mentioned in the two Blue Circle internal memoranda, one dated 1 December 1983 (contested decision, recital 18, paragraph 2; documents 33.126/11332 to 11334) and the other undated (contested decision, recital 18, paragraph 3; documents 33.126/11335 to 11337).

4212 The Court observes, however, that, as an indirect member of Cembureau, Halkis must have been aware of the Cembureau agreement (see paragraph 4098 above). Regardless of the role which it played within AGCI, by participating in the activities of the EPC, which pursued the same objective as the Cembureau agreement, at least from 18 November 1983 (see paragraphs 3980 and 4056 above), Halkis was necessarily aware that it was implementing the joint plan concluded and confirmed at the Head Delegates meetings and that in future it would be seen by the other participants in the Cembureau agreement as acceding to that agreement. The fact that there is no reference to Halkis in the Blue Circle internal memoranda is irrelevant. Nor can Halkis claim that the Cembureau agreement ran counter to its interests, since that agreement protected the Greek market, like all the other European home markets, against imports.

4213 None the less, owing especially to the particular conduct of the Greek undertakings on the market, it has already been found that as from 1 September 1986 Halkis was no longer seen by the other cement producers as subscribing to the common rule of non-transhipment to home markets. The particular conduct on the market to which Halkis refers, which triggered the formation of the ETF and the measures adopted within it, is therefore a factor which the Court will take into consideration when it determines the duration of that undertaking's participation in the infringement referred to in Article 1 of the contested decision (see paragraphs 4414 to 4417 below).

B — Continuous nature of the single infringement

4214 In the course of their pleas to the effect that Article 1 is illegal Dyckerhoff, SFIC, Heidelberger, Lafarge, Aalborg, BCA, Asland, Uniland, Oficemen, Holderbank, Hornos Ibéricos, Aker,

EUROC and AGCI expressly dispute the alleged duration of their participation in the infringement referred to in that article. In the context of their pleas to the effect that the fines should be cancelled, CBR, Ciments Luxembourgeois, Vicat, Ciments Français, Unicem, Valenciana, Irish Cement, Cimpor, SECIL, Italcementi, Cementir, Blue Circle and Halkis dispute the duration of the infringement. In any event, since all the applicants have disputed their participation in the infringement referred to in Article 1 of the contested decision, they have also raised the more limited argument that there is insufficient proof of the duration of their participation in that infringement.

1. Contested decision

4215 As regards the continuous nature, or the duration, of the single Cembureau agreement, the Commission fixed the starting date of the infringement referred to in Article 1 of the contested decision at 14 January 1983, the date on which the Cembureau agreement was concluded (contested decision, recital 45, paragraph 1, and recital 65, paragraph 4).

4216 That date was taken in the case of all the addressees of the contested decision which were established in the Community when the Head Delegates meetings in question were held, except for Buzzi.

4217 The Commission observes in that regard (contested decision, recital 65, paragraph 3, first subparagraph): 'All the undertakings and associations of undertakings to which [the] decision is addressed acceded to the agreement or principle of not transhipping to home markets (grey cement market), concluded on 14 January 1983 between the associations and undertakings which were direct members of Cembureau. As from that date, that agreement bound those undertakings and the undertakings which were members of the national associations concerned.'

4218 As regards the Spanish applicants, Asland, Uniland, Oficemen, Hornos Ibéricos and Valenciana, and the Portuguese applicants, Cimpor, SECIL and ATIC, the Commission states that it 'could deem their accession to the agreement to have had effects within the Community as from the date on which they acceded to the agreement' (contested decision, recital 45, paragraph 11). It goes on to state, however, that 'it deems the infringement to have occurred as from 1 January 1986, since the participation of the Spanish and Portuguese undertakings did not, according to the Commission's information, produce any significant effects within the Community until after the accession of their countries to the Community' (same paragraph; see also recital 65, paragraph 4, third subparagraph, second indent).

4219 The Commission deems the infringement to have occurred as from 28 May 1986 in the case of Holderbank and as from 9 June 1986 in the case of Aker and EUROC (contested decision,

recital 45, paragraph 11, and recital 65, paragraph 4, third subparagraph, third and fourth indents). The Commission states that it has no evidence that the participation of those undertakings in the Cembureau agreement had any effect within the Community before those dates.

4220 As regards the end of the infringement, the Commission states that it does not have 'any factual evidence to determine the date on which the infringement ended' (contested decision, recital 45, paragraph 6). Nor does it identify a date on which the infringement referred to in Article 1 of the contested decision came to an end, since 'it has no certainty that the infringement ever really ceased' (contested decision, recital 65, paragraph 4, fourth subparagraph). For that reason, in Article 8 of the contested decision it orders the undertakings to bring the infringement to an end if they have not already done so.

4221 Since the last apparent manifestation of the Cembureau agreement known to the Commission was the liquidation on 26 March 1993 of Interciment, the setting-up of which formed the subject-matter of the infringement referred to in Article 4(2) of the contested decision, the Commission used that date in order to determine the reference period for the fine (contested decision, recital 65, paragraph 4).

2. Starting date of the infringement

2.1. Cembureau and its direct members

4222 The Court has already pointed out that the Commission could lawfully find that Cembureau, FIC, VNC, Ciments Luxembourgeois, SFIC, Aalborg, BDZ, BCA, Irish Cement, Cementir and AGCI participated in the infringement referred to in Article 1 of the contested decision as from 14 January 1983 (see paragraph 1401 above). Those associations and undertakings participated in the Head Delegates meeting of 14 January 1983 at which the Cembureau agreement was concluded (see paragraphs 1344 and 1345 above).

4223 As regards Italcementi, it has been found that its participation in the Head Delegates meeting of 19 March 1984, at which the Cembureau agreement was confirmed, shows that it participated in the Cembureau agreement and, accordingly, in the infringement referred to in Article 1 of the contested decision (see paragraph 1403 above).

4224 However, the contested decision does not put forward any evidence to show that Italcementi acceded before 19 March 1984 to the concurrence of wills which emerged at the Head

Delegates meeting of 14 January 1983. Nor has Italcementi's participation in a measure which implemented the Cembureau agreement been established before 19 March 1984.

4225 Consequently, Article 1 of the contested decision must be annulled in so far as it finds that Italcementi participated in the Cembureau agreement before 19 March 1984.

4226 Oficemen and ATIC also participated in the Head Delegates meeting of 14 January 1983 and must therefore be considered to have been parties to the Cembureau agreement as from that date (see paragraph 1400 above).

4227 However, the Commission took 1 January 1986 as the starting date of their participation in the infringement. It considered that it was not established that the participation of the Spanish and Portuguese undertakings in the Cembureau agreement had produced any significant effects within the Community until after the accession of their countries to the Community (contested decision, recital 45, paragraph 11; see also recital 65, paragraph 4, third subparagraph, second indent).

4228 Oficemen and ATIC consider that, since the Commission took the view that they had not participated in the infringement before 1 January 1986 because their participation in the Cembureau agreement had not produced any significant effects within the Community at that time (contested decision, recital 45, paragraph 11), it should *a fortiori* have acknowledged that no such effects were produced after 1 January 1986, a period in respect of which the Commission had no evidence or firm indication of their participation in the Cembureau agreement.

4229 The Court points out, however, that the participation of Oficemen and ATIC in the Cembureau agreement clearly infringed Article 85(1) of the Treaty from 1 January 1986 onwards.

4230 In that regard, the Commission was entitled to find that on 1 January 1986 Oficemen and ATIC participated, within the framework of Cembureau, in the periodic information exchanges referred to in Article 2(2) of the contested decision and that Oficemen also participated in the Hispano-Portuguese agreement referred to in Article 3(2) of the contested decision. That conduct constituted the implementation of the Cembureau agreement on their part, which showed that on 1 January 1986 they had acceded to the anti-competitive object of the Cembureau agreement (see paragraph 4064 above).

4231 Next, the Court points out that on 1 January 1986 the applicants concerned were established in the Community. Regardless of whether the Commission was right to find that they participated in the infringement before that date on the ground that they had participated directly in the

Head Delegates meeting of 4 January 1983, it was not in any event required, in order to establish an infringement on their part after 1 January 1986, to show that their participation in the Cembureau agreement had a significant effect on trade between Member States. The application of Article 85(1) of the Treaty requires only that the agreements in restriction of competition are capable of affecting trade between Member States: there is no need for the Commission to show that the individual participation of each party is of such a kind as to affect trade between Member States (*Petrofina* v *Commission*, cited at paragraph 2260 above, paragraphs 226 and 227). The object of the Cembureau agreement, in which the applicants actually participated, was to prevent or regulate trade between Member States. That agreement was therefore capable of having an appreciable effect on trade between Member States.

4232 The argument put forward by Oficemen and ATIC must therefore be rejected.

4233 ATIC further maintains that all the documents which the Commission used to demonstrate the existence of the Cembureau agreement and ATIC's participation in that agreement were drawn up before 1 January 1986. They therefore relate to events which took place before the date from which, according to the contested decision, the conduct attributed to ATIC was anti-competitive. ATIC further states that proof of its participation in the Cembureau agreement was thus based purely on its status as a member of Cembureau.

4234 The Court points out that proof of the participation of the direct members of Cembureau in the single and continuous Cembureau agreement relies not only on their membership of Cembureau but also, and above all, on their participation in the Head Delegates meetings at which the Cembureau agreement was concluded and/or confirmed (see paragraphs 1302 and 1342 to 1353 above). ATIC participated in the three Head Delegates meetings at which the Cembureau agreement was concluded and confirmed. Its participation in the Cembureau agreement as from 14 January 1983 is therefore established. The Commission found, however, that its participation in that agreement constituted an infringement only as from 1 January 1986, not because ATIC's conduct before that date had not been anti-competitive but because its participation in the Cembureau agreement had not produced any significant effects within the Community before that date.

4235 Since it is established that on 1 January 1986 ATIC was still demonstrating its continuing adherence to the anti-competitive object of the Cembureau agreement through its participation in the periodical exchanges of information referred to in Article 2(2) of the contested decision, ATIC's argument must be rejected.

4236 Next, Aker and EUROC claim that it follows from the judgment in *Woodpulp I*, cited in paragraph 1325 above (paragraphs 11 to 18), that the Commission is not competent to apply Article 85(1) of the Treaty to an undertaking established outside the Community unless that

undertaking has implemented the agreement, decision or concerted practice inside the Community. The applicants claim that they never implemented the Cembureau agreement within the Community, even supposing that the existence of that agreement is established. Article 1 of the contested decision must therefore be annulled in so far as it relates to them.

4237 The Court points out that Aker and EUROC are direct members of Cembureau, whose respective Head Delegates, Mr Heiberg and Mr Borelius, participated in the Head Delegates meeting of 14 January 1983 (see paragraph 1344 above). As the Head Delegates represented the direct members of Cembureau at the Head Delegates meetings (see paragraphs 1314 to 1318 above), the participation of Aker and EUROC in the Cembureau agreement is therefore established as from 14 January 1983.

4238 The Cembureau agreement, which was concluded between associations and undertakings established inside the Community and outside the Community, aimed to prevent transhipment to home markets in Europe, in particular in the Community, and to regulate sales from one country to another. Its object was manifestly anti-competitive and capable of having appreciable effects on trade between Member States.

4239 None the less, in the contested decision the Commission found that Aker and EUROC participated in the infringement referred to in Article 1 of the contested decision only as from 9 June 1986.

4240 Even if the principles laid down in *Woodpulp I*, cited at paragraph 1325 above, were to apply in the present case, it would still be quite clear that, contrary to what Aker and EUROC claim, the Commission correctly assessed the territorial scope of Article 85 of the Treaty in the contested decision.

4241 As from 9 June 1986 (see paragraphs 2764, 3006 to 3021 and 3081 above), Aker and EUROC participated in two agreements within the framework of the single agreement relating to the ETF, namely the agreement on the setting-up of the ETF (contested decision, Article 4(1)) and the agreement on the setting-up of Interciment (contested decision, Article 4(2)). The participants in those agreements were essentially Community producers and, in particular, the sole purpose of the agreements was to eliminate imports in Western Europe. By participating in those agreements Aker and EUROC implemented the Cembureau agreement in the Community as from 9 June 1986.

4242 The Commission was therefore entitled to consider that Aker's and EUROC's participation in the Cembureau agreement constituted an infringement of Article 85(1) of the Treaty as from 9 June 1986.

4243 Finally, as it correctly points out Unicem did not participate in any of the Head Delegates meetings.

4244 None the less, the Commission was entitled to find that Unicem participated in the infringement referred to in Article 1 of the contested decision. Unicem's participation in the setting-up of the ETF (contested decision, Article 4(1)) and the measures adopted within the framework of the single agreement relating to the ETF designed to prevent imports of Greek cement by Calcestruzzi (contested decision, Article 4(3)) manifested its accession to the Cembureau agreement (see paragraph 4107 above).

4245 However, it has not been established that Unicem participated in the single agreement relating to the ETF before 9 September 1986 (see paragraphs 3744 and 3745 above). Its participation in the various measures adopted within the framework of the single agreement relating to the ETF therefore shows that it participated in the Cembureau agreement but only after that date.

4246 Even if, as the Commission claims, Unicem participated in the periodical exchanges of information as from 1 January 1984, that fact is not of such a nature as to show that it participated in the Cembureau agreement before 9 September 1986. Participation in those exchanges was designed only to 'facilitate the implementation of the [Cembureau] agreement' (contested decision, Article 2(2)) by the associations and undertakings whose participation in the Cembureau agreement has already been established (see paragraphs 1695 to 1699 above). The contested decision contains no evidence to show that Unicem had adhered to the Cembureau agreement before 9 September 1986.

4247 Consequently, Article 1 of the contested decision must be annulled in so far as it finds that Unicem participated in the Cembureau agreement before 9 September 1986.

2.2. Indirect members of Cembureau

4248 The indirect members of Cembureau did not participate directly in the Head Delegates meetings at which the Cembureau agreement was concluded and confirmed. None the less, the Commission took 14 January 1983, the date of the Head Delegates meeting at which the Cembureau agreement was concluded, as the starting point of the infringement by indirect members established in the Community at the material time (see paragraphs 4216 and 4217 above). The Commission considers that the Head Delegates represented not only the direct members of Cembureau but also its indirect members at their meetings. It observes, in that regard, that 'the cement producers are the real actors, acting through their trade associations' (contested decision, recital 44, paragraph 5).

4249 The Court has already pointed out, however, that because of inconsistency between the SO and the contested decision the Commission was not entitled in the contested decision to take Cembureau's indirect members' membership of an association as a ground for holding them liable for the infringement (see paragraphs 544 to 563 above). The sole ground on which it could lawfully hold the indirect members of Cembureau liable for the infringement was that of accession to the Cembureau agreement through a measure implementing that agreement (contested decision, recital 45, paragraph 10, and recital 65, paragraph 3) (see paragraph 564 above). That is the same ground used to attribute liability in the SO (see paragraphs 556 to 563 above). In the SO the Commission considered that undertakings which were not direct members of Cembureau had acceded to the Cembureau agreement with effect from the date of their participation in a measure implementing that agreement.

4250 The Court has also found, when it assessed the substance of the pleas, that the Commission established that the following indirect members of Cembureau had acceded to the Cembureau agreement by virtue of their participation in one or more measures implementing that agreement: CBR, Dyckerhoff, Vicat, Ciments Français, Heidelberger, Lafarge, Valenciana, Asland, Uniland, Cimpor, SECIL, Holderbank, Hornos Ibéricos, Blue Circle and Halkis.

4251 It is still necessary to consider whether the Commission has established that those indirect members participated in the infringement as from the date applied to them in the contested decision.

4252 The Court points out that proof has been adduced that Dyckerhoff, Ciments Français and Lafarge participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)) from 23 June 1982. The Commission also found that Heidelberger had participated in that agreement from 17 November 1982 (see paragraph 2436 above). Since the Franco-German agreements and concerted practices constituted, on the part of those undertakings, a measure implementing the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above), the Commission was entitled to find that Dyckerhoff, Ciments Français, Heidelberger and Lafarge participated in the infringement referred to in Article 1 of the contested decision as from that date.

4253 Next, the Court points out that in the case of the Portuguese undertakings, Cimpor and SECIL, the Commission was entitled to fix the starting date of the infringement at 1 January 1986. It established that their participation in the infringement relating to the Hispano-Portuguese agreement as from 1 January 1986 (contested decision, Article 3(2)) constituted a manifestation of their accession to the Cembureau agreement (see paragraph 4208 above).

4254 However, Cimpor and SECIL claim that the documents which the Commission used to demonstrate the existence of the Cembureau agreement and their participation therein pre-date 1 January 1986.

4255 That argument is factually inaccurate. The Commission established that Cimpor and SECIL participated in the infringement relating to the Hispano-Portuguese agreement as from 1 January 1986 on the basis of specific documentary evidence, some of which post-dates 1 January 1986 (see paragraphs 2070 to 2082 and 2115 above). Their participation in the Hispano-Portuguese agreement manifests their accession to the Cembureau agreement.

4256 Similarly, Article 1 correctly finds that Valenciana and Hornos Ibéricos participated in the infringement as from 1 January 1986, because from that date they manifested their accession to the Cembureau agreement through their participation in the concerted practice in the framework of the EPC (Article 6 of the contested decision).

4257 Since the starting point of Holderbank's participation in the setting-up of the ETF (contested decision, Article 4(1)) was properly fixed at 28 May 1986, participation which manifested its accession to the Cembureau agreement, the Commission has showed that Holderbank participated in the infringement referred to in Article 1 of the contested decision as from that date.

4258 On the other hand, in the case of CBR, Vicat, Asland, Uniland, Blue Circle and Halkis, the Commission has not adduced proof of their participation in the infringement as from the date stated in the contested decision.

4259 First, the Court points out that, after noting the inconsistency referred to in paragraph 4249 above, the Court has already held, in connection with the plea alleging infringement of the rights of the defence, that Article 1 of the contested decision must be annulled in so far as it fixes the starting point of participation in the infringement at a date before 11 May 1983 in Vicat's case and before 28 May 1986 in the case of CBR, Asland and Uniland (see paragraph 568 above). After examining the pleas on the substance of the case, the Court must determine whether those undertakings may still be regarded as having acceded to the Cembureau agreement as from those dates.

4260 Vicat manifested its accession to the Cembureau agreement by participating in the concerted practice with Buzzi referred to in Article 3(1)(c) of the contested decision, the starting date of which was properly fixed at 11 May 1983. The Commission therefore showed that Vicat participated in the infringement referred to in Article 1 of the contested decision as from that date.

4261 The participation of CBR, Asland and Uniland in the infringement referred to in Article 4(1) of the contested decision constitutes the first manifestation of their accession to the Cembureau agreement.

4262 The starting date of Asland's infringement was lawfully fixed at 28 May 1986. The Commission has therefore showed that Asland participated in the infringement referred to in Article 1 of the contested decision as from that date.

4263 Asland, like Oficemen and ATIC (see paragraph 4228 above), maintains that its alleged participation in the Cembureau agreement never produced significant effects within the Community (contested decision, recital 45, paragraph 11). That argument must be rejected for the reasons stated in paragraph 4231 above.

4264 As regards CBR and Uniland, Article 4(1) of the contested decision must be annulled in so far as it finds that they participated in the agreement on the setting-up of the ETF before 9 June 1986 (see paragraph 2604) and 9 September 1986 (see paragraph 2699 above) respectively. In the absence of any evidence that CBR and Uniland acceded to the Cembureau agreement before those dates, Article 1 of the contested decision must be annulled in so far as it finds that CBR participated in the Cembureau agreement before 9 June 1986 and that Uniland did so before 9 September 1986.

4265 As regards, second, Blue Circle and Halkis, their participation in the concerted practice within the framework of the EPC referred to in Article 6 of the contested decision constituted the first manifestation of their accession to the Cembureau agreement. However, the Commission has not established that the members of the EPC sought to 'prevent incursions by competitors on respective national markets in the Community' before 18 November 1983 (see paragraph 3980 above). The conduct referred to in Article 6 of the contested decision cannot therefore be regarded as implementation of the Cembureau agreement by Blue Circle and Halkis before that date.

4266 It follows that Article 1 of the contested decision must be annulled in so far as it finds that Blue Circle and Halkis participated in the Cembureau agreement before 18 November 1983.

2.3. Conclusions

4267 Article 1 of the contested decision must be annulled in so far as it finds participation in the Cembureau agreement by:

— CBR before 9 June 1986;

— Vicat before 11 May 1983;

— Unicem before 9 September 1986;

— Asland before 28 May 1986;

— Uniland before 9 September 1986;

— Italcementi before 19 March 1984;

— Blue Circle before 18 November 1983;

— Halkis before 18 November 1983.

3. Continuous nature of the infringement

4268 The applicants named in paragraph 4214 above deny that the infringement referred to in Article 1 of the contested decision was a continuous infringement. The Commission had no reason to consider that the infringement was continuing when it adopted the contested decision. The applicants point out that the last Head Delegates meeting referred to in the contested decision was held on 7 November 1984. They consider that in any event they cannot be found to have participated in the Cembureau agreement for longer than the duration of the relevant implementing measures.

4269 The Commission observes, with reference to the Opinion of Advocate General Sir Gordon Slynn in *Musique Diffusion Française and Others* v *Commission*, cited at paragraph 2800 above (at p. 1941), that 'a conspiracy, once established, is presumed to continue until the contrary is shown'. It has been shown that the Cembureau agreement existed and that the various applicants participated in it: the applicants concerned must therefore prove that the agreement had come to an end or that they demonstrated that they did not agree with it.

4270 That argument cannot be upheld, for the reasons stated in paragraphs 2801 and 2802 above. It is for the Commission to prove not only the existence of the agreement but also its duration (*Dunlop Slazenger* v *Commission*, cited at paragraph 270 above, paragraph 79).

4271 In order to determine whether the Commission was entitled not to fix the date on which the infringement ended and, accordingly, to presume that the agreement was still in force when it adopted the contested decision, the Court must first examine the only two passages in the grounds of the decision dealing with the duration of the infringement.

4272 In recital 45, paragraph 6, which deals with the Cembureau agreement, the Commission observes: 'The Commission does not have any factual evidence to determine the date on which the infringement ended; nor is it indeed in a position to establish that the undertakings in question have put an end to it.'

4273 In recital 65, paragraph 4, fourth subparagraph, which deals with the fines, the Commission further observes: 'While the Commission is able to establish the date on which the infringement constituted by the Cembureau agreement or principle commenced, it has no certainty that the infringement ever really ceased, and it cannot therefore establish a date for the ending of the infringement. However, since the apparently final manifestation of the agreement, known to the Commission, is the liquidation of Interciment SA [the company whose setting-up forms the subject-matter of the infringement referred to in Article 4(2) of the contested decision], the Commission has used that date for determining the reference period for the fine.'

4274 It follows that the Commission presumed that the agreement had continued to be observed even after the last known manifestation of its application and so did not fix a date for the ending of the infringement referred to in Article 1 of the contested decision.

4275 At the hearing the Commission defended its approach by invoking the particular characteristics of the Cembureau agreement. It observed that the agreement in question was of indeterminate duration. The object of the agreement was simple, unlike, for example, a price-fixing agreement, and there was no need to hold periodic meetings. All that the parties needed to do to comply with the agreement was to refrain from making (uncontrolled) sales outside their territory; compliance with the agreement thus left no traces. Therefore the fact that at a particular time the undertakings no longer participated in visible measures implementing the Cembureau agreement does not show that they no longer adhered to that agreement. The Commission also emphasised that the success of the agreement depended on its being complied with by all producers.

4276 The Court accepts that the Cembureau agreement did in fact present the particular characteristics described by the Commission. The question in the present case is, however,

whether, having regard to the fact that the Commission bears the burden of proving an infringement of Article 85 of the Treaty, those characteristics suffice to show that each applicant participated in the Cembureau agreement until the date on which the contested decision was adopted.

4277 In that regard, the Court finds that all the bilateral or multilateral agreements and concerted practices which the Commission correctly classified as measures implementing the Cembureau agreement, with the exception of the infringement referred to in Article 4(3)(b) of the contested decision, had ended by 19 May 1989 at the latest, the date which, in the case of certain members of the EPC, corresponds to the date on which the infringement referred to in Article 6 of the contested decision came to an end. In that regard, it should be recalled that Article 4(1) and (2) of the decision must be annulled in so far as they find an infringement after 31 May 1987 (see paragraph 2806 above) and 7 November 1988 (see paragraph 3097 above) respectively.

4278 Even though the Commission has shown that the infringement referred to in Article 4(3)(b) of the contested decision lasted until 3 April 1992, that infringement involves only three of the applicants, Unicem, Italcementi and Cementir. Although the five-year contracts which form the subject-matter of that infringement and which had 'as their aim the prevention of imports of Greek cement by Calcestruzzi' had produced effects on the Community market until 3 April 1992, that does not mean that the Cembureau agreement still governed relations between competing European cement producers on that date, even less so on the date when the contested decision was adopted, 30 November 1994. The fact that all the other measures implementing the Cembureau agreement which are referred to in the contested decision came to an end by 19 May 1989 at the latest, a few weeks after the first investigations carried out by the Commission (contested decision, recital 1), tends rather to demonstrate the contrary.

4279 The Court therefore concludes that having regard to all the evidence put forward in the contested decision the Commission was not entitled to take the view that all the addressees whose participation in the Cembureau agreement had been established were still adhering to that agreement when the contested decision was adopted.

4280 Next, the Court must consider the duration of each applicant's participation in the Cembureau agreement, having regard to the factual evidence in the contested decision.

4281 As the Commission correctly observes (contested decision, recital 65, paragraph 4), participation by an undertaking or association in a measure implementing the Cembureau agreement manifested its accession to that agreement. Therefore participation by an applicant in the infringement referred to in Article 1 of the contested decision is established at least for the entire period in respect of which the Commission lawfully established its participation in a measure implementing the Cembureau agreement.

4282 Admittedly, as the Commission alleges, participation by an applicant in the Cembureau agreement left few traces. None the less, having regard to the method of establishing an infringement employed in the contested decision, the Commission was not entitled to rely on that factor in order to find that an applicant had continued to adhere to the Cembureau agreement beyond the date on which the last measure whereby it implemented the Cembureau agreement came to an end.

4283 In that regard, it should be observed that in the contested decision the Commission chose to rely solely on specific documentary evidence to establish the various infringements and the participation of the undertakings and associations concerned in those infringements. As a result, the undertakings whose participation in the Cembureau agreement was not shown by such evidence were not referred to in the contested decision. Since the Commission itself considered that it was impossible to establish that an undertaking had participated in the Cembureau agreement if there was no documentary evidence of such participation, it could not, without such documentary evidence, presume that an undertaking whose participation in the Cembureau agreement had been established continued to adhere to that agreement beyond the point at which it was last shown to have participated in an implementing measure.

4284 The documentary evidence which the Commission put forward in the contested decision in support of its finding of the infringements referred to in Article 2, Article 3(1)(a) and (c), Article 3(2) and (3), Article 4(1) to (3) and Article 6 show unequivocally that the applicants concerned acceded to the Cembureau agreement. On the other hand, the absence of documentary evidence of continuing adherence to the agreement can be interpreted in two ways. It may indicate that the party whose participation in the Cembureau agreement is established continued to adhere to the agreement without leaving any traces. It may, however, also indicate that the party concerned did not continue to participate in the agreement. It was precisely because the lack of documentary evidence could be interpreted in two ways that the Commission took into consideration, for the purposes of the contested decision, only the undertakings whose participation in the Cembureau agreement it had been able to establish on the basis of specific documentary evidence.

4285 Consequently, the Court must assess, solely on the basis of the documentary evidence set out in the contested decision, the duration of the participation of each applicant whose participation in the Cembureau agreement has been established by the Commission.

3.1. CBR

4286 It has already been pointed out that the Commission was not entitled to fix the starting date of CBR's participation in the infringement at a date before 9 June 1986 (see paragraph 4264 above).

4287 CBR manifested its accession to the Cembureau agreement through various measures which implemented that agreement. Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 9 June 1986 and 31 May 1987 (see paragraphs 2604, 2784 and 2806 above), the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3017 and 3097 above) and in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)) between 9 September 1986 and 15 March 1987 (see paragraphs 3204, 3205 and 3301 to 3305 above).

4288 In the absence of any evidence that CBR continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established between 9 June 1986 and 7 November 1988.

4289 Article 1 of the contested decision must therefore be annulled in so far as it finds that CBR participated in that infringement before 9 June 1986 and after 7 November 1988.

3.2. Cembureau

4290 Cembureau participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraph 1342 above). It also participated in a number of measures which implemented the Cembureau agreement.

4291 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) and (3)(a)) between 28 May 1986 and 31 May 1987 (see paragraphs 3731 and 3732 above).

4292 In the absence of any evidence that Cembureau continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4293 Article 1 of the contested decision must therefore be annulled in so far as it finds that Cembureau participated in that infringement after 31 December 1988.

3.3. FIC

4294 FIC participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in two measures which implemented the Cembureau agreement.

4295 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above).

4296 In the absence of any evidence that FIC continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4297 Article 1 of the contested decision must therefore be annulled in so far as it finds that FIC participated in that infringement after 31 December 1988.

3.4. VNC

4298 VNC participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984 (see paragraphs 1344, 1345 and 1350 above). It also participated in two measures which implemented the Cembureau agreement.

4299 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above).

4300 In the absence of any evidence that VNC continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4301 Article 1 of the contested decision must therefore be annulled in so far as it finds that VNC participated in that infringement after 31 December 1988.

3.5. Ciments Luxembourgeois

4302 Ciments Luxembourgeois participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in two measures which implemented the Cembureau agreement.

4303 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above).

4304 In the absence of any evidence that Ciments Luxembourgeois continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4305 Article 1 of the contested decision must therefore be annulled in so far as it finds that Ciments Luxembourgeois participated in that infringement after 31 December 1988.

3.6. Dyckerhoff

4306 Dyckerhoff manifested its accession to the Cembureau agreement through various measures which implemented that agreement.

4307 Thus between 23 June 1982 and 12 August 1987 (see paragraph 2469 above) it participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2620 and 2806 above), the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3017 and 3097 above) and in the concerted

practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)) between 9 September 1986 and 15 March 1987 (see paragraphs 3204, 3205 and 3301 to 3305 above).

4308 In the absence of any evidence that Dyckerhoff continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 7 November 1988.

4309 Article 1 of the contested decision must therefore be annulled in so far as it finds that Dyckerhoff participated in that infringement after 7 November 1988.

3.7. SFIC

4310 SFIC participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a number of measures which implemented the Cembureau agreement.

4311 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). Between 23 June 1982 and 12 August 1987 it also participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)) (see paragraphs 2469 and 2503 above), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) to (3)(a)) between 28 May 1986 and 7 November 1988 (see paragraphs 2625, 2806, 3030, 3097, 3135 and 3136 above).

4312 It follows that SFIC must be held to have participated continuously in the Cembureau agreement from 14 January 1983 to 31 December 1988.

4313 In the absence of any evidence that SFIC continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, Article 1 of the contested decision must be annulled in so far as it finds that SFIC participated in that infringement after 31 December 1988.

3.8. Vicat

4314 The Court has already held that the Commission was not entitled to fix the starting date of Vicat's participation in the infringement referred to in Article 1 of the contested decision at a date before 11 May 1983 (see paragraphs 4259 and 4260 above).

4315 Vicat manifested its accession to the Cembureau agreement through a measure which implemented that agreement, namely the concerted practice with Buzzi (contested decision, Article 3(1)(c)), which has been proved to have been an infringement from 11 May 1983 to 23 April 1986 (see paragraphs 1970 and 2034 above).

4316 In the absence of any evidence that Vicat continued to participate in the Cembureau agreement after it had ceased to participate in that single implementing measure, its continuous participation in the Cembureau agreement must be considered to be established from 11 May 1983 to 23 April 1986.

4317 Article 1 of the contested decision must therefore be annulled in so far as it finds that Vicat participated in that infringement before 11 May 1983 and after 23 April 1986.

3.9. Ciments Français

4318 Ciments Français manifested its accession to the Cembureau agreement through various measures which implemented that agreement.

4319 Thus between 23 June 1982 and 12 August 1987 (see paragraph 2469 above) it participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2632 and 2806 above), the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3038 and 3097 above). Last, it participated in the concerted practice within the framework of the EPC between 18 November 1983 and 17 February 1989 (see paragraph 3980 above).

4320 In the absence of any evidence that Ciments Français continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous

participation in the Cembureau agreement must be considered to be established from 14 January 1983 to 17 February 1989.

4321 Article 1 of the contested decision must therefore be annulled in so far as it finds that Ciments Français participated in that infringement after 17 February 1989.

3.10. Heidelberger

4322 Heidelberger manifested its accession to the Cembureau agreement through two measures which implemented that agreement.

4323 Thus between 17 November 1982 and 12 August 1987 (see paragraph 2469 above) it participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2643 and 2806 above).

4324 In the absence of any evidence that Heidelberger continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 12 August 1987.

4325 Article 1 of the contested decision must therefore be annulled in so far as it finds that Heidelberger participated in that infringement after 12 August 1987.

3.11. Lafarge

4326 Lafarge manifested its accession to the Cembureau agreement through a number of measures which implemented that agreement.

4327 Thus it participated in a concerted practice with Buzzi (contested decision, Article 3(1)(a)) between 26 November and 31 December 1988 (see paragraphs 1829 to 1876 above) and, between 23 June 1982 and 12 August 1987 (see paragraph 2469 above), in the Franco-German agreements and concerted practices (contested decision, Article 3(3)(a)), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2650 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1987 (see paragraphs 3017 and 3097 above) and in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 17 June 1986 and 15 March 1987 (see paragraphs 3228 and 3301 to 3305 above). Finally, it participated in the concerted practice within the framework of the EPC between 18 November 1983 and 19 May 1989 (see paragraphs 3973 and 3980 above).

4328 In the absence of any evidence that Lafarge continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 19 May 1989.

4329 Article 1 of the contested decision must therefore be annulled in so far as it finds that Lafarge participated in that infringement after 19 May 1989.

3.12. Aalborg

4330 Aalborg participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a number of measures which implemented the Cembureau agreement.

4331 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) and (3)(a)) between 9 September 1986 and 31 May 1987 (see paragraphs 2657, 2806, 3204, 3205 and 3301 to 3305 above).

4332 In the absence of any evidence that Aalborg continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4333 Article 1 of the contested decision must therefore be annulled in so far as it finds that Aalborg participated in that infringement after 31 December 1988.

3.13. BDZ

4334 BDZ participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a number of measures which implemented the Cembureau agreement.

4335 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). Between 23 June 1982 and 12 August 1987 (see paragraphs 2469 and 2503 above) it participated in the Franco-German agreements and concerted practices (contested decision, Article 3(3)), by which it implemented the Cembureau agreement as from 14 January 1983 (see paragraph 4154 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) to (3)(a)) between 9 June 1986 and 7 November 1988 (see paragraphs 2673, 2806, 3030, 3097, 3239, 3240 and 3301 to 3305 above).

4336 In the absence of any evidence that BDZ continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4337 Article 1 of the contested decision must therefore be annulled in so far as it finds that BDZ participated in that infringement after 31 December 1988.

3.14. Unicem

4338 The Court has already held that the Commission was not entitled to fix the starting date of Unicem's participation in the infringement referred to in Article 1 of the contested decision at a date before 9 September 1986 (see paragraph 4247 above).

4339 Unicem manifested its accession to the Cembureau agreement through a number of measures which implemented that agreement.

4340 Thus it participated in the periodic exchanges of information (contested decision, Article 2(2)) between 9 September 1986 and 31 December 1988 (see paragraph 1817 above). It participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 9 September 1986 and 31 May 1987 (see paragraphs 2683 and 2806 above), in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 9 September 1986 and 15 March 1987 (see paragraphs 3252, 3253 and 3301 to 3305 above), and also in the agreement with Italcementi and Cementir 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 (contested decision, Article 4(3)(b)) between 3 April 1987 and 3 April 1992 (see paragraph 3396 above).

4341 In the absence of any evidence that Unicem continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 9 September 1986 to 3 April 1992.

4342 Article 1 of the contested decision must therefore be annulled in so far as it finds that Unicem participated in that infringement before 9 September 1986 and after 3 April 1992.

3.15. Valenciana

4343 Valenciana manifested its accession to the Cembureau agreement through a measure which implemented that agreement, namely the concerted practice within the framework of the EPC (Article 6 of the contested decision), which, in Valenciana's case, constitutes an infringement of Article 85(1) of the Treaty from 1 January 1986 to 13 May 1987 (see paragraph 4005 above).

4344 In the absence of any evidence that Valenciana continued to participate in the Cembureau agreement after it had ceased to participate in that single implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 1 January 1986 to 13 May 1987.

4345 Article 1 of the contested decision must therefore be annulled in so far as it finds that Valenciana participated in that infringement after 13 May 1987.

3.16. BCA

4346 BCA, which must be held responsible for the conduct of CMF (see paragraph 1341 above), participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in two measures which implemented the Cembureau agreement.

4347 Thus BCA participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above).

4348 In the absence of any evidence that BCA continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4349 Article 1 of the contested decision must therefore be annulled in so far as it finds that BCA participated in that infringement after 31 December 1988.

3.17. Asland

4350 The Court has already held that the Commission was not entitled to fix the starting date of Asland's participation in the infringement referred to in Article 1 of the contested decision at a date before 28 May 1986 (see paragraph 4267 above).

4351 Asland manifested its accession to the Cembureau agreement through a single measure which implemented that agreement, namely the agreement on the setting-up of the ETF (contested decision, Article 4(1)), in which it participated between 28 May 1986 and 31 May 1987 (see paragraphs 2690 and 2806 above).

4352 In the absence of any evidence that Asland continued to participate in the Cembureau agreement after it had ceased to participate in that single implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 28 May 1986 to 31 May 1987.

4353 Article 1 of the contested decision must therefore be annulled in so far as it finds that Asland participated in that infringement before 28 May 1986 and after 31 May 1987.

3.18. Uniland

4354 The Court has already held that the Commission was not entitled to fix the starting date of Uniland's participation in the infringement referred to in Article 1 of the contested decision at a date before 9 September 1986 (see paragraphs 4264 and 4267 above).

4355 Uniland manifested its accession to the Cembureau agreement through a number of measures which implemented that agreement.

4356 Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 9 September 1986 and 31 May 1987 (see paragraphs 2699 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 September 1986 and 7 November 1988 (see paragraphs 3073 and 3097 above) and in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 9 September 1986 and 15 March 1987 (see paragraphs 3204, 3205 and 3301 to 3305 above).

4357 In the absence of any evidence that Uniland continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 9 September 1986 to 7 November 1988.

4358 Article 1 of the contested decision must therefore be annulled in so far as it finds that Uniland participated in that infringement before 9 September 1986 and after 7 November 1988.

3.19. Oficemen

4359 Oficemen participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984 (see paragraphs 1344, 1345 and 1350 above). It also participated in a number of measures which implemented the Cembureau agreement.

4360 Thus it participated in the periodic exchanges of information (contested decision, Article 2(2)) within the framework of Cembureau between 1 January 1986 and 31 December 1988 (see paragraph 1817 above). It participated in the Hispano-Portuguese agreement between 1 January 1986 and 24 April 1989 (see paragraph 2132 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) to (3)(a)) between 9 June 1986 and 7 November 1988 (see paragraphs 2720, 2806, 3030, 3097, 3239, 3240 and 3301 to 3305 above).

4361 In the absence of any evidence that Oficemen continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the infringement referred to in Article 1 of the contested decision has been established from 1 January 1986 (see paragraphs 4226 to 4231 above) to 24 April 1989.

4362 Article 1 of the contested decision must therefore be annulled in so far as it finds that Oficemen participated in that infringement after 24 April 1989.

3.20. Irish Cement

4363 Irish Cement participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a number of measures which implemented the Cembureau agreement.

4364 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and the periodical exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). It also participated in a number of measures within the framework of the single agreement relating to the ETF (contested decision, Article 4(1) and (3)(a)) between 9 September 1986 and 31 May 1987 (see paragraphs 2737, 2806, 3204, 3205 and 3301 to 3305 above).

4365 In the absence of any evidence that Irish Cement continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 31 December 1988.

4366 Article 1 of the contested decision must therefore be annulled in so far as it finds that Irish Cement participated in that infringement after 31 December 1988.

3.21. Cimpor

4367 Cimpor manifested its accession to the Cembureau agreement through a measure which implemented that agreement, namely the Hispano-Portuguese agreement (contested decision, Article 3(2)), which has been found to have constituted an infringement from 1 January 1986 to 24 April 1989 (see paragraph 2132 above).

4368 In the absence of any evidence that Cimpor continued to participate in the Cembureau agreement after it had ceased to participate in that one implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 1 January 1986 to 24 April 1989.

4369 Article 1 of the contested decision must therefore be annulled in so far as it finds that Cimpor participated in that infringement after 24 April 1989.

3.22. SECIL

4370 SECIL manifested its accession to the Cembureau agreement through a measure which implemented that agreement, namely the Hispano-Portuguese agreement (contested decision, Article 3(2)), which has been found to have constituted an infringement from 1 January 1986 to 24 April 1989 (see paragraph 2132 above).

4371 In the absence of any evidence that SECIL continued to participate in the Cembureau agreement after it had ceased to participate in that one implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 1 January 1986 to 24 April 1989.

4372 Article 1 of the contested decision must therefore be annulled in so far as it finds that SECIL participated in that infringement after 24 April 1989.

3.23. ATIC

4373 ATIC participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a measure which implemented the Cembureau agreement.

4374 Thus it participated in the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1986 and 31 December 1988 (see paragraph 1817 above).

4375 In the absence of any evidence that ATIC continued to participate in the Cembureau agreement after it had ceased to participate in that one implementing measure, its continuous participation in the infringement referred to in Article 1 of the contested decision has been established from 1 January 1986 (see paragraphs 4226 to 4231 above) to 31 December 1988.

4376 Article 1 of the contested decision must therefore be annulled in so far as it finds that ATIC participated in that infringement after 31 December 1988.

3.24. Italcementi

4377 The Court has already held that the Commission was not entitled to fix the starting date of Italcementi's participation in the infringement referred to in Article 1 of the contested decision at a date before 19 March 1984 (see paragraph 4225 above).

4378 As regards the continuous nature of Italcementi's participation in the Cembureau agreement, it must be pointed out that Italcementi participated in the Head Delegates meeting of 19 March 1984 (see paragraph 1351 above). It also participated in a number of measures which implemented the Cembureau agreement.

4379 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) on 19 March 1984 and the periodic exchanges of information (contested decision, Article 2(2)) between 19 March 1984 and 31 December 1988 (see paragraph 1817 above). It also participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2747 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1987 (see paragraphs 3017 and 3097 above), in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 17 June 1986 and 15 March 1987 (see paragraphs 3270 and 3301 to 3305 above) and also in the agreement with Unicem and Cementir 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 (contested decision, Article 4(3)(b)) between 3 April 1987 and 3 April 1992 (see paragraph 3396 above).

4380 In the absence of any evidence that Italcementi continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 19 March 1984 to 3 April 1992.

4381 Article 1 of the contested decision must therefore be annulled in so far as it finds that Italcementi participated in that infringement before 19 March 1984 and after 3 April 1992.

3.25. Holderbank

4382 Holderbank manifested its accession to the Cembureau agreement through a number of measures which implemented that agreement.

4383 Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2783 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3081 and 3097 above) and also in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 17 June 1986 and 15 March 1987 (see paragraphs 3275 and 3301 to 3305 above).

4384 In the absence of any evidence that Holderbank continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 28 May 1986 to 7 November 1988.

4385 Article 1 of the contested decision must therefore be annulled in so far as it finds that Holderbank participated in that infringement after 7 November 1988.

3.26. Hornos Ibéricos

4386 According to the contested decision, Hornos Ibéricos manifested its accession to the Cembureau agreement through a measure which implemented that agreement, namely the concerted practice within the framework of the EPC (Article 6 of the contested decision), which constituted an infringement by Hornos Ibéricos of Article 85(1) of the Treaty between 1 January 1986 and 19 May 1989 (see paragraphs 3975 and 3980 above).

4387 It follows that Hornos Ibéricos must be held to have participated continuously in the Cembureau agreement from 1 January 1986 to 19 May 1989.

4388 In its rejoinder the Commission emphasised Hornos Ibéricos's involvement in Interciment in order to show the duration of its participation in the Cembureau agreement. However, Hornos Ibéricos is not among the undertakings and associations of undertakings referred to in Article 4(2) of the contested decision. In any event, since that article must be annulled in so far as it finds that there was an infringement of Article 85(1) of the Treaty after 7 November 1988, any participation by Hornos Ibéricos in the agreement on the setting-up of Interciment would not be capable of showing that it continued to participate in the Cembureau agreement after it had ceased to participate in the infringement referred to in Article 6 of the contested decision.

4389 In the absence of any evidence that Hornos Ibéricos continued to participate in the Cembureau agreement after it had ceased to participate in the concerted practice within the framework of the EPC, Article 1 of the contested decision must be annulled in so far as it finds that Hornos Ibéricos participated in that infringement after 19 May 1989.

4390 The applicant's argument that the Commission disregarded the rules of evidence by fixing the end of the reference period for the calculation of fines at 26 March 1993, when it had no evidence that the unlawful activities continued after 19 May 1989, is thus devoid of purpose.

3.27. Aker

4391 Aker participated in the Head Delegates meetings of 14 January 1983 and 19 March 1984 (see paragraphs 1344, 1345 and 1350 above). It also participated in a number of measures which implemented the Cembureau agreement.

4392 Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 9 June 1986 and 31 May 1987 (see paragraphs 2764 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3017 and 3097 above) and also in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 9 September 1986 and 15 March 1987 (see paragraphs 3281, 3282 and 3301 to 3305 above).

4393 In the absence of any evidence that Aker continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, it must be held to have participated continuously in the infringement referred to in Article 1 of the contested decision from 9 June 1986 (see paragraph 4242 above) to 7 November 1988.

4394 Article 1 of the contested decision must therefore be annulled in so far as it finds that Aker participated in that infringement after 7 November 1988.

3.28. EUROC

4395 EUROC participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in a number of measures which implemented the Cembureau agreement.

4396 Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 9 June 1986 and 31 May 1987 (see paragraphs 2764 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3017 and 3097 above) and also in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 9 September 1986 and 15 March 1987 (see paragraphs 3281, 3282 and 3301 to 3305 above).

4397 In the absence of any evidence that EUROC continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, it must be held to have participated continuously in the infringement referred to in Article 1 of the contested decision from 9 June 1986 (see paragraph 4242 above) to 7 November 1988.

4398 Article 1 of the contested decision must therefore be annulled in so far as it finds that EUROC participated in that infringement after 7 November 1988.

3.29. Cementir

4399 Cementir participated in the Head Delegates meetings of 14 January 1983 and 7 November 1984 (see paragraphs 1344, 1345 and 1352 above). It also participated in several measures which implemented the Cembureau agreement.

4400 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) on 14 January 1983 and the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above). It also participated in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 9 September 1986 and 15 March 1987 (see paragraphs 3289, 3290, 3301 to 3304 and 3306 above) and also in the agreement with Unicem and Italcementi 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 (contested decision, Article 4(3)(b)) between 3 April 1987 and 3 April 1992 (see paragraph 3395 above).

4401 In the absence of any evidence that Cementir continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 14 January 1983 to 3 April 1992.

4402 Article 1 of the contested decision must therefore be annulled in so far as it finds that Cementir participated in that infringement after 3 April 1992.

3.30. Blue Circle

4403 The Court has already held that the Commission was not entitled to fix the starting date of Blue Circle's participation in the infringement referred to in Article 1 of the contested decision at a date before 18 November 1983 (see paragraphs 4266 and 4267 above).

4404 Blue Circle manifested its accession to the Cembureau agreement through a number of measures which implemented that agreement.

4405 Thus it participated in the agreement on the setting-up of the ETF (contested decision, Article 4(1)) between 28 May 1986 and 31 May 1987 (see paragraphs 2783 and 2806 above), in the agreement on the setting-up of Interciment (contested decision, Article 4(2)) between 9 June 1986 and 7 November 1988 (see paragraphs 3081 and 3097 above) and in the concerted practices designed to withdraw Calcestruzzi as a customer from the Greek producers, and from Titan in particular (contested decision, Article 4(3)(a)), between 17 June 1986 and 15 March 1987 (see paragraphs 3298, 3301 and 3307 to 3310 above). It also participated in the concerted practice within the framework of the EPC between 18 November 1983 and 12 October 1987 (see paragraphs 3973 to 3980 above).

4406 In the absence of any evidence that Blue Circle continued to participate in the Cembureau agreement after it had ceased to participate in the last implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 18 November 1983 to 7 November 1988.

4407 Article 1 of the contested decision must therefore be annulled in so far as it finds that Blue Circle participated in that infringement before 18 November 1983 and after 7 November 1988.

3.31. AGCI

4408 AGCI participated in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 (see paragraphs 1344, 1345, 1350 and 1352 above). It also participated in two measures which implemented the Cembureau agreement.

4409 Thus it participated in the specific exchanges of information (contested decision, Article 2(1)) between 14 January 1983 and 19 March 1984 and in the periodic exchanges of information (contested decision, Article 2(2)) between 1 January 1984 and 31 December 1988 (see paragraph 1817 above).

4410 It follows that AGCI must be held to have participated continuously in the Cembureau agreement from 14 January 1983 to 31 December 1988.

4411 AGCI maintains that the Greek industry's conduct on the market was completely incompatible with any participation in the Cembureau agreement. It observes that until 1985 its sole reason for participating in Cembureau was to obtain information: on the one hand, AGCI's members were not present on the Community market at that time, since their export outlets were in the Middle East; on the other hand, the extremely low price levels pertaining on its market were in themselves an obstacle to imports of cement into its market, so that it had no interest whatsoever in participating in an agreement which restricted competition. As regards the period after 1985, AGCI claims that the spectacular increase in its members' exports to the Community markets, as a result of which they became victims of collective retaliatory measures by the main European producers through the ETF, shows that the conduct of the Greek industry did not show its alleged participation in the Cembureau agreement. In conclusion, AGCI claims that throughout the period in issue its members acted in a way that was dictated solely by economic and commercial considerations and in all respects consistent with the requirements of the international market.

4412 However, those explanations to not make it possible to ignore AGCI's continuous participation in the Cembureau agreement from 14 January 1983 to 31 December 1988. AGCI refers only to the commercial conduct adopted by its members and adduces no evidence of having itself sought to distance itself from the Cembureau agreement before 31 December 1988. In any event, by participating in the periodic exchanges of information on prices referred to in Article 2(2) of the contested decision, AGCI assured the other participants in the Cembureau agreement of its continuing support for the object of that agreement.

4413 In the absence of any evidence that AGCI continued to participate in the Cembureau agreement after 31 December 1988, Article 1 of the contested decision must be annulled in so far as it finds that AGCI participated in that infringement after 31 December 1988.

3.32. Halkis

4414 The Court has already held that the Commission was not entitled to fix the starting date of Halkis's participation in the infringement referred to in Article 1 of the contested decision at a date before 18 November 1983 (see paragraphs 4265 and 4267 above).

4415 Halkis participated in a measure implementing the Cembureau agreement, namely the concerted practice within the framework of the EPC (Article 6 of the contested decision), between 18 November 1983 and 1 September 1986 (see paragraph 3980 above).

4416 In the absence of any evidence that Halkis continued to participate in the Cembureau agreement after it had ceased to participate in that one implementing measure, its continuous participation in the Cembureau agreement must be considered to have been established from 18 November 1983 to 1 September 1986.

4417 Article 1 of the contested decision must therefore be annulled in so far as it finds that Halkis participated in that infringement before 18 November 1983 and after 1 September 1986.

Infringement of the principle of equal treatment

4418 Vicat and Hornos Ibéricos claim that the fact that some members of SFIC and Oficemen are not referred to in the contested decision constitutes discrimination.

4419 Ciments Français, Aker and EUROC maintain that by drawing, for the purposes of the contested decision, a distinction between undertakings according to whether or not they had implemented the Cembureau agreement the Commission infringed the principle of non-discrimination. They further maintain that the closure of the proceedings initiated against undertakings which had not adopted measures to implement the Cembureau agreement was discriminatory. In their view, producers which had not made any sales outside their national

market should have been declared guilty of having adhered to the Cembureau agreement in the most flagrant manner. Ciments Français also alleges that the Commission's approach was contradictory.

4420 Asland, Uniland, Cimpor and SECIL also consider that the contested decision discriminates against them, because not all the direct and indirect members of Cembureau were penalised.

4421 Irish Cement claims to have suffered discrimination, in comparison with the undertakings which are indirect members of Cembureau, as regards the conditions for attributing liability for the Cembureau agreement. The Commission relied solely on its membership of Cembureau in holding it liable for the infringement associated with that agreement, whereas of the indirect members of Cembureau only those which, as well as belonging to a national association, had manifested their accession to the Cembureau agreement by participating in the implementing measures were held liable for that infringement.

4422 In a plea alleging infringement of Article 190 of the Treaty, Italcementi claims to find a contradiction in the contested decision between direct participation and indirect participation by the parties to the Cembureau agreement (contested decision, recitals 45, paragraph 9, and 65, paragraph 3). It states that the criterion used to determine whether the mere fact of being a member of Cembureau showed that the undertaking concerned had participated in the Cembureau agreement was not applied uniformly. The Commission distinguished between the undertakings which participated directly in Cembureau and those which participated through their national trade associations, as the accession of the latter undertakings was examined separately in the context of the alleged implementing measures (contested decision, recital 45, paragraph 10). Italcementi does not accept the principle that responsibility for any decisions taken by an association can be attributed directly to the members of that association and states that the Commission did not apply that principle uniformly to all the addressees of the contested decision.

4423 Those arguments must be rejected. The situation of the direct members of Cembureau which participated in one or more Head Delegates meetings at which the Cembureau agreement was concluded and/or confirmed is objectively different from that of the indirect members of Cembureau. The participation of the direct members of Cembureau in the Cembureau agreement is already evident from their participation in the meetings at which the concurrence of wills emerged concerning the principle of non-transhipment to home markets, whereas the participation of the indirect members in the agreement had to be established through their participation in a measure showing their accession to the agreement.

4424 The Court points out that Irish Cement, Italcementi, Aker and EUROC are all direct members of Cembureau and participated directly in the conclusion and/or confirmation of the Cembureau agreement. The argument put forward by those applicants, which do not claim

that any other direct members of Cembureau are not referred to in the contested decision, must therefore be rejected.

4425 Vicat, Ciments Français, Asland, Uniland, Cimpor, SECIL and Hornos Ibéricos, are indirect members whose participation in the Cembureau agreement was established through their participation in a measure which implemented that agreement.

4426 In the case of indirect members of Cembureau not referred to in the contested decision, whose situation the Court is not required to consider, the Commission states that it does not have documentary evidence showing that they in any way manifested their accession to the Cembureau agreement.

4427 The situation of undertakings not referred to in the contested decision is therefore different from that of Vicat, Ciments Français, Asland, Uniland, Cimpor, SECIL, Hornos Ibéricos and the other indirect members of Cembureau for which the Commission has documentary evidence showing that they participated in the Cembureau agreement. The argument must also be rejected in so far as it was raised by those undertakings.

4428 In any event, even supposing that the situation of some undertakings to which the contested decision was not addressed was comparable to that of the applicants concerned, such a circumstance could not in any event constitute a ground for setting aside the finding of an infringement by Vicat, Ciments Français, Asland, Uniland, Irish Cement, Cimpor, SECIL, Italcementi, Hornos Ibéricos, Aker and EUROC, provided that it was properly established on the basis of documentary evidence showing that they participated in the Cembureau agreement (see, in that regard, *Woodpulp II*, cited at paragraph 106 above, paragraph 146).

4429 Blue Circle considers that the Commission acted arbitrarily in taking the view that agreements to restrict imports involving producers from more than one Member State manifest accession to the Cembureau agreement, while purely national agreements having the same object as the Cembureau agreement were not regarded as measures implementing that agreement.

4430 The Court has already pointed out that the SO included separate chapters relating to the purely national agreements. However, those national objections were dropped by decision of 23 September 1993 and are therefore not taken up in the contested decision.

4431 Even supposing that some undertakings to which the contested decision was not addressed thought that, through their participation in a national agreement or concerted practice referred to in one of the national chapters of the SO, they were implementing the Cembureau agreement, that could not constitute a ground for setting aside the finding in the contested decision of an infringement by Blue Circle, as that has been properly established (see, in that regard, *Woodpulp II*, cited at paragraph 106 above, paragraph 146).

4432 Aker and EUROC consider that they suffered discrimination in comparison with the Spanish and Portuguese undertakings and associations. The latter were not regarded as having infringed Article 85(1) of the Treaty during the period when they were not established in the Community.

4433 However, even supposing that at the time the contested decision was adopted Aker and EUROC were in a comparable situation to that of the Spanish and Portuguese addressees of the contested decision before Spain and Portugal acceded to the Community, that could not constitute a ground for setting aside the finding of an infringement by them as from 9 June 1986, provided that it was properly established (see, in that regard, *Woodpulp II*, cited at paragraph 106 above, paragraph 146).

4434 Finally, AGCI complains of discrimination resulting from the fact that not all the participants in the Head Delegates meeting of 14 January 1983 were penalised for their participation in the Cembureau agreement as from that date. It gives the example of Holderbank, which was penalised for its participation in the Cembureau agreement only as from 28 May 1986, even though Mr Pestalozzi, representing its Belgian subsidiary Ciments d'Obourg, was present at the meeting.

4435 That argument must be rejected. AGCI is a direct member of Cembureau and, unlike Holderbank, which is an indirect member of Cembureau, it participated directly in the conclusion of the Cembureau agreement. Mr Pestalozzi participated in the Head Delegates meeting of 14 January 1983 not as a representative of Holderbank but as a representative of FIC. In any event, even supposing that Holderbank was in a comparable situation to that of AGCI, which has not been shown to be the case, that could not constitute a ground for setting aside the finding of an infringement by AGCI as from 14 January 1983, provided that it was properly established (see, in that regard, *Woodpulp II*, cited at paragraph 106 above, paragraph 146).

Infringement of Article 190 of the Treaty

A — Classification of the Cembureau agreement as a single and continuous agreement

4436 SFIC claims that the contested decision fails to demonstrate the single and continuous nature of the Cembureau agreement. It claims that the Commission failed to establish a connection between the Cembureau agreement and the bilateral and multilateral agreements and concerted practices in which the French undertakings were involved; the mere semblance of an objective connection between the Cembureau agreement and the conduct of the French undertakings cannot suffice for that purpose. It observes that the Franco-German agreement is based on events which predate the conclusion of the Cembureau agreement, of which it is deemed to be the result.

4437 The Court points out that SFIC's complaints in reality go to the substance of the contested decision. They are therefore irrelevant in the context of a plea based on Article 190 of the Treaty. In any event, the connection between the Cembureau agreement and the bilateral or multilateral agreements and concerted practices which have been established is made sufficiently explicit in recital 46 of the contested decision.

4438 Heidelberger maintains that the contested decision does not explain the concept of a single and continuous agreement. In any event, it considers that a number of agreements or arrangements which are all contrary to Article 85(1) of the Treaty cannot constitute a 'single' agreement.

4439 It argues that the contested decision as also completely incomprehensible in so far as it asserts that the existence of the 'single and continuous agreement' may be deduced merely from the 'accession' of the producers to the Cembureau principle (contested decision, recital 46, paragraph 1). Accession cannot create an agreement, but assumes that an agreement is already in existence.

4440 Heidelberger maintains that it is contradictory to classify the Cembureau agreement as single and continuous and at the same time to make a finding of infringement in the operative part of the contested decision in respect not only of that 'single' agreement (Article 1 of the contested decision) but also of the various measures which implemented that agreement (Articles 2 to 6 of the contested decision).

4441 The Court points out, however, that the Commission clearly explains in recital 46 of the contested decision (paragraph 1) why it considered that 'the whole of the arrangements adopted within the framework of Cembureau and the bilateral and/or multilateral meetings and contacts ... constituted a "single and continuous agreement"'.

4442 Heidelberger's argument that the contested decision is incomprehensible (see paragraph 4439 above) must also be rejected. The applicant has confused the question of the proof of the existence of the Cembureau agreement and the question of the classification of the various arrangements found in the contested decision as a single and continuous agreement. The Commission established the existence of the Cembureau agreement solely on the basis of the direct documentary evidence analysed in recitals 18, 19 and 45 of the contested decision, not on the basis of the 'measures taken to implement' that agreement. In recital 46 of the contested decision the Commission, having established that the undertakings in question acceded to the Cembureau agreement by participating in arrangements which pursued the same objective as that agreement, classified the whole of those arrangements as a single and continuous agreement. The Court finds no contradiction or lack of clarity in that approach.

4443 Nor is it contradictory for the Commission to find that the various addressees of the contested decision participated in the infringement relating to the single and continuous agreement on non-transhipment to home markets established in Article 1 of the contested decision and at the same time to describe, in Articles 2 to 6, the various unlawful measures whereby, in the Commission's view, that agreement was applied (see, in that regard, *Commission* v *Anic*, cited at paragraph 270 above, paragraph 81). In any event, it was stated in the contested decision that the various arrangements referred to in Articles 2 to 6 could be 'regarded as infringements in themselves' (contested decision, recital 46, paragraph 1, first subparagraph).

4444 Italcementi claims that the Commission contradicts itself when it maintains in recital 53, paragraph 4, of the contested decision that each addressee of the contested decision was responsible for all the infringements implemented by the parties to the Cembureau agreement, even where they had not actually participated in them, but finds that some undertakings, including Italcementi, are not responsible for some infringements, in particular those established in Articles 3 and 6 of the contested decision.

4445 The applicant has misread recital 53, paragraph 4, of the contested decision.

4446 That provision refers to participation in the single agreement relating to the ETF, not participation in the Cembureau agreement. Nor does the Commission state there what Italcementi claims it does. It explains why it considered unfounded the observations formulated by certain undertakings and associations of undertakings during the administrative procedure to the effect that they could not be held responsible for the measures examined by the ETF, since they had participated only in the meetings of the Head Delegates held at that time and not in the meetings of the ETF and its working subgroups: 'Even if they did not participate in the Task Force meetings, the Task Force consisting of a restricted group, they did participate in the meetings of the Head Delegates at which the Task Force proposals were endorsed and the measures adopted. As stated in recital 44, the fact that the composition of the various bodies

may vary from one to another does not mean that all the activities of the parties to such structure are not attributable to all the members, since the structure acts with and is based on the assistance of all the members.'

4447 It follows that Italcementi's argument must be rejected.

B — Participation of the various applicants in the single and continuous Cembureau agreement

4448 CBR maintains that the contested decision fails to state the reasons on which it is based, or gives contradictory reasons, so that it is unable to ascertain with sufficient precision the exact nature of the objections made against it and is thus prevented from defending itself.

4449 By way of example, it states that the decision:

— establishes the existence of an agreement concluded on 14 January 1983 and gives it a specific content, even though there is no documentary evidence of the existence and content of that agreement;

— accepts as proof of an agreement not to tranship to home markets concluded on 14 January 1983 the allegation that a similar principle had been in existence for 30 years;

— sees in the existence of alleged bilateral or multilateral relations between certain undertakings proof of an agreement linking all the associations which are members of Cembureau and the members of those associations;

— accepts as proof of an agreement concluded on 14 January 1983 certain 'established practices and ethics' or 'neighbour rules' which Cembureau encouraged;

— maintains that the associations which are members of Cembureau and the members of those associations are parties to a Cembureau agreement, since they take part in the '*de facto* activities' of that association;

— considers that the purchase of Greek clinker by CBR formed part of the ETF's activities, whereas the ETF had been dissolved a year earlier;

— considers that cooperation on exports outside the Community is contrary to Article 85 of the Treaty, without examining the actual effects which that cooperation might have on the Community market.

4450 The Court points out, however, that the various illustrations which CBR puts forward in support of its plea are in reality arguments which go to the substance, which have already been examined when the Court assessed the merits of the contested decision.

4451 Cembureau and SFIC find a contradiction in the grounds of the contested decision in that they are found to have participated in the Cembureau agreement and various alleged measures taken to implement that agreement but not ordered to bring the infringements to an end.

4452 The Court points out that under Article 3(1) of Regulation No 17 (see paragraph 2 above), where the Commission finds that there is an infringement of Article 85 (1) of the Treaty 'it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end'. Since the Commission is thus under no obligation to do so, the applicants cannot claim that it is contradictory for it to find that they participated in the Cembureau agreement and in measures taken to implement that agreement but not to order them to bring those infringements to an end. The argument must therefore be rejected.

4453 SFIC, Ciments Français, Vicat and Irish Cement consider that the reasoning on which the Commission bases Article 1 of the contested decision is contradictory, in that it is based on the assumption that any undertaking belonging to a national association involved in the conclusion of the Cembureau agreement was bound by that agreement, whereas ultimately only the undertakings which played a direct part in the conclusion of that agreement and those which manifested their accession to the agreement in the form of specific actions were penalised.

4454 That argument is based on a misreading of the contested decision. In the contested decision the Commission did not find that indirect members of Cembureau not referred to in the contested decision had participated in the Cembureau agreement, even though it considered that such participation was likely 'since the agreement was acceded to by the Head Delegates, who are ranked on a par with "government representatives on international bodies" ... and are appointed "in order to cast votes in the General Assembly"' (contested decision, recital 45, paragraph 5). Having regard to the burden of proof which it bears, the Commission properly considered that it could not find that the indirect members of Cembureau had participated in the infringement unless it was established that they had clearly manifested their accession to the Cembureau agreement by participating in a measure implementing that agreement. The Court finds no contradiction in that approach.

4455 Heidelberger maintains that the Commission contradicts itself where it states that Heidelberger took part indirectly in the Cembureau agreement and also that it acceded to it.

4456 However, since Heidelberger did not participate directly in the Head Delegates meetings at which the Cembureau agreement was concluded and confirmed, it is by no means contradictory to consider that it participated indirectly in that agreement through its participation in measures implementing it (contested decision, recital 45, paragraph 10, and recital 65, paragraph 3, first subparagraph).

4457 Heidelberger also claims that in the contested decision the Commission does not clearly state whether Heidelberger is accused of direct participation or of indirect participation through measures implementing the Cembureau agreement.

4458 That argument must also be rejected. In recital 45, paragraph 10, of the contested decision Heidelberger is among the undertakings found to have 'participated indirectly in the [Cembureau] agreement, through their participation in the various arrangements and measures agreed on to supplement the general agreement and/or assist in its implementation'.

4459 Dyckerhoff, Aalborg, Asland, Irish Cement, Holderbank and Blue Circle criticise the Commission for failing to take account in the contested decision of the various observations which they had submitted during the administrative procedure.

4460 The Court points out once more that the Commission is not required to provide in the decision a detailed answer to all the arguments formulated during the administrative procedure by the various addressees of the SO. It is sufficient that the statement of reasons allows the Community judicature to exercise its power of review as to the legality of the contested decision and provides the undertakings and associations concerned with the necessary information to be able to determine whether or not the decision is well founded (judgments cited at paragraph 846

above, *VBVB and VBBB* v *Commission*, paragraph 22, *BAT and Reynolds* v *Commission*, paragraph 72, and *La Cinq* v *Commission*, paragraph 42). It is apparent from the Court's assessment of the merits of the finding of infringement made in Article 1 of the contested decision that the statement of reasons gave the Court and the applicants sufficient indication of the principal points of fact and law which constituted the basis for the reasoning which led the Commission to hold the applicants concerned responsible for that infringement (see, to that effect, Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 81). The argument must therefore be rejected.

4461 BCA claims that the Commission did not explain how the fact that BCA no longer provided information to Cembureau after 1985 could be reconciled with the conclusion that BCA had subscribed to the principle of non-transhipment to home markets, when the Commission had been convinced in the SO that the provision of information on prices and accession to the Cembureau principle were closely linked.

4462 In the contested decision (recital 45, paragraph 12) the Commission states that BCA, 'which has been a member of Cembureau since 1 June 1988, is also responsible ... for the conduct of the former Cembureau member, [CMF]'. The Commission's conclusion that BCA participated in the Cembureau agreement is based on its membership of Cembureau and its participation in the Head Delegates meetings at which the agreement was adopted and confirmed (contested decision, recitals 45, paragraphs 1 and 10, and 65, paragraph 3(a)) for a period which the Commission is not certain ever ceased (contested decision, recital 65, paragraph 4). BCA's complaint alleging failure to state reasons on that point must be rejected.

4463 Aker and EUROC claim that the contested decision does not contain an adequate statement of reasons concerning the Commission's competence *ratione territoriae* in the case of undertakings established outside the Community. The Commission should have expressly stated the reasons which led it to declare itself competent to apply Article 85(1) of the Treaty to Aker and EUROC.

4464 The Court points out that the Commission states in recital 65, paragraph 4, of the contested decision that in the case of those two applicants it deems the infringement to have started on 9 June 1986 because it has no evidence that their participation in the Cembureau agreement had any effect within the Community before that date.

4465 That statement of reasons is sufficient, because the application of Article 85(1) of the Treaty to Aker and EUROC had been part of the Commission's previous practice when adopting decisions, a practice which, moreover, had been approved by the Court of Justice in the judgment in *Woodpulp I*, cited at paragraph 1325 above (see, in that regard, Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31).

4466 AGCI criticises the Commission for its failure to explain the criteria which it used to determine which participants in the Head Delegates meeting of 14 January 1983 were to be regarded as parties to the Cembureau agreement. It also finds inconsistency between the statement of reasons and the operative part of the contested decision. The Commission held AGCI and its members responsible for an alleged restriction of trade within the Community, whereas their conduct would, upon examination, have revealed a considerable contribution to that trade, which led to the forming of a coalition of the principal European cement producers against AGCI and its members.

4467 Those arguments must be rejected. It follows from recitals 19 and 45 of the contested decision that the Commission attributed the infringement to AGCI on the basis of its membership of Cembureau and its presence at the Head Delegates meetings at which the Cembureau agreement was concluded and confirmed. The Commission was not required to state its reasons for not attributing that infringement to undertakings or associations of undertakings which were not referred to in the contested decision.

4468 Furthermore, the Commission explained the reasons for its view that the Cembureau agreement, in which AGCI participated, infringed Article 85(1) of the Treaty (contested decision, recitals 45, 46 and 52). The alleged inconsistency to which AGCI refers essentially merely aims to dispute the substance of the Commission's assessment of the gravity of AGCI's participation in the infringement referred to in Article 1 of the contested decision. Such an argument, which belongs to an examination of the merits of the contested decision, is irrelevant in the context of a plea based on Article 190 of the Treaty.

4469 Halkis complains that there is no correlation between the facts, the legal assessment and the operative part of the contested decision. It analyses the various sections of the part of the contested decision headed 'The Facts' (sections 2 to 7 of the contested decision) and concludes that, with the exception of its conduct within the framework of the EPC, the Commission considers that it is completely unconnected with the alleged agreements and concerted practices described there. Furthermore, unlike the SO, the contested decision no longer pursues the Greco-Spanish agreement on the setting-up of the CMA, in which Halkis claims not to have been involved. Examination of the facts presented in the contested decision also leads Halkis to consider that the Commission may also have criticised it for participating in exchanges of price information within its national association, as well as at Cembureau level, through its indirect membership of Cembureau. However, Halkis denies ever having exchanged such information at any level, adding that such exchanges of information could not in any event be deemed illegal. Having regard to all the foregoing, Halkis does not understand how the Commission can have held it liable in the context of the Cembureau agreement.

4470 The Court points out that in the contested decision the Commission finds that Halkis participated only in the infringements referred to in Articles 1 and 6.

4471 In recitals 18 and 19 of the contested decision the Commission clearly sets out the facts and documents on the basis of which it concluded, in recital 45, paragraphs 1 to 3, of the contested decision, that the Cembureau agreement, which it classified as a single and continuous agreement in recital 46 of the contested decision, did in fact exist. Then, in recitals 30 and 35 to 37 of the contested decision it sets out the facts and documentary evidence on the basis of which it concluded, in recital 59, that there was, within the framework of the EPC, a continuous concerted practice of channelling production surpluses to third countries, in respect of which it makes a finding of an infringement in Article 6 of the contested decision, and that Halkis participated in that infringement. Finally, it explains in recitals 45, 46 and 65 that Halkis's participation in the infringement referred to in Article 6 is to be regarded as a manifestation of its accession to the single and continuous Cembureau agreement in respect of which a finding of an infringement is made in Article 1.

4472 It follows that the complaint alleging that there is no correlation between the facts, the legal assessment and the operative part of the contested decision must be rejected.

4473 Last, Halkis claims that in 1988, when the Commission accuses it in the SO of participating in an overall agreement with the other European cement producers, it was at the same time initiating a proceeding relating to the grant of State aid (Commission Decision 91/144/EEC of 2 May 1990 on aid granted by the Greek government to a cement manufacturer (Halkis Cement Company) (OJ 1991 L 73, p. 27)), in which the Commission complained that Halkis was attempting to enter other Community markets. Halkis criticises the Commission for failing to explain that ambivalent attitude, by reason of which it has been penalised both for having allegedly restricted competition on the Community markets and for having attempted to enter those markets.

4474 Halkis's argument has become devoid of purpose, since the Court has held that the Commission has not established that it participated in the Cembureau agreement after 1 September 1986 (see paragraph 4417 above). In any event, contrary to what Halkis asserts, Decision 91/144 never complained of its attempts to enter the Community markets. In that decision the Commission merely ruled on the legality of the aid which the Geek Government had granted to Halkis. The Court finds no contradiction in the fact that the Commission criticised an undertaking for participating in a European agreement and at the same time initiated a proceeding against a Member State concerning the grant of illegal State aid to that undertaking.

Infringement of the rights of the defence when the applicants were given access to the file

4475 The arguments whereby the parties concerned allege infringement of their rights of defence when they were given access to the file have to a large extent already been examined.

4476 Thus all the arguments alleging inadequate access to the incriminating evidence in the investigation file which the Commission used to support its finding of the infringement referred to in Article 1 of the contested decision have been examined in paragraphs 1111, 1112 and 1429 to 1431 above.

4477 As regards allegedly exculpatory evidence, the various arguments whereby the applicants concerned allege that they were not given access during the administrative procedure to documents in the file which would have been of use to their defence against the objection concerning the existence of the Cembureau agreement have been examined in paragraphs 1113 to 1295 above. Furthermore, Cembureau's and Cementir's arguments alleging that they had insufficient access to the documents in the case-file relating to their participation in the infringement referred to in Article 1 of the contested decision have been examined in paragraphs 1432 to 1438 above.

4478 The Court must still examine, first, the arguments which various indirect members of Cembureau and Unicem formulated in the observations which they lodged following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 and 168 above), in which they allege that they had insufficient access to the documents in the case-file relating to their participation in the infringement referred to in Article 1 of the contested decision, and, second, the arguments of certain direct and indirect members of Cembureau alleging that they had insufficient access to the documents in the case-file relating to the single and continuous nature of the Cembureau agreement.

A — Case T-25/95 *CBR* v *Commission*

4479 In its observations of 12 November 1997 CBR puts forward a number of documents which allegedly show that the observations made by Mr Van Hove at the Head Delegates meeting of 14 January 1983 were in keeping with a general desire to find a solution to the problems facing the cement industry in compliance with European competition rules. It refers to three internal memoranda from Lafarge. The first is dated 16 June 1982 (document 33.126/6962) and states that CBR refused to 'twist [the] necks' of the German independents which were exerting strong pressure on its market. The second is dated 1 December 1982 (document 33.126/6696) and states that Mr Van Hove seems to attach too much importance to what the Community says. The third is dated 14 January 1984 (document 33.126/7452) and states that the Belgians and Dutch are the most European.

4480 The Court points out, however, that those documents do not establish a breach of CBR's rights of defence. They are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO and in the contested decision in finding that the Cembureau agreement existed (SO, points 9 and 61(a); contested decision, recitals 18, 19 and 45) and that CBR participated in that agreement by participating in measures adopted within the framework of the single agreement relating to the ETF (SO, points 16 to 19, 59 and

61(h); contested decision, recitals 24 to 27, 29, 45, paragraph 10, 46, 53 to 55, 57 and 65, paragraph 3).

4481 As regards the Lafarge memorandum of 16 June 1982 (document 33.126/6962), the existence of German imports into Belgium in a specific case is not of such a nature as to shed a different light on the specific documentary evidence of the existence of the Cembureau agreement (see paragraph 1140 above). Furthermore, the fact that CBR did not act to stop imports from independent German undertakings does not in any way show that CBR did not comply with its obligations under the Cembureau agreement. The object of the agreement is limited to non-transhipment to home markets and the regulation of sales of cement from one country to another by the participants in the Cembureau agreement. Consequently, access during the administrative procedure to the Lafarge internal memorandum of 16 June 1982 (document 33.126/6962), which also predates the conclusion of the Cembureau agreement, could have made no difference to the outcome of the administrative procedure.

4482 As regards the Lafarge internal memorandum of 1 December 1982 (document 33.126/6966), it is important to place the extract to which CBR refers in its original sentence: 'He [Mr Van Hove] seems to attach too much importance to what the EEC says; is this because of proximity or rather with an idea at the back of his mind: to unlock the borders without being denounced by the trade as the instigator of disorder.' Far from demonstrating conduct differing from that in respect of which CBR is criticised in the contested decision, the memorandum in question tends to confirm, on the contrary, that even in December 1982 CBR was acting in accordance with a rule which was subsequently adopted in the context of the Cembureau agreement. Access to that memorandum during the administrative could have made no difference to the outcome of the administrative procedure.

4483 Nor, finally, is the internal memorandum of 14 January 1984 (document 33.126/7452), which includes the remark 'Belges et Holl. les + européens', of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO to establish that CBR participated in the Cembureau agreement through its participation in measures implementing that agreement within the framework of the single agreement relating to the ETF. The above remark is brief, not accompanied by any explanation, and does not refer to specific conduct of CBR.

B — Case T-30/95 *FIC* v *Commission*

4484 In its observations of 20 January 1998 FIC relies on a document dealing with the business plan of the Netherlands company ENCI for 1989-1991 (documents 33.126/732 to 735), which shows that when ENCI was faced with imports from markets in southern Europe the sole reaction which it envisaged was an effort to increase productivity in order to improve its

competitiveness as against those imports. FIC considers that if the alleged Cembureau agreement on non-transhipment to home markets had existed it is more likely that ENCI would have envisaged attempting to remind the 'guilty parties' of their alleged obligations.

4485 The Court points out, first, that that argument has become devoid of purpose, since it has been established (see paragraphs 4077 to 4079 above) that the Commission has failed to show to the requisite standard that ENCI participated in the Cembureau agreement. Furthermore, the document relates to a period (1989 to 1991) after that during which FIC has been found to have unlawfully participated in the Cembureau agreement (see paragraph 4296 above). In any event, the fact that the ENCI document (documents 33.126/732 to 735) contains no reference to the Cembureau principle or to the European cement producers' obligations under that agreement is not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in concluding that the Cembureau agreement existed and that FIC participated in that agreement (SO, points 9 and 61(a); contested decision, recitals 18, 19 and 45).

C — Case T-37/95 *Vicat* v *Commission*

4486 In its observations of 10 February 1997 Vicat emphasises, first, the absence of structural links between Buzzi and Cembureau. Thus, it observes that documents 33.126/2945 to 1951 show that the problems raised by the Greek and Yugoslav exports were examined by the Italian cement producers among themselves, without Cembureau's assistance being sought. The documents in question make no reference to Cembureau. Vicat also claims that the sections of the SO devoted to Italy (sections 3 and 13) and documents 33.126/2945 to 2951 establish that Buzzi did not take part in the setting-up of SIPAC, a company governed by Italian law which allegedly served as a joint intermediary for a number of Italian cement producers for the purpose of supplying cement to Calcestruzzi.

4487 Vicat also relies on documents 33.126/2929 to 2931 and 3150 to 3154 to emphasise Buzzi's isolated position in relation to its national competitors, since Buzzi expressed its active opposition to an agreement with Italcementi, Unicem and Cementir. Buzzi's conduct as an irregular on the Italian market also shows that it had little inclination to join in agreements or concerted practices, especially with a foreign undertaking such as Vicat.

4488 The Court points out, however, that both in the SO (points 9 and 61(a)) and in the contested decision (recitals 18, 19 and 45) the Commission relied on specific documentary evidence in order to establish that the Cembureau agreement existed. The same applies to the concerted action between Vicat and Buzzi (SO, points 10 and 61(b); contested decision, recitals 20, paragraphs 5 to 7, and 48). According to the Commission, the Franco-Italian concerted practice referred to in Article 3(1)(c) of the contested decision constituted, on Vicat's part, a manifestation of its accession to the Cembureau agreement. The Commission relies in that regard on the identity of object between the Cembureau agreement and the Franco-Italian

concerted practice and on the circumstance that Vicat, as an indirect member of Cembureau, was necessarily aware that its conduct implemented the Cembureau agreement (contested decision, recitals 46 and 48). The Commission did not rely in the SO and in the contested decision on the existence of structural links between Buzzi and Cembureau in order to show that Vicat had participated in the Cembureau agreement and the Franco-Italian concerted practice. To the contrary, in recital 48, paragraph 2, of the contested decision it expressly stated: 'It is true that Buzzi is not a member of Cembureau, but it is also true that the three French producers in question [Vicat, Ciments Français and Lafarge] are indirectly members through their national association. Even though Buzzi was not a member of Cembureau, it applied the agreement through its contacts with the French producers, who were linked to Cembureau.' Therefore if during the administrative procedure Vicat had been able, on the basis of the documents referred to in paragraphs 4486 and 4487 above, to demonstrate that there was no structural link between Buzzi and Cembureau, that could not have altered the outcome of the administrative procedure. Furthermore, the fact that there is no reference to the Cembureau agreement or to Cembureau in those documents, and Buzzi's specific position on the Italian market as disclosed in those documents, are not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO and the contested decision to establish that Vicat participated in the Cembureau agreement through its participation in an unlawful concerted action with Buzzi (SO, points 10, 59 and 61(b); contested decision, recitals 20, paragraphs 5 to 7, 45, paragraph 10, 46, 48 and 65, paragraph 3).

4489 Second, Vicat refers to a number of documents which, it maintains, show that it did not participate indirectly in Cembureau's activities. It observes that there are documents which show that Oficemen's representatives in Cembureau were appointed and authorised by the board of directors of that association (documents 33.322/1334 to 1346 and 1348 to 1353) and that CMF's representatives in Cembureau were also appointed by their association (documents 33.126/17073 to 17075 and 17199 to 17202). The fact that there are no documents of that type relating to SFIC's representatives indicates that the Commission does not have the necessary evidence to establish that Vicat participated, even indirectly, in Cembureau.

4490 That argument must be rejected. The Commission has never claimed that Vicat's participation in the Cembureau agreement was based on evidence that a particular national delegate had been appointed. To the contrary, proof of Vicat's participation in the Cembureau agreement relies, both in the SO (points 10, 59 and 61(b)) and in the contested decision (recitals 45, paragraph 10, 46, 48 and 65, paragraph 3), on its participation in a measure implementing that agreement.

4491 Third, Vicat refers to documents to show that there is no link between the Hispano-Portuguese agreement and the Cembureau agreement. It maintains that documents 33.322/1406 to 1408 and 1410 to 1412 would have enabled it to show that Cembureau was not involved in the bilateral relations between cement producers, even where those relations went to the extent of drawing up an agreement to restrict exports. It emphasises that there is no reference to Cembureau or a Cembureau principle in those documents. Furthermore, it states that the

exchanges which it had with Buzzi were much less frequent and less specific than those between Spanish and Portuguese cement producers.

4492 That argument must also be rejected. The existence of a bilateral agreement between Spanish and Portuguese producers was not used by the Commission to establish Vicat's participation in the Cembureau agreement. That participation is based, both in the SO and in the contested decision, on Vicat's participation in a concerted practice with Buzzi, which constituted, on Vicat's part, the implementation of the Cembureau agreement. Documents 33.322/1406 to 1408 and 1410 to 1412 on the Hispano-Portuguese agreement cannot therefore shed a different light on the specific documentary evidence used in the SO and in the contested decision to establish the reality of the concerted practice between Vicat and Buzzi and Vicat's participation in the Cembureau agreement (SO, points 10, 59 and 61(b); contested decision, recitals 20, paragraphs 5 to 7, 45, paragraph 10, 46, 48 and 65, paragraph 3).

4493 In its observations of 8 January 1998 Vicat puts forward still more documents to show that it did not participate in an alleged Cembureau agreement.

4494 First, it refers to documents 33.126/370, 371, 387, 423, 623, 630, 632, 673, 674 and 1543 to 1547 on the Franco-Belgian agreement referred to in the SO in order to show that the Commission intentionally remained silent about a Belgian national agreement of which it had been notified and in respect of which it had adopted a more positive position. Vicat claims that this constitutes objective evidence which could have been a source of specific facts to support the alternative explanation, namely that the conduct of the European cement producers was due to the natural or actual inflexibility of the various national markets. Furthermore, document 33.126/18023, which contains the replies of the Belgian company CCB (see paragraph 1169 above) to the written questions put by the Commission's officials, would have been of use in its defence to the objection relating to its participation in an alleged Franco-Belgian agreement.

4495 The Court points out, however, that the observations which Vicat makes on the basis of the documents referred to above do not show that there has been a breach of its rights of defence. First, Vicat cannot rely on documents which support its analysis of the market in question to challenge the existence of the Cembureau agreement, which was established on the basis of specific documentary evidence (see paragraph 264 above). Second, at no point in the contested decision is Vicat accused of having participated in a Franco-Belgian agreement. Access to the documents referred to above would not therefore have been of such a nature as to induce the Commission to adopt a different decision on that point. Vicat's argument must therefore be rejected.

4496 Vicat then puts forward a number of documents to establish that it is in a special position on the French market and that it pursues an independent strategy from its competitors. It refers to the Lafarge internal memoranda of 25 April 1988 (documents 33.126/4621 to 4624) and 21 April 1989 (documents 33.126/4796 to 4804), and to a Lafarge record of a visit to Brussels on 11 November 1987 (documents 33.126/7418 to 7428), the content of which shows that Vicat

occupied a comparatively atypical position on the French market and the European market and that it had no interest in agreements or concerted practices involving undertakings from other European countries.

4497 However, those documents would not have been of any use to Vicat's defence during the administrative procedure. The assessment of Vicat's special competitive position and of its interest in taking part in international agreements or concerted practices was not of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in the SO and the contested decision to establish the existence of the Cembureau agreement and Vicat's participation in that agreement through an unlawful concerted practice with Buzzi (SO, points 9, 10, 59 and 61(b); contested decision, recitals 18, 19, 20, paragraphs 5 to 7, 45, paragraph 10, 46, 48 and 65, paragraph 3).

D — Case T-39/95 *Ciments Français* v *Commission*

4498 Ciments Français claims in its observations of 10 February 1997 that it would have been able to show on the basis of the content of the national files that the alleged Cembureau agreement had no connection with the Franco-German agreement, with the Hispano-Portuguese agreement, with the Franco-Italian agreement or with the ETF's actions. It claims that the documents relating to the national agreements contain no reference to Cembureau or to a Cembureau agreement.

4499 That argument must be rejected. The fact that the documents relating to the national agreements contain no reference to Cembureau or to the Cembureau agreement is not of such a nature as to shed a different light on the evidence on which the Commission relied, in the SO and the contested decision, to demonstrate the existence of the Cembureau agreement and the link between the various international agreements and that agreement (SO, points 9 to 19, 27 to 29, 59, 61 and 67; contested decision, recitals 18 to 27, 30, 35 to 37, 45 to 55, 59 and 65).

E — Case T-42/95 *Heidelberger* v *Commission*

4500 In its observations of 20 February 1998 Heidelberger refers to a telex from Mr Schuhmacher to Mr Schleicher dated 16 March 1984 (documents 33.126/5217 and 5218). The content of that document shows that, during the meeting of 14 January 1983 in which he took part, Mr Schuhmacher had no precise picture of the concept and function of a Head Delegate. He therefore confused the Head Delegates meeting with the meeting of the liaison group, at which no topic contrary to the Community rules on agreements and concerted practices was addressed. Mr Schuhmacher, who was clearly unaware of his function in the system which the

Commission believes it has detected within Cembureau, could not have committed the German industry to an agreement which was contrary to the Treaty.

4501 The Court points out, however, that Mr Schuhmacher, who wrote the telex in question, was then the Chairman of the Board of Directors of Heidelberger. The document in question was therefore known to Heidelberger when the administrative procedure took place. If Heidelberger had then considered that the document contained exculpatory evidence, there was nothing to prevent it from relying on it during the administrative procedure. Accordingly, there can be no question of infringement of its rights of defence (see paragraph 248 above). In any event, the telex would not have been of such a nature as to shed a different light on the bundle of specific documentary evidence on which the Commission relied in concluding that the Cembureau agreement existed (SO, paragraphs 9 and 61; contested decision, recitals 18, 19 and 45) and that that agreement had been implemented by Heidelberger, in particular through its participation in the Franco-German agreement and the setting-up of the ETF (SO, points 12, 16, 17, 59 and 61(d) and (h); contested decision, recitals 22, 24, 25, 45, paragraph 10, 46, 50, 53, and 65, paragraph 3).

F — Case T-50/95 *Unicem* v *Commission*

4502In its observations of 28 November 1997, Unicem maintains that a number of documents (documents 33.126/4140 to 4142 and 6619 to 6622) to which it had access following the measures prescribed by the Court confirm that, owing to the extremely fragmented nature of supply, its internal market could not form the setting for the collusion which the Commission believes to be found there. Those documents also show that the Italian cement producers were not capable of devising coordinated retaliatory measures against imports from abroad, owing to the large number of actors on the market, and that they were not in a position to export, since the Italian market did not form part of a 'natural' transfrontier market, as was the case, for example, of the markets in Western Germany, Belgium, the Netherlands, Luxembourg and northern France (see documents 33.126/939, 1081, 1107, 2550, 7810, 7835, 7857, 7858, 8107 and 9212). A Lafarge document of June 1985 (document 33.126/6852), moreover, expressly shows that owing to the distance between Unicem's factory and the coast, inadequate port infrastructures and the power of the dockers' unions, it was impossible for Unicem to export profitably.

4503 Unicem refers to the documents referred to in paragraph 1224 above on the national agreements and concerted practices and claims that it did not participate in any initiative designed to 'lock' the national markets.

4504 The Court observes that only the international objections were pursued by the Commission in the contested decision, not the national objections. The only international objection involving

solely the Italian producers which was upheld in the contested decision is the agreement between Italcementi, Cementir and Unicem relating to the contracts and agreements signed on 3 and 15 April 1987 with the Italian company Calcestruzzi (Article 4(3)(b)). In that regard, it is clear that the explanations based on an economic analysis of the Italian market which Unicem would have been able to put forward on the basis of the documents to which it refers in its observations of 28 November 1997 to dispute the possibility of collusion on its domestic market, would not have been of such a nature as to shed a different light on the bundle of specific documentary evidence on which the Commission relied in concluding that there was an agreement between the three main Italian cement producers and that it had an anti-competitive purpose, namely to prevent a threat of imports by Calcestruzzi, in approximately 10 ports, of 1.5 million tonnes of cement from Greece, which would have had a catastrophic effect on prices (SO, points 19(d) and 61(h); contested decision, recital 27, in particular paragraphs 5 and 7 to 11, and recital 55, paragraph 2).

4505 Next, the Court observes that the three Italian producers, including Unicem, claimed in their answer to the SO that 'Italy could not be involved in the agreement on non-transhipment to home markets, since it did not ... export' (contested decision, recital 45, paragraph 14). For the reasons stated in recital 45, paragraph 14, however, the Commission considered that '[t]his argument is not correct' and that it was irrelevant in any event, since 'the fact remains that the undertakings of [that member country] of Cembureau [had] participated in an agreement whose object was to prevent competition'. Accordingly, the further comments which Unicem would have been able to make to show that it was impossible for it, as for the other Italian producers, to export profitably would clearly not have been of such a nature as to alter the outcome of the administrative procedure.

4506 Unicem further states that it is clear from the documents to which it had access following the measures prescribed by the Court that the local conduct, individual actions, relations and bilateral agreements noted at the time among European cement producers operated wholly independently of an alleged European agreement on non-transhipment to home markets. It observes that the documents which it was able to consult made no reference to any overall plan seeking to guarantee non-transhipment to home markets on a European scale. That also clearly contradicts the Commission's theory that the various bilateral and multilateral actions and forms of cooperation which could be seen on the markets were based on a Cembureau principle of sharing the national markets. The various national files actually show that each of the actions observed on the markets was the responsibility of the producer(s) concerned and responded to commercial constraints and production requirements specific to each market.

4507 Unicem relies first on document 33.126/375, the minutes of the meeting of the Board of Directors of Ciments d'Obourg held on 26 June 1987. It is apparent from that document that, where cement producers were threatened by imports, they alone decided on retaliatory measures. Unicem then refers to a series of documents relating, in turn, to Franco-German cooperation (documents 33.126/14763, 14801 to 14803, 16383 to 16389, 16600 to 16608 and chapters of the SO on Germany), German agreements on the exchange of information and the sharing of regional markets (pp. 176 to 262 of the German file and documents 33.126/20382,

20383, 20416 to 20431, 20433 to 20442, 20498 and 20560 to 20571), the successful moves by the German producers to convince PZW to join the national association and the local agreements on the allocation of production quotas (documents 33.126/3740, 3741, 5385 to 5388, 5392 to 5394, 6687, 6710 to 6714, 7041 bis to 7041 decies, 16545, 16546, 16559, 16560, 16588 to 16595, 20386 to 20397, 20405, 20492 to 20497 and 20499), cooperation between Spain and Portugal (documents 33.322/311, 996 to 1011 and 2897 to 2903) and cooperation between France and the United Kingdom (document 33.126/17220). All those documents show that those local actions and bilateral agreements were completely independent of an alleged European agreement on non-transhipment to home markets. The documents relating to the bilateral agreements, in particular those relating to cooperation between Spain and Portugal and between France and Germany, also prove that those agreements were quite sufficient to ensure the harmonisation of the various interests of the markets and that there was no need to resort to a general European principle for that purpose. Unicem again considers that if it had had access to the documents relating to the Franco-German and Hispano-Portuguese agreements it would have been able to support the argument which it put forward in its defence, namely that it had no connection with any bilateral or multilateral relations which might have existed between certain European producers.

4508 The Court points out, however, that no national objection was upheld in the contested decision. Furthermore, the contested decision did not attribute to Unicem any of the bilateral agreements and concerted practices defined in Article 3, namely the Franco-Italian concerted practices (Article 3(1)), the Hispano-Portuguese agreement (Article 3(2)) and the Franco-German agreements and concerted practices (Article 3(3)). Consequently, the comments which Unicem would have been able to make during the administrative procedure to show that there was no connection between those national, bilateral and multilateral agreements and concerted practices and the Cembureau agreement could not have altered the outcome of the administrative procedure in its case.

4509 In any event, neither the fact that in the various documents on which Unicem relies there is no reference to a Cembureau agreement or principle of non-transhipment to home markets, nor the comments which Unicem could have made as to the autonomy of the individual actions and the bilateral relations and agreements observed on the various markets, and the effectiveness of those relations and agreements themselves in ensuring harmony of the various interests on the markets, would have been of such a nature as to shed a different light on the body of specific documentary evidence on which the Commission relied in concluding that the Cembureau agreement existed (SO, points 9 and 61; contested decision, recitals 18, 19 and 45) and that it was implemented by Unicem through its participation in various measures within the framework of the single agreement relating to the ETF (SO, points 16 to 19, 59 and 61(h); contested decision, recitals 24 to 27, 45 paragraph 10, 46, 53 to 55 and 65, paragraph 3).

G — Case T-55/95 *Asland* v *Commission*

4510 Asland claims in its observations of 10 February 1997 that there is nothing in the documents to which it had access to support the conclusion that it clearly and intentionally manifested its accession to the alleged Cembureau agreement.

4511 It fails to state, however, how the fact that there is nothing in the documents made available to it during the administrative procedure to indicate that it participated in the Cembureau agreement is of such a kind as to shed a different light on the specific documentary evidence made available to it and on which the Commission relied in concluding that the Cembureau agreement existed (SO, points 9 and 61(a); contested decision, recitals 18, 19 and 45) and that it acceded to that agreement through its participation in the setting-up of the ETF (SO, points 17, 59 and 61(h); contested decision, recitals 25, 45, paragraph 10, 46, 53 and 65, paragraph 3). Its argument must therefore be rejected.

H — Case T-65/95 *Italcementi* v *Commission*

4512 In its observations of 10 February 1997 Italcementi states that it is apparent from the German file that there can have been no link between the Franco-German agreement and the alleged Cembureau agreement.

4513 However, that argument has no relevance to proof of a breach of Italcementi's rights of defence. The Franco-German objection referred to in Article 3(3) of the contested decision was not raised against Italcementi. Accordingly, those comments could not have altered the outcome in its case. In any event, they would not have been of such a nature as to shed a different light on the various items of evidence on which the Commission relied in the SO and the contested decision in concluding that the Franco-German agreement had been, from 14 January 1983, a measure implementing the Cembureau agreement (SO, points 12 and 61(d); contested decision, recitals 22, 46 and 50, paragraph 3).

I — Case T-88/95 *Blue Circle* v *Commission*

4514 In its submissions of 12 December 1997 Blue Circle maintains that the fact that none of the documents to which it had access following the measures prescribed by the Court refers to its participation in the Cembureau agreement constitutes exculpatory evidence.

4515 Blue Circle fails to state, however, how the fact that there is no reference to its participation in the Cembureau agreement in the documents made available to it during the present proceedings is of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in concluding that the Cembureau agreement existed (SO, points 9 and 61(a); contested decision, recitals 18, 19 and 45) and that it had acceded to that agreement through its participation in various measures adopted within the framework of the single agreement relating the ETF (SO, points 16 to 19, 59 and 61(h); contested decision, recitals 25 to 27, 45, paragraph 10, 46, 53 to 55 and 65, paragraph 3) and its participation in the activities

of the EPC (SO, points 24, 27 to 29, 59 and 67; contested decision, recitals 30, 35 to 37, 45, paragraph 10, 46, 59 and 65, paragraph 3). Its argument must therefore be rejected.

Final conclusions

4516 It follows from all the foregoing that Article 1 of the contested decision must be annulled in its entirety in so far as it concerns ENCI, Cedest, Alsen-Breitenburg, Nordcement, Buzzi, Rugby, Castle, Heracles and Titan.

4517 Article 1 of the contested decision must also be annulled in so far as it finds an infringement by:

— CBR, before 9 June 1986 and after 7 November 1988;

— Cembureau, after 31 December 1988;

— FIC, after 31 December 1988;

— VNC, after 31 December 1988;

— Ciments Luxembourgeois, after 31 December 1988;

— Dyckerhoff, after 7 November 1988;

— SFIC, after 31 December 1988;

— Vicat, before 11 May 1983 and after 23 April 1986;

— Ciments Français, after 17 February 1989;

— Heidelberger, after 12 August 1987;

— Lafarge, after 19 May 1989;

— Aalborg, after 31 December 1988;

— BDZ, after 31 December 1988;

— Unicem, before 9 September 1986 and after 3 April 1992;

— Valenciana, after 13 May 1987;

— BCA, after 31 December 1988;

— Asland, before 28 May 1986 and after 31 May 1987;

— Uniland, before 9 September 1986 and after 7 November 1988;

— Oficemen, after 24 April 1989;

— Irish Cement, after 31 December 1988;

— Cimpor, after 24 April 1989;

— SECIL, after 24 April 1989;

— ATIC, after 31 December 1988;

— Italcementi, before 19 March 1984 and after 3 April 1992;

— Holderbank, after 7 November 1988;

— Hornos Ibéricos, after 19 May 1989;

— Aker, after 7 November 1988;

— EUROC, after 7 November 1988;

— Cementir, after 3 April 1992;

— Blue Circle, before 18 November 1983 and after 7 November 1988;

— AGCI, after 31 December 1988;

— Halkis, before 18 November 1983 and after 1 September 1986.

4518 The remaining pleas must be rejected.

XIII — *Pleas of infringements of Article 85(1) and Article 190 of the Treaty and the rights of defence in that the Commission finds that there were, within the framework of the WCC, infringements of Article 85(1) of the Treaty and that various applicants participated in them (Article 7 of the contested decision)*

Preliminary observations

4519 According to Article 7 of the contested decision Italcementi, Dyckerhoff, Lafarge, Ciments Français and CBR, from 6 May 1982 to 26 May 1988, and Valenciana, from 1 January 1986 to 26 May 1988, 'infringed the provisions of Article 85(1) of the EC Treaty by participating, within the framework of the WCC, in the concerted practice and agreement relating to non-transhipment to home markets, in the continuous concerted practice relating to the channelling of production surpluses for export to third countries, and in a continuous concerted practice relating to exchanges of information on the production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual undertakings'.

4520 The reasoning dealing with these infringements is set out, in 'The Facts', in recitals 38 to 41 and, in the 'Legal Assessment', in recitals 61 to 63 of the contested decision.

4521 The Commission first sets out the framework within which these infringements were committed, namely the WCC, and describes the object pursued by its members and the unlawful activities in which they engaged.

4522 In recital 38, paragraph 1, of the contested decision the Commission, relying on a handwritten undated note of Ciments Français (document 33.126/4454), an internal note of Ciments Français dated 7 March 1989 (documents 33.126/4466 and 4467) and the record of the WCC meeting on 3 October 1985 drawn up by CBR (documents 33.126/9962 to 9966), states that 'the WCC [was] a club of European exporting white-cement manufacturers'. It was (recital 38, paragraph 2) an informal club without by-laws or founding instrument and its secretariat was provided in turn by the members.

4523 The Commission continues (same paragraph):

'The only certainties about the WCC, according to the records of the meetings between 6 and 7 May 1982 and 26 May 1988 entered in the file, are that its members [met] twice a year and that the activity of the club [was] supported by a White Cement Promotion Committee (WCPC), which consist[ed] only of the WCC's members ... and which [was] responsible for the promotion of white cement and the exchange of information on its various uses.'

4524 Furthermore (recital 38, paragraph 5):

'According to a note from Italcementi of 30 August 1985 (document 33.126/2802), which points out that the WCC is not an offshoot of Cembureau although it was set up several years ago by Cembureau members, the founder members of the WCC were: Aalborg (Denmark), Alsen and Dyckerhoff (Germany), CBR (Belgium), Lafarge (France), Blue Circle (United Kingdom), Italcementi (Italy); they were joined later by, first, Ciments Français (France) and then Valenciana (Spain) ...'

4525 The Commission goes on to state (recital 39, paragraph 7):

'In January 1984 (documents 33.126/2850 to 2852), Italcementi, Dyckerhoff, Lafarge, Ciments Français and CBR met in restricted committee and, having observed that cooperation with Aalborg was no longer possible, decided to suspend the old WCC and set up a new one ...'

4526 Referring to the content of an internal Italcementi memorandum dated 30 April 1984 (recital 39, paragraph 8; documents 33.126/2842 to 2844), the Commission observes that the new WCC, composed of those five undertakings and Valenciana, held its first meeting on 13 March 1984.

4527 The Commission then describes the illegal activities in which the applicants in question were involved within the framework of the WCC. Those activities consisted, first, in establishing close cooperation based on the twofold rule of respect for home markets and the channelling of surplus production outside the Community market and, second, in exchanging data on production capacities, output, home and export sales, home prices for white and grey cement and export prices of individual undertakings.

4528 As regards the first branch of those activities, the Commission observes (recital 61, paragraphs 1 and 2):

'The documents referred to in recital 39 reveal that the object of the WCC is to protect the members' home markets and to export their production surpluses under a general agreement.

The members of the WCC established close cooperation and a community of interests in which the division of the Community markets forms the basis of a general consensus amongst them. To make it effective, the division of markets was reinforced by the practice of channelling for export to third countries that part of production that was not absorbable by the markets of the countries in which each member is established. The protection of home markets and the channelling of production surpluses for export are thus two inseparable aspects of one and the same obligation.'

4529 As regards the second branch of the WCC's activities, the Commission states (recital 62, paragraph 1):

'The system of information exchange (recital 40) under which the WCC members pass on to one another at the meetings data on the production capacities, output, home and export sales, home prices for white and grey cement and export prices of individual undertakings ... The object of the system of information exchange is to make known the conduct which each member plans to pursue on the various Community and export markets, and it creates, between the undertakings participating in it, a system of solidarity and reciprocal influence designed to achieve coordination of their economic activities.'

4530 CBR (T-25/95), Dyckerhoff (T-35/95), Lafarge (T-43/95), Valenciana (T-52/95) and Italcementi (T-65/95) dispute both the existence of the infringements and their participation therein. Ciments Français (T-39/95) does not devote any plea in its application to formally disputing the infringement referred to in Article 7 of the contested decision. The applicants' complaints concern both the assessment of the economic context of the infringements established in Article 7 and the interpretation of the evidence presented by the Commission in the contested decision. There are also arguments alleging that certain matters are time-barred. Valenciana and Italcementi also rely on an infringement of their rights of defence owing to the lack of access during the administrative procedure to documents in the Commission's file which might have proved useful to their defence, having regard to the complaints ultimately upheld in Article 7 of the contested decision.

Protection of home markets and coordinated export of production surpluses outside the Community

4531 In recital 39 of the contested decision the Commission refers to five documents which lead it to the view (recital 61, paragraph 1) that 'the object of the WCC [was] to protect the members' home markets and to export their production surpluses under a general agreement'.

4532 It refers, first (recital 39, paragraph 1; document 33.126/4454), to a handwritten undated note from Ciments Français, according to which the WCC 'is a club: purpose: protection of home markets — rule: each member keeps to its home market and exports its excess production on generally agreed terms'.

4533 Second, it observes (recital 39, paragraph 2) that:

'The object and the rule are confirmed by certain records of WCC meetings. The record of the meeting of 9 May 1985, compiled by Ciments Français (documents 33.126/2793 to 2798) states at item 2 "Relations with Aalborg/BC and ABZ/Japan" that the decision was taken not to invite Aalborg to the meetings any more and "[t]hey point out that respecting 'home markets' is the sine qua non for membership of the WCC or WCPC".'

4534 Third, it reproduces at length (recital 39, paragraph 3; documents 33.126/9958 to 9961) the general conclusions reached by CBR in an internal memorandum drawn up after the WCC meeting on 3 October 1985, and in particular the following conclusions:

'The current members abide amongst themselves by a certain set of rules, but for how much longer? (example of Tunisia)

Most white-cement manufacturers have an easy life within their national borders ...

Respecting the home market does not suit us, because de facto it limits our natural market in the Benelux.'

4535 Fourth, and last, it relies on the content of two records of WCC meetings.

4536 It refers, first (recital 39, paragraph 4; documents 33.126/9874 and 9875), to an extract from the record of the meeting of 2 October 1986 compiled by CBR, which in 'point 1. Aalborg' relates the following conversation between Ciments Français and Aalborg:

(Aalborg) 'You still don't want us in the WCC';

(Ciments Français) 'You know very well why you are no longer in the WCC. We are all affected in proportion to the exports we made. There was a gentlemen's agreement (to) respect home market.'

4537 The Commission then refers (recital 39, paragraph 4; documents 33.126/2737 to 2739) to Italcementi's record of the same meeting, which states:

'Mr Leboeuf [representing Ciments Français] seized the opportunity to draw attention to respect for home markets.'

4538 The applicants put forward in essence six separate arguments disputing that the object of the WCC was illegal.

4539 First, CBR, Dyckerhoff, Lafarge, Valenciana and Italcementi claim that the sole object of the WCC was to promote its members' exports to non-member countries, in particular by exchanging information on overseas export markets, so that the WCC's activities had no impact on competition in the Community cement market. Dyckerhoff adds that although the WCC was actually responsible for promoting the sale in non-member countries of the quantities of white cement which its members were unable to sell in the Community there was no question of an activity contrary to Article 85(1) of the Treaty, since the undertakings belonging to the WCC remained free to make independent decisions on the sale of their output. Lafarge maintains that the WCC's object was not to channel its members' production surpluses outside the Community but to obtain the best prices and that, moreover, the records of the WCC meetings deal only with overseas exports.

4540 The Court points out first that it is apparent from the various documents referred to in recital 40 of the contested decision that cooperation between the members of the WCC covered all areas and not merely overseas exports outside the Community: production capacity (present and future) and output; sales and forecast sales on home markets; export sales and forecasts; export prices; and prices on home markets. Accordingly, it cannot be denied that the members of the WCC analysed and exchanged with one another information relating to their commercial policies, both domestic and export.

4541 Next, the applicants' allegations are unable to undermine what is shown by the bundle of documents to which the Commission refers in recital 39, paragraphs 1 to 4, of the contested decision (see paragraphs 4531 to 4537 above), which unequivocally shows that the WCC's real object was respect for its members' home markets and the channelling of their production surpluses to non-member countries as a guarantee thereof.

4542 It is clear upon reading those various documents that the Commission was entitled to take the view (recital 61, paragraph 1) that 'the object of the WCC [was] to protect the members' home markets and to export their production surpluses under a general agreement'.

4543 Article 85(1)(c) of the Treaty expressly prohibits all agreements and concerted practices which 'share markets'. In that regard, where undertakings reach an understanding to exclude particular products from certain markets in the Community they engage in anti-competitive practice contrary to Article 85(1) of the Treaty, whether the products in question are channelled towards other Member States or outside Europe (see, in particular, *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraphs 67, 68 and 87 to 127).

4544 In the present case, therefore, the WCC pursued an aim which restricted competition, contrary to Article 85(1) of the Treaty.

4545 Second, CBR, Dyckerhoff, Valenciana and Italcementi dispute the probative value of the documents presented by the Commission in recital 39 of the contested decision, or at the very least some of them. As the WCC had neither by-laws nor a formal structure and organisation, those documents were internal documents which at the very most expressed the personal views of the authors and therefore only rendered the authors liable.

4546 Those arguments must be rejected. Evidence must be assessed, not in isolation, but as a whole (Case 48/69 *ICI* v *Commission*, cited in paragraph 636 above, paragraph 68; *Thyssen Stahl* v *Commission*, cited in paragraph 2062 above, paragraph 175). Although the various documents referred to above come from different sources (CBR, Ciments Français, Italcementi), they consistently show that the WCC's purpose was to ensure respect for home markets. The

Commission was therefore entitled to rely on that consistent body of evidence in arriving at the conclusions which it draws in recital 61, paragraph 1, of the contested decision.

4547 Dyckerhoff further claims that the content of the documents in question does not reflect what actually took place at the various meetings in which its representative participated.

4548 However, it adduces no evidence to show that the documents used by the Commission do not provide an accurate account of the discussions which took place during the WCC meetings to which those documents relate. Its argument must therefore be rejected.

4549 Dyckerhoff also draws attention to the limited number of documents to which the Commission refers in comparison with the total number of documents relating to the WCC in its file, which show that the WCC's members concentrated on their exports outside the Community.

4550 It should be pointed out, however, that proof of the existence of an infringement of Article 85(1) of the Treaty depends not on the number of documents used for that purpose but on their value as evidence. In that regard, Dyckerhoff's criticism has no effect on the probative value which the Commission properly ascribed to the documents referred to in recital 39, paragraphs 1 to 4, of the contested decision. Dyckerhoff's argument must therefore be rejected.

4551 It is also necessary to reject the criticisms made by Italcementi in respect of the Italian translation of the handwritten undated note from Ciments Français (contested decision, recital 39, paragraph 1; documents 33.126/4454 and 4455). Those criticisms cannot alter the express meaning of the original version of that extract, which alone is authentic.

4552 Valenciana further maintains, in response to the Commission's reference, in its defence, to the record of the WCC meeting on 17 December 1987 (document 33.126/9890), that the reference in that document to home markets does not justify the conclusion that there was a prior agreement to share the national markets but merely illustrates the influence which supply on national markets inevitably has on the volume of exports to non-member countries.

4553 Although in footnote 185 of the contested decision the Commission provides the references to the various records of the WCC meetings held throughout the period of the infringement, including the meeting on 17 December 1987, it is apparent upon reading recital 39 of the contested decision that the Commission did not rely on the record of that meeting to show that the fundamental rule of the WCC was respect for home markets. Valenciana's argument is therefore irrelevant.

4554 Third, Valenciana maintains that the Commission cannot presume that the channelling of production surpluses and the protection of home markets were two aspects of the same rule, without reaching the incorrect conclusion that any cooperation in exporting to non-member countries necessarily implies the existence of a non-aggression pact in respect of the markets of the various parties to that pact.

4555 That argument must be rejected. A number of documents presented by the Commission in the contested decision contradict Valenciana's allegations. First, it follows from the undated handwritten note by Ciments Français (contested decision, recital 39, paragraph 1; document 33.126/4454) that the WCC '[was] a club: purpose: protection of home markets — rule: each member keeps to its home market and exports its excess production on generally agreed terms'. Next, the extract from the conversation between Aalborg and Ciments Français reproduced in CBR's record of the WCC meeting on 2 October 1986 (contested decision, recital 39, paragraph 4; documents 33.126/9874 and 9875) states: 'We are all affected in proportion to the exports we made. There was a gentlemen's agreement (to) respect home market.'

4556 Both those extracts from documents establish that the members of the WCC had made respect for home markets and the channelling of exports to non-member countries two interdependent parts of one and the same rule of the game, whose purpose was to ensure the protection of their domestic markets. The Commission was therefore entitled to conclude (recital 61, paragraph 2, *in fine*) that '[t]he protection of home markets and the channelling of production surpluses for export are thus two inseparable aspects of one and the same obligation' or again (recital 61, paragraph 5) that '[t]he channelling of production surpluses to third countries [was] a corollary of the concerted practice and agreement on the protection of home markets'.

4557 The foregoing assessment (paragraphs 4555 and 4556) also leads the Court to reject Dyckerhoff's argument that the objection relating to the channelling of production surpluses to exports to non-member countries has no basis in fact or in law in the contested decision, since there is no reference to such concerted channelling within the WCC in the documents referred to by the Commission.

4558 Fourth, Lafarge maintains that there was not even an indirect link between the WCC and Cembureau. Dyckerhoff and Italcementi dispute the Commission's assertion (contested

decision, recital 38, paragraph 6) that the WCC came under the ECMEC, like the EPC and the ECEC.

4559 However, although in recital 38 of the contested decision ('Nature and functions of the WCC') the Commission does in fact analyse a number of documents and on that basis reach the conclusion (recital 38, paragraph 6) that 'the ECMEC consisted of the three export committees: ECEC, EPC and WCC', the Court points out that its conclusion that the WCC had an anti-competitive object was based exclusively (recital 61, paragraph 1) on '[t]he documents referred to in recital 39' and that it never treated the link between the WCC and Cembureau or the ECMEC as one of the decisive elements of its legal assessment. The parties' arguments on this point must therefore be rejected.

4560 Fifth, CBR, Dyckerhoff, Valenciana and Italcementi dispute the Commission's analysis in recital 39, paragraphs 6 to 17, of the contested decision of the specific cases in which the home market rule was applied, namely the exclusion of Aalborg from the WCC for its alleged breach of the home market rule (recital 39, paragraphs 6 to 13), the exclusion of Blue Circle and Alsen-Breitenburg from the WCC for reasons allegedly linked with those which had led to Aalborg's exclusion (recital 39, paragraphs 14 and 15), the relations between Blue Circle and Lafarge (recital 39, paragraph 16) and the relations between Italcementi and Dyckerhoff (recital 39, paragraph 17).

4561 Before the various arguments formulated by the applicants in regard to those different cases are examined in detail, it should be pointed out that the mere fact that an agreement or concerted practice is animated by an anti-competitive purpose is sufficient to render it incompatible with Article 85(1) of the Treaty, whether or not it had effects of that type (see, to that effect, the case-law cited in paragraphs 837 and 1674 above). It has been established that, in the present case, the purpose of the WCC was anti-competitive (see paragraphs 4531 to 4544 above). Moreover, in the absence of proof to the contrary, which it was for the undertakings concerned to adduce, the Court finds that the cooperation at WCC level influenced the conduct of its members, which remained active on the market (see, to that effect, *Commission* v *Anic*, cited in paragraph 270 above, paragraph 118, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraph 161).

4562 It must now be established, by examining the arguments put forward by the applicants in regard to each of the cases which the Commission presents as an application of the home market rule in force within the WCC, whether the Commission was justified in seeing further proof of the illegal object of the WCC in the fact (contested decision, recital 61, paragraph 3) that '[t]he home market rule [had been] applied ... [and that] [a]ny infringement of the rule [had been] penalised'.

4563 As regards, first, Aalborg's exclusion from the WCC, CBR, Dyckerhoff and Italcementi contend that it was excluded not, as the Commission claims, because it had breached the alleged home market principle but for reasons to do with its aggressive pricing policy on the overseas export markets.

4564 CBR states that at the close of the WCC meeting on 24 July 1986, which was devoted specifically to the Aalborg case, a decision was taken to react individually, not collectively, to Aalborg's conduct. The need to hold an ad hoc meeting on that issue confirms that the WCC's object was not to impose the home market rule.

4565 Dyckerhoff claims that the account of the Aalborg case confirms that the WCC's activity consisted solely in cooperating on the overseas markets. It explains that Aalborg, which was anxious to increase its exports to the overseas markets by adopting very aggressive pricing conduct, participated in the WCC meetings with the sole aim of obtaining information for that purpose. That attitude led the other WCC members to exclude Aalborg from the exchange of information on the overseas markets, as the various records of the WCC meetings confirm, especially the record of the meeting on 13 September 1983 (contested decision, recital 39, paragraph 6). Dyckerhoff considers that it is wholly illogical to exclude one of the most important white cement manufacturers from the WCC, on the ground that it had breached an alleged home market rule, when the principal aim of the WCC was, in the Commission's words, to implement the home market rule. Similarly, it cannot be presumed from any of the documents presented in the contested decision that the WCC members made the resumption of collaboration with Aalborg conditional upon the latter's acceptance, in any form whatsoever, of the alleged home market rule.

4566 Italcementi contends that it is inaccurate to describe as an expulsion or a penalty the WCC's members' refusal of Aalborg's application to join. Aalborg was not admitted to the WCC because it practised an aggressive commercial policy on the overseas markets (see Italcementi's memorandum of 3 September 1982 (documents 33.126/286 to 2880) and the record of the WCC meeting on 2 October 1986 compiled by CBR (contested decision, recital 39, paragraph 4; documents 33.126/9874 and 9875)).

4567 It must be pointed out, however, that the evidence adduced by the Commission in the contested decision specifically contradicts the argument advanced by these three applicants.

4568 The documents referred to in recital 39, paragraphs 6 to 8, of the contested decision unequivocally show that Aalborg was at first temporarily excluded from the WCC for slashing its prices in the overseas export markets, whereas it had been agreed among the members of the WCC that production surpluses should be exported 'on generally agreed terms' in order to

protect home markets (contested decision, recital 39, paragraph 1; document 33.126/4454). As stated in the contested decision (recital 39, paragraph 9), that temporary suspension started to look like an expulsion when the members of the WCC learnt that Aalborg had begun to export to certain European markets (Germany and Belgium), that it was preparing to sell white cement in 5 kg bags and that it had not replied at all to the letter sent to it on 19 March 1984 by Mr Clemente (Italcementi) on behalf of the members of the new WCC. At the meeting on 21 May 1984 all the members of the WCC expressed the desire not to allow Aalborg back in the committee (contested decision, recital 39, paragraph 9; documents 33.126/2830 to 2832). Aalborg's conduct was seen by the WCC members as infringing the home market rule adopted in the WCC, which is confirmed by the extract from the conversation between Ciments Français and Aalborg set out in the record compiled by CBR following the WCC meeting on 2 October 1986 (contested decision, recital 39, paragraph 4): (Ciments Français) 'You know very well why you are no longer in the WCC. We are all affected in proportion to the exports we made. There was a gentlemen's agreement (to) respect home market.' Further confirmation of the Commission's analysis is to be found in the note from Italcementi dated 30 August 1985 (contested decision, recital 38, paragraph 5; document 33.126/2808 (not 2802, as wrongly indicated at that point in the contested decision)), which states why Aalborg was not able to join the new WCC in 1984: 'Aalborg broke the agreements'. The Commission was therefore entitled to take the view that Aalborg's exclusion from the WCC was intended to penalise its infringement of the twofold rule of respect for home markets and the export of production surpluses outside the Community under a general agreement.

4569 Contrary to what Dyckerhoff alleges, moreover, it follows from all those documents, and in particular from the extract from the conversation between Ciments Français and Aalborg referred to in the previous paragraph, that the penalty ultimately imposed on Aalborg was simply expulsion from the WCC, not merely from the system of exchange of periodic information on the overseas export markets.

4570 Likewise, contrary to what CBR alleges, the fact that the members of the WCC considered it necessary to hold a working session on 24 July 1986 for the specific purpose of examining possible retaliatory measures to counter any attack by Aalborg on their home markets and that, following that meeting, it was finally agreed, at the WCC meeting on 2 October 1986, that each member would respond individually to Aalborg's attacks (contested decision, recital 39, paragraphs 11 to 13) is not susceptible of invalidating any of the points in the analysis presented by the Commission in the contested decision. On the contrary, the very fact of holding that meeting for the specific purpose of examining the retaliatory measures that might be envisaged to prevent a competitor from intruding on the home markets merely confirms the anti-competitive purpose of the WCC.

4571 As regards, second, the exclusion of Blue Circle and Alsen-Breitenburg from the WCC (contested decision, recital 39, paragraphs 14 and 15), CBR, Dyckerhoff, Valenciana and Italcementi claim that the explanation lies solely in the fact that Blue Circle had stopped exporting white cement to non-member countries, while Alsen-Breitenburg no longer manufactured white cement.

4572 Again, the evidence adduced by the Commission in the contested decision categorically contradicts the applicants' argument. Although Blue Circle and Alsen-Breitenburg were actually suspended and then excluded from the WCC, the former because it no longer produced white cement for export and the latter because it had stopped producing white cement (contested decision, recital 39, paragraph 14), Italcementi's record of the WCC meeting in January 1984 (contested decision, recital 39, paragraph 7; documents 33.126/2850 to 2852) states that: 'Cooperation is equally unlikely with the British company Blue Circle and Alsen-Breitenburg, because both companies buy Aalborg products to supply their foreign customers.' As regards Blue Circle, the record of the WCC meeting on 19 June 1986, after noting, under the item 'Possible return of former members', that as there was no majority in favour Blue Circle's request to be readmitted to the WCC had been rejected, mentions two remarks (contested decision, recital 39, paragraph 15; documents 33.126/9914 to 9920, in particular 9920): '1) CBR referred to its contacts with Blue Circle (position regarding imports from Aalborg into Scotland). 2) Ciments Français thinks that Aalborg is supplying or has supplied white clinker to Blue Circle.' It follows from those various documents that although Blue Circle and Alsen-Breitenburg were excluded from the WCC partly as a result of the industrial and commercial decisions which they had taken, another reason was the fact that they bought white cement from Aalborg to supply their foreign customers, thus making themselves accomplices, in the eyes of the other WCC members, in an infringement of the twofold rule of respect for home markets and the channelling of exports under a general agreement.

4573 As regards, third, relations between Blue Circle and Lafarge (contested decision, recital 39, paragraph 16), Dyckerhoff complains that the Commission took Italcementi's record of the WCC meeting on 2 October 1984 (documents 33.126/2815 to 2817) as the basis for its conclusion that this was a case of the application of the home market rule, whereas the author of the record was not from either of the undertakings concerned and the document referred to an individual (Mr Wiggins) who had not attended the meeting in question. Dyckerhoff further claims that it only became aware of that document upon reading the contested decision.

4574 That argument cannot be accepted.

4575 First, the Court points out that point 22(c) of the SO, dealing with 'Blue Circle — Lafarge' reproduces the following extract from the record of the WCC meeting on 2 October 1984 made by Italcementi:

'Mr Wiggins, a former secretary of the WCC, asked Mr Balbo of Lafarge about supplies of white cement for the United Kingdom. Mr Balbo replied that he could have considered the request only with Blue Circle's prior agreement.'

4576 This passage from the SO corresponds virtually word for word with the content of recital 39, paragraph 16, of the contested decision. Furthermore, Italcementi's record of the WCC meeting on 2 October 1984 (documents 33.126/2815 to 2817) was in the Box (see paragraph 95 above). Dyckerhoff cannot therefore claim that it only became aware of the content of that document upon reading the contested decision.

4577 The Commission was justified in regarding the extract reproduced in recital 39, paragraph 16, of the contested decision as expressing Lafarge's intention to observe, with regard to Blue Circle, the home market principle agreed within the framework of the WCC.

4578 The fact that Mr Wiggins was not present at the WCC meeting on 2 October 1984, like the fact that the record of the meeting did not come from one of the two undertakings concerned, does not affect either the evidential value of that extract from the document or the likelihood that the information which it contained was correct.

4579 As regards, fourth, relations between Italcementi and Dyckerhoff (contested decision, recital 39, paragraph 17), Dyckerhoff also claims that it only became aware of the Italcementi note entitled 'Reflections on the white cement markets' (documents 33.126/3370 to 3375) upon reading the contested decision. It also states that Italcementi never gave any commitment to it.

4580 Italcementi asserts that, contrary to what the Commission maintains, it does not follow from its internal note of 23 December 1987 that it had concluded an agreement to respect the German market with Dyckerhoff, in implementation of the alleged home market rule. It claims to have taken an autonomous strategic decision to export white cement only to neighbouring countries, such as Switzerland and Austria, and to overseas countries, because it considered exports to other European markets difficult and unprofitable. Its note of 23 December 1987 actually shows that it had not undertaken any commitment to others not to export to Germany, since it also states that it intended to help the Italian company Sebino to export cement to Germany. Its purpose in supporting Sebino in its efforts to penetrate the German market was to remove part of that Italian competitor's supply from its own traditional markets.

4581 Both Dyckerhoff's arguments and Italcementi's arguments must be rejected.

4582 In paragraph 22(f) of the SO, headed 'Italcementi — Dyckerhoff', the Commission observes:

'On 23 December 1987, Italcementi's representative drew up a memorandum for the commercial director under the title "Considérations sur les marchés du ciment blanc". The memorandum examines, *inter alia*, the outlook for each market and, with regard to the German market, states: "En Allemagne où nous sommes engagés à ne pas déranger directement Dyckerhoff, mais où Sebino ... pourrait placer, avec notre appui, une partie de sa production, avec des compensations quantitatives pour nous en Autriche et en Suisse".'

4583 This passage from the SO corresponds virtually word for word with the content of recital 39, paragraph 17, of the contested decision. Furthermore, Italcementi's note of 23 December 1987 was in the Box (see paragraph 95 above). Dyckerhoff cannot therefore claim that it became aware of the content of that document only upon reading the contested decision.

4584 Nor can Dyckerhoff and Italcementi maintain that Italcementi's decision not to export to Germany was the outcome of a free strategic choice, when one of Italcementi's representatives stated in a note for his sales director (contested decision, recital 39, paragraph 17; documents 33.126/3370 to 3375): '— in Germany ... we are committed not to disturb Dyckerhoff directly.' Italcementi's conduct vis-à-vis Dyckerhoff was the necessary consequence of its intention to comply, in their bilateral relations, with the principle of the division of home markets agreed within the framework of the WCC, of which both undertakings were members. The reference in the note to the possibility that Italcementi might assist Sebino to sell part of its production in Germany cannot hide the commitment given by Italcementi to Dyckerhoff to respect Dyckerhoff's home market.

4585 Sixth, Dyckerhoff, Lafarge and Italcementi claim that the Commission has completely misunderstood the functioning and characteristics peculiar to the white cement market as compared with the grey cement market (limited number of manufacturers; higher price of the product; reduced impact of transport costs; greater elasticity of demand with respect to price; substantial demand from non-member countries).

4586 Those arguments must also be rejected. It is evident from recital 7 of the contested decision that the Commission took the characteristics peculiar to the production of white cement (particular production requirements, structure of supply, level of cost price and selling price) into consideration before reaching the conclusion that '[w]hite cement has a different market from the grey cement market' (contested decision, recital 7, paragraph 2, and recital 11, paragraph 1).

4587 In any event, the considerations drawn from the particular features of the white cement market cannot conceal the anti-competitive purpose of the WCC that emerges from the analysis in paragraphs 4531 to 4544 above.

4588 Last, it is clear that the producers themselves recognised on various occasions that the white cement and grey cement markets were not as compartmentalised and independent as they would now have the Court believe.

4589 Thus the record of the WCC meeting on 19 and 20 June 1986 (contested decision, recital 39, paragraph 11; document 33.126/9918) states:

'[I]t is therefore agreed that a working session of the WCC be held in Brussels on 24 July on the subject: "What retaliatory measures can be taken to counter a possible attack by Aalborg on our home markets?" The measures may also apply to grey cement.'

4590 A number of extracts from the record of that working session, which was held on 24 July 1986 (contested decision, recital 39, paragraph 12; documents 33.126/9876 to 9883), show that when the question of protecting their home markets arose the white cement producers had no hesitation in treating the markets for white cement and grey cement in the same way:

'Dyckerhoff reports having lost two customers ... who had been "visited" by Aalborg and had bowed to the Danes' arguments ... In return, they [i.e. Dyckerhoff] visited Ole Stevens Larsen and threatened him with retaliation on the Danish grey cement market ... Lafarge: One must not hide one's face. It's difficult to discuss white cement without taking grey into account ... As Mr Leboeuf [Ciments Français] had no mandate to discuss grey cement, the subject will not be discussed today, but each member will reconsult its board to find out whether a scenario based on retaliation in the grey market can be worked out and studied, if not applied.'

4591 Italcementi also accuses the Commission of not having specifically defined the geographical market for white cement.

4592 However, Italcementi adduces no evidence susceptible of challenging the conclusion drawn by the Commission in recital 11, paragraph 7, of the contested decision following its analysis of

both the grey cement market and the white cement market that 'Europe [was] the relevant [geographic] market, consisting of a set of juxtaposed and interdependent markets'.

System of exchange of information on individual undertakings

4593 CBR, Dyckerhoff, Lafarge and Italcementi put forward a series of arguments aimed at challenging the anti-competitive nature of the cooperation established, in the form of exchanges of information, between the members of the WCC. They claim that the data provided — or at least those relating to the Community markets — were limited and very general, that they contained no confidential trade information (prices actually practised on the markets; rebates and other advantages granted to customers, etc.) or information on the output of each individual establishment of the manufacturers brought together in the WCC, or reference to the costs of transport, market exploration or assistance. The information on prices charged on the Community markets came from the public domain owing to the system of State control in force in a considerable number of Member States. The exchanges were designed solely to compare national markets and overseas markets and the markets in white cement and grey cement, for the sole purpose of promoting overseas exports. Dyckerhoff further states that this system was not capable of implementing the alleged home market rule, since there is no proof that the rule existed. Furthermore, no agreement on prices was ever concluded within the WCC.

4594 The argument whereby Dyckerhoff seeks to show that no agreement on prices was concluded within the WCC must be rejected forthwith. In recital 62 and Article 7 of the contested decision the Commission finds a concerted practice relating to a system of exchange of individualised information set up at WCC level, not an agreement on prices.

4595 Next, the Court finds that the various arguments put forward by the applicants are unfounded. The numerous documents which the Commission lists in recital 40 of the contested decision, which have not been challenged by the applicants, confirm that during their meetings the members of the WCC periodically and continuously exchanged information broken down by individual producer and country on all aspects of their present and future commercial policies, both within and outside the Community: installed and future production capacity and actual output; sales on home markets during the period preceding each meeting and sales forecasts for the period following the meeting; current level of export sales and sales forecasts; export prices; home market prices, both for white cement and for grey cement (current prices, but sometimes also adjustments which had not yet become applicable).

4596 By taking part in such meetings the members of the WCC participated in concerted action contrary to Article 85(1) of the Treaty. By means of those exchanges they disclosed to each other, continuously and over many years, the commercial conduct which they were following or which they contemplated following on the Community and export markets, thus eliminating uncertainty about their present and future policies, with the aim of bringing about conditions of competition that did not correspond to normal market conditions (see the case-law cited in paragraph 1852 above).

4597 It is apparent from a number of documents that the purpose of those information exchanges was to coordinate the policies of the members of the WCC with the permanent intention of imposing collective discipline which would ensure the stability and protection of the home markets in white cement. Thus, in a telex sent to Italcementi on 17 January 1984 (contested decision, recital 39, paragraph 7; document 33.126/2854) Valenciana states: 'It is our intention to continue to collaborate with Italcementi, Dyckerhoff, Ciments Français, Ciments Lafarge and CBR as we have done thus far, by exchanging information and endeavouring to secure a stable and profitable market for all the undertakings.' In the conclusions which it drew from the WCC meeting on 9 May 1985 (contested decision, recital 39, paragraph 2; document 33.126/2796) Ciments Français stated: 'Our cooperation has enabled us to prevent the price aggression observed on the grey cement market from affecting white cement, and this policy must be maintained by increasing the information exchanges and preserving contacts between the companies.' Finally, at the WCC meeting on 26 May 1986 (contested decision, recital 41; documents 33.126/9885 to 9887) it was observed that: 'CBR [confirms] that Aalborg is present everywhere on the export markets, always at prices lower than ours.'

4598 Moreover, in the light of the extract from document 33.126/2796 reproduced in the preceding paragraph and in the absence of evidence to the contrary, which it was for the parties in question to adduce, the Court finds that the undertakings which took part in those information exchanges, which remained active on the market, took account of the information exchanged with their competitors in order to determine their conduct on that market. Such an assessment is all the more compelling in view of the fact that the above exchanges took place on a regular basis over a long period (see, to that effect, *Commission* v *Anic*, cited in paragraph 270 above, paragraphs 118 and 121, and *Hüls* v *Commission*, cited in paragraph 155 above, paragraphs 161 and 162).

4599 CBR also seeks to rely on *John Deere* v *Commission*, cited in paragraph 420 above (paragraph 51), in support of its argument that the information exchange system set up within the WCC was lawful. In that regard, it disputes the Commission's assertion that the white cement market is an oligopolistic market.

4600 However, CBR provides no evidence to support its general criticism of the Commission's description of supply on the cement market (in particular the white cement market) in recital 12 of the contested decision. Consequently, it cannot use the judgment in *John Deere* v

Commission, cited in paragraph 420 above, in order to defend the lawfulness of the periodic information exchange system set up within the WCC.

4601 CBR further states that it cannot understand how the same information exchanges could, within the framework of Cembureau, constitute an infringement of Article 85(1) of the Treaty only in so far as they made it possible to comply with an anti-competitive agreement, but, within the framework of the WCC, they could in themselves constitute such infringements.

4602 However, CBR's argument does not undermine the analysis set out in paragraphs 4595 to 4598.

4603 In conclusion, the Commission was justified in finding that the system of cooperation described in recital 40 of the contested decision '[had] the object of mak[ing] known the conduct which each member plan[ned] to pursue on the various Community and export markets, and ... create[d], between the undertakings participating in it, a system of solidarity and reciprocal influence designed to achieve coordination of their economic activities' (contested decision, recital 62, paragraph 1).

Effect on inter-State trade

4604 CBR, Dyckerhoff, Lafarge and Valenciana claim that the Commission accuses them of conduct which had no effect on trade between Member States.

4605 CBR considers that the Commission has failed to show that competition within the Community could have been affected by the collaboration in respect of exports outside the Community, as practised within the WCC, which was limited to the exchange of general information and recommendations on prices that were not followed up — as the Commission acknowledges (contested decision, recital 40, paragraph 5).

4606 Dyckerhoff relies on a record drawn up by Italcementi of the WCC meetings on 6 and 7 May 1982 (contested decision, footnote 185; document 33.126/2881) to show that the alleged agreements restricting competition and the information exchanges within the WCC of which the Commission complains had no adverse effect on intra-Community trade. That record shows significant variations during the period 1980 to 1982 in the domestic and export turnover of the various undertakings referred to in the document.

4607 Lafarge asserts that the exchange of information relating to overseas exports had no effect on competition within the Community.

4608 Valenciana accuses the Commission of having simply assumed, in recital 63 of the contested decision, that the WCC's activities had had an impact on inter-State trade, without providing further details of or grounds for that allegation. It also disputes that trade within the Community actually suffered any harm as a result of the WCC's activities.

4609 The arguments put forward by those four applicants must be rejected.

4610 First, it must be pointed out that the Commission devotes two paragraphs of the contested decision (recital 63, paragraphs 1 and 2) to explaining what led it to conclude that the twofold rule of respect for home markets and the channelling of exports, on the one hand, and the periodic information exchange system, on the other hand, had affected or, at the very least, been capable of affecting, inter-State trade:

'The home market rule and the rule on the channelling of production surpluses for export to third countries were intended to prevent or restrict marketing between Member States: Community trade is therefore directly and appreciably affected.

The information exchange system is liable to affect trade between Member States to the extent that it contributes to the implementation of agreements and concerted practices having as their object or effect the prevention or restriction of trade in white cement between Member States. Trade between Member States is also affected because each of the undertakings involved in the exchange of information is induced to define its policies on prices and sales on the basis of those of the other participating producers and, consequently, the natural flows of trade between Member States are artificially influenced to an appreciable extent.'

4611 The contested decision is not, therefore, vitiated by a failure to provide reasons in that regard.

4612 Next, it should be pointed out that, in prohibiting agreements and concerted practices which may affect trade between Member States and which have as their object or effect the restriction of competition, Article 85(1) of the Treaty does not require proof that such agreements or concerted practices have actually affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that the agreement or concerted practice in question was capable of having that effect. The condition that trade between Member States must be affected is thus satisfied where it is possible to

foresee with a sufficient degree of probability on the basis of a set of factors of law and of fact that the agreement or practice found to exist may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see, to that effect, the case-law cited in paragraph 1986 above). Having regard to the actual object of the WCC (protection of home markets and channelling of production surpluses to exports to non-member countries) and its activities (information exchange system), and to the size of the undertakings involved in the WCC (the principal European white cement manufacturers) and the duration of the practices (from 1982 until 1988), the Commission was justified in taking the view that the WCC's activities were at the very least liable to affect inter-State trade to an appreciable extent, as it states in the contested decision.

4613 Furthermore, the WCC and its activities did actually affect inter-State trade.

4614 Thus Italcementi decided not to export to Germany in view of its undertaking 'not to disturb Dyckerhoff directly [in Germany]' (contested decision, recital 39, paragraph 17) (see paragraph 4584 above).

4615 Moreover in its comments on the WCC meeting held on 3 October 1985, (contested decision, recital 39, paragraph 3; document 33.126/9961), CBR states:

'Most white-cement manufacturers have an easy life within their national borders (Italcementi, Ciments Français, Dyckerhoff. The latter are being attacked a little by Aalborg through Alsen).

Respecting the home market does not suit us, because de facto it limits our natural market in the Benelux.'

4616 The Italcementi record of May 1982 on which Dyckerhoff relies (see paragraph 4606 above) is of no relevance, in so far as the variations in trade which it describes relate to a period before 6 May 1982, the date taken by the Commission as the starting point of the infringement established in Article 7 of the contested decision.

4617 It follows from the foregoing analysis (paragraphs 4531 to 4616) that the WCC activities to which the contested decision refers had an anti-competitive object and were capable of having an appreciable effect on inter-State trade. The Commission was therefore entitled to find in Article 7 of the contested decision that they were contrary to Article 85(1) of the Treaty.

The applicants' participation in the infringements referred to in Article 7 of the contested decision

4618 As well as disputing the existence of an infringement of Article 85(1) of the Treaty within the framework of the WCC's activities described in the contested decision, CBR, Dyckerhoff, Valenciana and Italcementi submit a number of arguments to dispute their participation in the infringements found in Article 7.

4619 CBR contends that it cannot be accused of having deliberately or negligently infringed Article 85(1) of the Treaty since it was entitled to believe that the WCC's activities were lawful in the light of the approach adopted by the Commission in 1972 in the 'Cimbel' case, relating to an overseas export agreement.

4620 That argument cannot be accepted. As the Commission rightly observes in its defence in Case T-25/95, the conclusion of the Cimbel agreement was found to be an infringement and fined (Commission Decision 72/474/EEC of 22 December 1972 relating to a proceeding under Article 85 of the EEC Treaty (IV/243, 244, 245 — Cimbel) (*Journal Officiel* 1972 L 303, p. 24)). In any event, CBR, which was a founder member of the WCC and which participated in the various WCC meetings during which the home market principle was evoked, recalled or applied, cannot take refuge behind the alleged legitimate expectation derived from the Cimbel case and maintain that it had every reason to believe that the general objective of the WCC and its activities were lawful. As agreements and practices consisting in sharing the home markets are expressly prohibited by Article 85(1)(c) of the Treaty, CBR must have participated, with full knowledge of the facts, in activities which it could not but be aware were unlawful.

4621 Dyckerhoff emphasises its modest role on the white cement market (2% share of the world market; 8% share of the European market).

4622 None the less, that circumstance cannot alter the reality of its participation in the WCC's meetings and unlawful activities, which was established on the basis of the evidence which the Commission set out in recitals 39 and 40 of the contested decision.

4623 Dyckerhoff also relies on the size of its export activities (between 20 and 40% of its output), mainly to European States, to show that it did not share the approach of the undertakings responsible for the various documents on which the Commission based its conclusion that the WCC's basic rule was respect for home markets. To its knowledge the home market rule was never referred to at the WCC meetings. Last, its decision not to export to the 'areas of influence' of the other European white cement producers was taken deliberately, wholly autonomously

and independently of any home market principle, and for strictly economic reasons, having regard to the conditions of competition existing on the market for that product.

4624 Those arguments must be rejected.

4625 Dyckerhoff was a founder member of the WCC. In that capacity, it necessarily gave a commitment to respect the rule on the protection of the home markets of the members of the WCC, which was the basic rule of the WCC. Furthermore, at the WCC meeting on 9 May 1995, which Dyckerhoff attended, the participants pointed out that 'respecting "home markets" [was] the sine qua non for membership of the WCC or WCPC'(record of the WCC meeting on 9 May 1985; contested decision, recital 39, paragraph 2; documents 33.126/2793 to 2798). Dyckerhoff has provided no evidence that it openly distanced itself from that rule at that meeting. Consequently, the Commission was right to consider that Dyckerhoff had adhered to the home market rule which prevailed within the WCC (see, to that effect, the case-law cited in paragraph 1353 above).

4626 Dyckerhoff's claims that it exported a significant part of its white cement output to other European States are not supported by any solid evidence. In any event, even supposing that Dyckerhoff's conduct on the market did not comply with the rule agreed within the WCC, that circumstance is not such as to relieve it of full responsibility for the fact that it participated in the agreement found in Article 7 of the contested decision because, at the WCC meetings in which it participated, it never openly distanced itself from that rule, to which it had acceded when the WCC was set up (see, in that regard, *Tréfileurope* v *Commission*, cited in paragraph 958 above, paragraph 85, and Case T-310/94 *Gruber and Weber* v *Commission* [1998] ECR II-1043, paragraph 130, Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 203, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 87, and *Mayr-Melnof* v *Commission*, cited in paragraph 897 above, paragraph 135).

4627 Valenciana disputes its participation in the unlawful conduct found in Article 7 of the contested decision and denies having either adopted or applied the home market rule.

4628 First, the home market rule was never adopted or referred to during the WCC meetings which it attended. Valenciana emphasises that it was not present at eight of the fourteen meetings held by the WCC during the period in issue, either because it had no interest in the information exchanged or simply because it had not been invited to participate. It observes that the Commission cannot show that Valenciana actually received the records of the WCC meetings in which it did not participate. Accordingly, the Commission could not find that it adhered to the home market rule solely on the basis of what was said at those meetings by the other members

of the WCC. Valenciana places particular emphasis on an extract from CBR's record of the WCC meeting held on 2 October 1986 (contested decision, recital 39, paragraph 4; documents 33.126/9874 and 9875), which states that 'in SCF's [Ciments Français's] opinion, Spain = as dangerous as Aalborg'. In conclusion, Valenciana states that as far as it was concerned the WCC was simply a meeting place for European white cement exporters where information on exports to non-member countries was exchanged and where questions relating to the protection of European producers' interests in the face of illegal imports from non-member countries were discussed. Last, it points out that it was not a founder member of the WCC.

4629 That argument must be rejected.

4630 It should be pointed out that, in the words of the record of the WCC meeting of 9 May 1985, the commitment to respect home markets had been established as 'the sine qua non for membership of the WCC or WCPC' (contested decision, recital 39, paragraph 2; documents 33.126/2793 to 2798). The fact that that extract is taken from the record of a meeting in which Valenciana did not participate does not deprive it of its probative value vis-à-vis the Spanish undertaking. Since adherence to the principle of respect for home markets — and its corollary, the principle that production surpluses were to be channelled towards exports to non-member countries, under a general agreement — therefore appears to be a condition of joining the WCC, and since Valenciana does not deny having been a member of that club, it must be concluded that, upon joining, it necessarily gave a commitment to respect the other members' home markets.

4631 Furthermore, the home market rule was referred to at the WCC meeting on 3 October 1985, in which Valenciana participated. The note commenting on the meeting subsequently drawn up by CBR states, in the general conclusions, that '[t]he current members abide amongst themselves by a certain set of rules', by virtue of which 'most white-cement manufacturers have an easy life within their national borders' (contested decision, recital 39, paragraph 3; documents 33.126/9958 to 9961).

4632 It is true, finally, that Valenciana did not attend all the WCC meetings, and that Ciments Français said at the meeting on 2 October 1986 that 'Spain [was] just as dangerous as Aalborg'. However, Valenciana continued to participate in the WCC meetings until the end of the period of the infringement found in Article 7 of the contested decision (see record of the WCC meeting on 17 December 1987 in Rome (contested decision, footnote 185; documents 33.126/9888 to 9891) and record of the WCC meeting on 26 May 1988 in Baden-Baden (contested decision, recital 41; documents 33.126/9885 to 9887)).

4633 The Commission was therefore right to take the view that Valenciana had adhered to the twofold rule of respect for home markets and the concerted channelling of production surpluses

outside the Community from 1 January 1986 to 26 May 1988 (Article 7). In that regard, Valenciana's claim that it did not receive the records of the WCC meetings in which it did not participate is irrelevant.

4634 Valenciana further maintains that the Commission committed an error of assessment by transforming (contested decision, recital 61, paragraph 4) the concerted practice relating to respect for home markets into an agreement (concurrence of will), alleged by the Commission to have been formed during the WCC meeting on 21 May 1984, whereas the document on which the Commission relies for that purpose relates to the WCC meeting on 9 May 1985, in which the applicant did not participate.

4635 In fact it must be pointed out that the document on which the Commission relies is not the record of the WCC meeting on 21 May 1984 but the record of the WCC meeting on 9 May 1985 compiled by Ciments Français (contested decision, recital 39, paragraph 2; documents 33.126/2793 to 2798), more specifically the extract from that record which reads '[t]hey point[ed] out that respecting "home markets" [was] the sine qua non for membership of the WCC or WCPC'. That error of fact is of no consequence, however. Valenciana attended the WCC meeting on 3 October 1985 during which the home markets rule was referred to (see note commenting on the meeting drawn up by CBR following the meeting; contested decision, recital 39, paragraph 3; documents 33.126/9958 to 9961). As Valenciana has provided no evidence that it expressed any reservation or dissented in any way at that meeting, it must be concluded that it acceded on that occasion to what had then become a concurrence of will, or an agreement within the meaning of Article 85(1) of the Treaty, having as its object the protection of home markets. In any event, Valenciana's argument cannot hide the fact that when it joined the WCC it subscribed to the principle of respect for home markets and therefore acceded to an unlawful arrangement which, at the date taken as the starting point of the infringement in its case (1 January 1986, the date on which Spain acceded to the Community), was no longer a concerted practice, but an agreement.

4636 Second, Valenciana claims that it never took part in the measures adopted in implementation of the rule on not transhipping to home markets which the Commission describes in recital 39, paragraphs 6 to 17, of the contested decision.

4637 Thus, in regard, first, to Aalborg's exclusion from the WCC, Valenciana claims that it was not present at any of the WCC meetings during which retaliatory or punitive measures were considered and/or adopted in respect of Aalborg (meetings of 4 January and 2 October 1984, 19 June, 24 July and 2 October 1986). It further points out, with reference to the documents quoted in recital 39, paragraphs 11 to 13, of the contested decision, that certain members expressed the wish that Valenciana should not be associated with the adoption of those measures. Although it was present at the meetings on 21 May 1984 and 3 October 1985, all it did was to make known its opposition to any request by Aalborg to be readmitted to the WCC;

however, Aalborg never requested to be readmitted. Valenciana also points out that both meetings in question were held before Spain acceded to the Community on 1 January 1986.

4638 It is correct that Valenciana did not participate in the following meetings:

— the meeting in January 1984, during which it was agreed to set up the new WCC because it was impossible to continue cooperating with Aalborg (contested decision, recital 39, paragraph 7; documents 33.126/2850 to 2852);

— the meeting on 2 October 1984, during which the decision not to readmit Aalborg to the WCC was confirmed (contested decision, recital 39, paragraph 9; documents 33.126/2815 to 2817);

— the meeting on 19 and 20 June 1986, during which it was decided to hold a special seminar on 24 July 1986 to consider what retaliatory measures might be taken against Aalborg (contested decision, recital 39, paragraph 11; documents 33.126/9914 to 9920);

— the seminar on 24 July 1986 (contested decision, recital 39, paragraph 12; documents 33.126/2751 to 2755 and 9876 to 9883);

— the meeting on 2 October 1986, during which the members of the WCC decided to respond individually to Aalborg's attacks and to reject Aalborg's request to be admitted to the WCPC (contested decision, recital 39, paragraph 13; documents 33.126/9874 and 9875, and documents 33.126/2737 to 2739).

4639 None the less, a number of factors show that Valenciana was involved in Aalborg's exclusion from the WCC and supported the decision to exclude it.

4640 First, at the WCC meeting on 13 September 1983, during which the participants noted that Aalborg had increased its production capacity and slashed its prices despite the commitment given at the meeting on 31 May 1983, Valenciana informed the other participants that, in the circumstances, it no longer intended to participate in WCC meetings, thus displaying its

disapproval of the conduct adopted by Aalborg in breach of the rules in force within the WCC (contested decision, recital 39, paragraph 6; documents 33.126/2855 to 2858).

4641 Then, in Paris on 13 March 1984, it participated in the first meeting of the new WCC, during which the decision temporarily to exclude Aalborg from the WCC was confirmed (contested decision, recital 39, paragraph 8; documents 33.126/2842 to 2844).

4642 Valenciana also participated in the WCC meeting on 21 May 1984, during which it expressly confirmed that it did not want to see Aalborg readmitted to the new WCC.

4643 Thus the record of that meeting (documents 33.126/2830 to 2832, referred to in the contested decision, recital 39, paragraph 9) states under the heading '1. Attitude of the six members to Aalborg/BC/ABZ':

'Mr Clemente informed the members present that he had received no official reply from those to whom the letter of 19 March 1984 sent on behalf of the six members was sent. A survey of those present shows that none of the members of the restricted WCC wants to have Aalborg back in the committee. VC [Valenciana] is not interested in seeing the Danes readmitted to the WCC, because they exploit the information obtained to take their decisions. The later they have that information, the better for us. We must not make their task easy. As far as Mr Boffarul [Valenciana's representative] is concerned, therefore, it is clear that the WCC should continue without Aalborg.'

4644 Finally, Valenciana's intention not to readmit Aalborg to the WCC is confirmed by the note drawn up by CBR following the WCC meeting on 3 October 1985 in Milan (contested decision, recital 39, paragraph 3; documents 33.126/9958 to 9961), in which Valenciana participated. That note states: 'All the current members are opposed to Aalborg rejoining, since they no longer have any confidence in the current directors at Dansk [Aalborg].'

4645 The fact that all these factors relate to the period prior to 1 January 1986 does not prevent their being taken into consideration for the purpose of establishing Valenciana's adherence to the sanction imposed on Aalborg and, accordingly, its adherence to the rule prohibiting transhipments to home markets, respect for which was the sine qua non of membership of the WCC.

4646 In any event, the arguments whereby Valenciana seeks to show that it was not involved in Aalborg's exclusion from the WCC cannot refute the findings in paragraphs 4630 to 4632 above that it adhered continuously to the twofold rule of respect for home markets and the

channelling of production surpluses under a general agreement which was in force among the WCC's members.

4647 As regards, second, Blue Circle's and Alsen-Breitenburg's exclusion, Valenciana maintains that it played no part in the adoption of the measures taken within the WCC against those two undertakings.

4648 In that regard, it should be pointed out that although Valenciana was not present at the WCC meeting in January 1984 at which it was noted that cooperation with Blue Circle and Alsen-Breitenburg was becoming unlikely, in particular because both undertakings had bought from Aalborg in order to supply their foreign customers (contested decision, recital 39, paragraph 14; documents 33.126/2850 to 2852), it follows from the record of the WCC meeting on 19 and 20 June 1986 (contested decision, recital 39, paragraph 11; documents 33.126/9914 to 9920) that at the meeting in Milan on 3 October 1985 in which it had participated Valenciana had opposed Blue Circle's return to the WCC (documents 33.126/2781 to 2784), and that its opinion was taken into account at the meeting on 19 and 20 June 1986 when Blue Circle's return was refused.

4649 In any event, the arguments whereby Valenciana seeks to show that it was not involved in Blue Circle's and Alsen-Breitenburg's exclusion from the WCC cannot refute the findings in paragraphs 4630 to 4632 above that it adhered continuously to the twofold rule in force among the WCC's members on respect for home markets and the channelling of production surpluses under a general agreement.

4650 As regards, third, relations between Blue Circle and Lafarge, Valenciana relies on the fact that it was not present at the WCC meeting on 2 October 1984, when reference was made to those relations.

4651 In fact Valenciana did not participate in the WCC meeting during which reference was made to the relations between Blue Circle and Lafarge. However, that circumstance is not in itself of such a nature as to call in question the evidence that it participated in the agreement and concerted practices found in Article 7 of the contested decision, in relation to the rules on respect for home markets and the channelling of production surpluses to exports to non-member countries. The Commission's purpose in referring to the relations between Blue Circle and Lafarge was not to show that all the members of the WCC were involved in Lafarge's decision to respect the rules in force in the WCC in its relations with Blue Circle, but to illustrate the actual implementation of the home market rule adopted within the WCC, *inter alia*, in the relations between Blue Circle and Lafarge.

4652 As regards, fourth, the relations between Italcementi and Dyckerhoff, Valenciana denies having been in any way involved in this case of the implementation of the home market rule and points out that the Commission's case relies solely on the content of a note drawn up on 23 December 1987 by Italcementi, an undertaking with which Valenciana had no particular link.

4653 It should once again be pointed out, however, that the Commission's purpose in referring to the case based on the relations between Italcementi and Dyckerhoff was not to show that all the members of the WCC were involved in Italcementi's commitment not to disturb Dyckerhoff in Germany. Its sole purpose was to illustrate the actual implementation of the home market rule adopted within the WCC. Consequently, Valenciana's arguments denying any involvement in the Italcementi-Dyckerhoff 'case' described in recital 39, paragraph 17, of the contested decision cannot refute the findings in paragraphs 4630 to 4632 above that it adhered continuously to the twofold rule on respect for home markets and the channelling of production surpluses under a general agreement which was in force among the WCC's members.

4654 Third, Valenciana disputes any participation within the WCC in an information exchange system designed to establish solidarity between the members of the WCC. It observes that some members did not have the same confidence in it as they did in others (CBR note of 24 July 1986; document 33.126/9884).

4655 It must be pointed out, however, that the lack of trust which the members of the WCC had in Valenciana was mainly the result of what was considered to be the unreliable position of its representatives in the WCC (Mr Bofarull and Mr Manglano) and the fact that 'the Spanish [were] not people who would readily give their opinion or their word' (see document 33.126/9882, referred to in recital 39, paragraph 12, of the contested decision). The lack of confidence in Valenciana was mainly expressed during discussions at the special working session of the WCC on 24 July 1986 devoted to possible defence strategies against Aalborg (contested decision, recital 39, paragraph 12). On the other hand, the documents before the Court do not reveal that this lack of confidence extended to the quality of the information provided by Valenciana at the WCC meetings.

4656 Furthermore, the words used by Valenciana in its telex of 17 January 1984 to Italcementi (contested decision, recital 39, paragraph 7; document 33.126/2854) show that it was willing to continue to participate with the other members of the WCC in the information exchange system established within the WCC.

4657 In any event, Valenciana does not deny having periodically provided and received, during the period of the infringement found in regard to it in Article 7 of the contested decision, information on the various topics covered by the cooperation established within the WCC.

4658 The Commission was therefore entitled to find that Valenciana participated in the continuous concerted practice relating to exchanges of information referred to in Article 7 of the contested decision.

4659 In conclusion, the Commission was entitled to find that Valenciana participated in the various infringements found in Article 7 in relation to the WCC. None the less, it will be necessary, when examining the legality of Article 10 in regard to the fines imposed in respect of the infringements found in Article 7, to assess the merits of the alternative arguments put forward by Valenciana regarding its lesser involvement in the unlawful conduct found in that article (see paragraphs 4992 and 4997 to 5004 below).

4660 Italcementi seeks to absolve itself by showing its marginal interest in intra-Community exports of white cement and that it did not have any particular interest in protecting itself against any exports into Italy.

4661 That argument must be rejected.

4662 Italcementi was a founder member of the WCC, a 'club of European exporting white cement manufacturers' (contested decision, recital 38, paragraph 1; documents 33.126/4454, 4466, 4467 and 9962 to 9966), which contradicts its claimed lack of interest in intra-Community trade in white cement.

4663 Next, the internal Italcementi note of 23 December 1987 (contested decision, recital 39, paragraph 17; documents 33.126/3370 to 3375) reflects its interest in certain Community markets, in particular Germany, where it was, however, committed not to disturb Dyckerhoff directly, in accordance with the principle of non-transhipment to the home markets of WCC members (see paragraph 4584 above).

4664 Last, it is apparent from the documents presented by the Commission in the contested decision that Italcementi attended various WCC meetings at which the principles of respect for home markets and the channelling of exports to non-member countries were agreed and referred to. Italcementi emphasised, in its record of the WCC meeting on 2 October 1986, that 'Mr Leboeuf [had] seized the opportunity to draw attention to respect for home markets' (contested decision, recital 39, paragraph 4; documents 33.126/2737 to 2739). Italcementi has adduced no evidence that it openly distanced itself from the anti-competitive objective which was the WCC's driving force. Nor has it adduced evidence to show that the cooperation within the WCC did not influence its conduct on the market. Accordingly, the Commission was entitled to take the view that Italcementi had manifested its accession to and support for the various agreements and

unlawful practices found in Article 7 of the contested decision (see the case-law cited in paragraphs 1353 and 1671 above).

4665 Italcementi further maintains that it did not play a major role in dealing with the problem posed by Aalborg and that it even opposed Aalborg's exclusion from the WCPC, as may be seen from the letter from its representative to Aalborg's sales director dated 11 August 1986 (document 33.126/2756).

4666 However, the document submitted by Italcementi shows at the most that it was not in favour of Aalborg's exclusion from the WCPC, which is confirmed by the record of the WCC meeting on 24 July 1986 compiled by CBR (contested decision, recital 39, paragraph 12; document 33.126/9883), which states that '... as regards the Danes' and Blue Circle's membership of the WCPC, Mr Clemente [Italcementi] reports that his company is not in favour of their being excluded but will none the less support the decision of the majority', and also by Italcementi's record of the WCC meeting on 2 October 1986 (contested decision, recital 39, paragraph 4; documents 33.126/2737 to 2739).

4667 On the other hand, those documents do not show that Italcementi took a stand on Aalborg's exclusion from the WCC.

4668 On the contrary, it follows from the documents to which the Commission refers in recital 39, part (a), of the contested decision that Italcementi participated in the various WCC meetings in 1983 and 1984 during which the members of the WCC decided to exclude Aalborg from the WCC, first on a temporary basis and then permanently, and also in the WCC meetings in 1986 during which retaliatory measures against Aalborg were considered. Among those documents, reference should be made to the extract from the record of the WCC meeting on 21 May 1984 (documents 33.126/2830 to 2832 mentioned in recital 39, paragraph 9, of the contested decision), which reports the position of Mr Clemente, Italcementi's representative in the WCC, as follows: 'Mr Clemente fully agrees with the members present and personally considers it inappropriate to have Aalborg back in the WCC.'

4669 Italcementi was therefore fully involved in the decisions which the WCC took against Aalborg. In any event, its arguments on this point cannot refute the findings in paragraphs 4662 to 4664 above that it adhered continuously to the twofold rule on respect for home markets and the channelling of production surpluses under a general agreement which was in force among the WCC's members.

Time bar of matters found in Article 7 of the contested decision

4670 Dyckerhoff asserts that, as the decision ordering the investigations was notified in April 1989, it must be concluded, pursuant to Article 1(1)(b) of Regulation No 2988/74 (see paragraph 1964 above), that matters before 20 April 1984 are time barred.

4671 Italcementi observes that in Article 7 of the contested decision the Commission complains, in particular, that the members of the WCC participated in a concerted practice and in an agreement relating to non-transhipment to home markets. It concludes from the Commission's presentation of the facts in recital 39 of the contested decision that the activities of the members of the old WCC constituted the concerted practice found, while those of the members of the new WCC arose from the agreement. Italcementi maintains that these were two quite separate infringements that should not have been classified by the Commission as a single and continuous infringement (contested decision, recital 61, paragraph 4). The facts relating to the old WCC, that is the facts prior to January 1984, must therefore be declared time barred, in accordance with Article 1 of Regulation No 2988/74.

4672 Those arguments cannot be accepted.

4673 Contrary to what Italcementi maintains, the Commission never considered that the concerted practice relating to non-transhipment to home markets had become an agreement when the new WCC succeeded the old one in January 1984. In the contested decision the Commission states that the transition from a concerted practice to an agreement took place at the WCC meeting during which the members pointed out that respecting 'home markets' was the 'sine qua non' for participation in the WCC and the WCPC (see contested decision, recital 39, paragraph 2, and recital 61, paragraph 4; documents 33.126/2793 to 2798).

4674 In that regard, it follows from the documents to which the Commission refers in recitals 38 to 41 of the contested decision that all the facts found in connection, first, with a concerted practice and then with an agreement were the consequence of a continuous infringement within the meaning of Article 1(2) of Regulation No 2988/74, which throughout the entire period of the infringement found in Article 7 of the contested decision had been guided by the same anti-competitive purpose: respect for home markets and the channelling of production surpluses outside the Community. Thus the extract quoted in the preceding paragraph from the record of the WCC meeting on 9 May 1985, on which the Commission bases its conclusion that the concerted practice became an agreement, shows unequivocally that one and the same anti-competitive purpose inspired both the concerted practice up to that date and the concurrence of wills thereafter. The fact that the Commission classified that arrangement as a concerted practice and then as an agreement does not alter the fact that the infringements found in Article 7 of the contested decision continued from 6 May 1982 until 26 May 1988; accordingly, for the purpose thereof time began to run on 26 May 1988, in accordance with Article 1(2) of Regulation No 2988/74, and had not expired when the Commission commenced its investigations in April 1989.

Access to the file

4675 Neither Valenciana nor Italcementi claims not to have had access during the administrative procedure to the incriminating evidence referred to in recitals 38 to 41 of the contested decision in connection with the infringements found in Article 7. Dyckerhoff's allegations in that regard have been rejected (see paragraphs 4573, 4575, 4576, 4579, 4582 and 4583 above).

4676 As regards incriminating evidence, Valenciana and Italcementi make a series of observations based on the documents which they were able to consult following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 and 168 above).

4677 In its submissions of 10 February 1997 Valenciana refers to the statistics of the SFIC on French cement imports for 1985 (documents 33.126/14956 to 14962), which show that Spanish producers exported 36 tonnes of white cement to the French market in 1985. Those statistics show that the German, Italian and British undertakings did likewise. Furthermore, SFIC statistics on French cement imports for 1987 (document 33.126/14964) show that Germany, Italy, the United Kingdom and the Netherlands also exported white cement to the French market in 1987. Those documents, all of which provide evidence of the existence of some exports of white cement to the Community countries, therefore show that it was not the WCC's object to protect its members' home markets.

4678 It should be pointed out, however, that in the SO (paragraphs 21 to 23 and 63 to 65) and the contested decision (recitals 38 to 41 and 61 to 63) the Commission relied not on statistics showing the low level of trade in white cement between Member States of the Community but on specific documentary evidence to establish the infringements found in Article 7 of the contested decision and the participation of Valenciana, among others, in those infringements.

4679 Moreover, nowhere in the SO or the contested decision did the Commission claim that the infringements committed within the framework of the WCC had stopped all exports of white cement in the Community. It merely observed that the object of the WCC was to protect home markets.

4680 The SFIC documents to which Valenciana had access following the measure of 2 October 1996 are therefore not of such a nature as to shed a different light on the documentary evidence used by the Commission in finding not only that the infringements referred to in Article 7 of the contested decision existed but also that Valenciana participated in them. They merely illustrate the existence of white cement exports within the Community and do not identify the individual

undertakings behind such exports. As regards, particularly, Valenciana's participation in the infringements found within the WCC, the SFIC documents relating to 1985 (documents 33.126/14956 to 14962) mention imports of white cement from Spain amounting to 36 tonnes. However, Valenciana has provided no evidence that they were its own exports. Furthermore, the SFIC document relating to 1987 (document 33.126/14964) no longer mentions Spanish exports to France.

4681 Consequently, the SFIC statistics on French cement imports for 1985 and 1987 would not have proved useful to Valenciana's defence against the objection upheld in Article 7 of the contested decision.

4682 In its submissions of 22 December 1997 Valenciana again refers to an internal Ciments Français memorandum (documents 33.126/4464 and 4465). That memorandum confirms that it did not apply any home market rule. First, it follows from the memorandum that Valenciana exported white cement to the Community market. Second, the memorandum shows that Valenciana began to participate in the WCC's activities when the members of the WCC had already decided to exclude Alsen-Breitenburg, Aalborg and Blue Circle. Valenciana therefore did not participate in any of the actions in respect of which the Commission concluded (contested decision, recital 61, paragraph 3): 'Any infringement of the rule was penalised.'

4683 The Court points out that the memorandum states, in the case of Valenciana, '500 KT capacity' and, for Spain, '350 to 400 KT', with the reference 'home market'. However, there is no reason to conclude that the second reference is to Valenciana's exports to Community countries. Furthermore, any comments which Valenciana might have been able to make during the administrative procedure on the basis of documents 33.126/4464 and 4465 to dispute its participation in the measures that excluded Aalborg, Blue Circle and Alsen-Breitenburg from the WCC could not have refuted the findings in paragraphs 4639 to 4643 and 4648 above to the effect that Valenciana was involved in those measures. In any event, the evidence now adduced by Valenciana is not of such a nature as to shed a different light on the specific documentary evidence (see paragraphs 4630 to 4632 above) which shows that Valenciana adhered, on the white cement market, to the principle of non-transhipment to home markets and the channelling of production surpluses referred to in Article 7 of the contested decision. On the contrary, the internal Ciments Français memorandum (documents 33.126/4464 and 4465) which Valenciana puts forward merely confirms the Commission's findings in the SO and the contested decision, since it states that the principle of the WCC was to 'export excess production' and 'not to disturb home markets'. It also confirms that Valenciana participated in the WCC meetings: 'In theory, Manglano is boss; in practice Bofarull is.'

4684 It follows that the internal Ciments Français memorandum (documents 33.126/4464 and 4465) would not have proved useful to Valenciana's defence against the complaints referred to in Article 7 of the contested decision.

4685 Last, in its memorandum of 22 December 1997 Valenciana refers to an internal CBR memorandum of 4 May 1987 (documents 33.126/10209 to 10211) as showing that it exported white cement to the Community market. That proves that it never applied the rule on the protection of home markets in the white cement market.

4686 It should be pointed out, however, that the memorandum in question merely states that 'Valenciana and Aalborg have continued to produce tonnage which they export in bulk'. It does not say that those exports were destined for European markets or, in particular, for the markets of the other WCC members. In any event, the comments which Valenciana might have been able to make on the basis of that memorandum would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission properly relied in order to find, in Article 7 of the contested decision, that the Spanish undertaking had adhered to the rule on non-transhipment to home markets which was then applied by the members of the WCC.

4687 In its observations of 26 November 1997 Italcementi claims that a series of CBR documents show that CBR sold its white cement output in other countries of the Community (document 33.126/8519 et seq. (sic), in particular 8540, 8969, 8970, 8424, 8425 and 8431). Other documents (documents 33.126/6938 and 6943, and document 33.322/2017) show that the ways of dealing with intra-Community imports of white cement which were contemplated consisted in adopting retaliatory measures or other immediate means of action, but nowhere is there any reference to an alleged home market principle. Those documents would therefore have enabled Italcementi to dispute the existence or, at any rate the effectiveness, of a home market principle in the white cement sector.

4688 It should be pointed out that a number of documents to which Italcementi refers (documents 33.126/8519 and 8540, and document 33.322/2017) relate to matters which occurred after the period of the infringement (May 1982-May 1988) found by the Commission in the contested decision. Those documents therefore have no relevance to the complaints addressed to Italcementi within the context of the WCC.

4689 In any event, the comments which Italcementi could have made on the basis of the documents on which it relies, had they been available to it during the administrative procedure, would not have been of such a nature as to shed a different light on the specific documentary evidence on which the Commission relied in order to establish the existence of a principle of non-transhipment to home markets of the members of the WCC, which included Italcementi, and the application of that principle in a number of specific cases (SO, paragraphs 21 to 23, 63 and 64; contested decision, recitals 38 to 40 and 61 to 63).

4690 Last, the Commission has never claimed that the home market principle applicable among members of the WCC in the white cement market had the effect of eliminating all inter-State trade in white cement, even between the home markets of the WCC members. It imposed a penalty on the WCC because of its anti-competitive object (contested decision, recital 61, paragraph 1) and stated that it had direct evidence that the principle had been applied on various occasions and that certain members of the WCC had been penalised for infringing the rule (contested decision, recital 61, paragraph 3).

4691 In conclusion, none of the comments by Valenciana and Italcementi examined in paragraphs 4676 to 4690 above would have had even a small chance of altering the outcome of the administrative procedure. Those applicants have therefore failed to show, on this point, that there was an infringement of their rights of defence during the administrative procedure.

General conclusions

4692 In the light of all the foregoing (see paragraphs 4519 to 4691 above), the Commission was entitled to find in Article 7 of the contested decision that '[Italcementi], [Dyckerhoff], [Lafarge], [Ciments Français] and [CBR], from 6 May 1982 to 26 May 1988, and [Valenciana] from 1 January 1986 to 26 May 1988, infringed the provisions of Article 85(1) of the EC Treaty by participating, within the framework of the WCC, in the concerted practice and agreement relating to non-transhipment to home markets, in the continuous concerted practice relating to the channelling of production surpluses for export to third countries, and in a continuous concerted practice relating to exchanges of information on the production capacities, output, domestic and export sales, domestic prices for white and grey cement and export prices of individual undertakings'.

4693 All the pleas examined must therefore be rejected.

XIV — *The plea alleging that the order in Article 8 of the contested decision is unlawful*

4694 In Article 8 of the contested decision the Commission directs 'the undertakings specified in Articles 1 to 7 [to] forthwith bring the infringements referred to in those articles to an end (if they have not already done so) and [to] henceforth refrain, in relation to the markets for grey cement and white cement, from any agreement or concerted practice which may have the same or similar object, including any exchange of confidential commercial information designed to monitor the performance of any express or tacit agreement or any concerted practice involving the sharing of markets in the Community'.

4695 The lawfulness of that order is contested by FIC (T-30/95), alleging errors of fact and of law, by Aalborg (T-44/95), alleging infringement of Article 85(1) of the Treaty, and Halkis (T-104/95), alleging infringement of Articles 85(1) and 190 of the Treaty.

4696 FIC requests the Court to confirm that the order in question does not relate to it and does not preclude an exchange of statistics with Cembureau. The Court should therefore find that the Commission implicitly acknowledges that the associations themselves did not commit infringements, which would be at variance with the Commission's decision to attribute to them responsibility for the infringements referred to in the contested decision and to impose a separate fine on them. If, on the other hand, Article 8 is held to relate to FIC, it should be annulled because the Commission has not explained the reasons which led it to characterise FIC as an 'undertaking'.

4697 FIC states that the order is directed specifically at the statistical work of Cembureau and, therefore, of the trade associations, and that it calls that work into question for the future even though the Commission has not explained why it prohibited activities which are nevertheless in conformity with the Commission's previous decisions and the case-law in that area.

4698 The Court finds that the order in Article 8 of the contested decision is not in fact addressed to the associations of undertakings. Nor are they referred to in the recital relating to that order (recital 64). Such a finding does not, however, affect the Court's analysis set out in paragraphs 1343 to 1372, 1400, 1401, 1458 to 1755 and 4063 to 4065 regarding the correctness of the Commission's decision finding that FIC participated in the infringements referred to in Articles 1 and 2(1) and (2) of the contested decision.

4699 Moreover, as the Commission confirmed during the written procedure in Case T-30/95, Article 8 of the contested decision does not prohibit exchanges of statistics, first, between the member associations of Cembureau and, second, between those members and Cembureau inasmuch as those exchanges are not designed to facilitate the monitoring and/or implementation of agreements or concerted practices having the same or similar object to that of the infringements to which the contested decision refers.

4700 Aalborg considers that the order in Article 8 of the contested decision is so general that it does not constitute a formal decision for the purposes of Regulation No 17 (see paragraph 2 above). It adds that it is impossible to comply with that order because the order does not indicate how it can withdraw from an agreement to which it is not a party. Halkis asserts that it cannot be ordered to put an end to infringements which it has never committed.

4701 The Court points out that, by virtue of Article 3(1) of Regulation No 17, where the Commission finds that there is an infringement, *inter alia*, of Article 85(1) of the Treaty, it may require the undertakings concerned to bring the infringement to an end.

4702 Recital 64 of the contested decision expressly refers to that provision of Regulation No 17.

4703 It then states as follows:

'The great majority of the undertakings have denied most of the infringements of Article 85(1). Although a fairly limited number of undertakings have informed the Commission that they have taken steps to prohibit their staff from participating in meetings or having any contacts with the representatives of the other undertakings on business matters, the Commission is not certain that the infringements described in recitals 45, 46, 47, 49, 50, 53, 55, 56, 61 and 62 have in fact ever ceased. Similarly, the Commission is not certain that the concerted practices within the EPC are not continuing under the new CDICT Committee.

The Commission must therefore not only find that infringements have been committed, but also require the undertakings to terminate them.'

4704 It is settled law that Article 3(1) of Regulation No 17 may be applied so as to include an order directed at bringing an end to certain acts, practices or situations which have been found to be unlawful but also at prohibiting the adoption of similar conduct in the future (see, *inter alia*, *PVC*, cited in paragraph 734 above, paragraph 1249).

4705 Moreover, since Article 3(1) of Regulation No 17 is to be applied according to the nature of the infringement found, the Commission has the power to specify the extent of the obligations on the undertakings concerned in order to bring an infringement to an end. Such obligations on the part of the undertakings may not, however, exceed what is appropriate and necessary to attain the objective sought, namely to restore compliance with the rules infringed (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 93; *PVC*, cited in paragraph 734 above, paragraph 1250).

4706 In Article 8 of the contested decision the Commission directs the undertakings specified in Articles 1 to 7 forthwith to bring to an end the infringements found in those provisions. It then

directs them to refrain in future, in relation to the markets for grey cement and white cement, from any agreement or concerted practice which may have the same or similar object, including any exchange of confidential commercial information designed to monitor the performance of any express or tacit agreement or any concerted practice involving the sharing of markets in the Community.

4707 Such directions clearly fall within the Commission's powers under Article 3(1) of Regulation No 17.

4708 The Commission was entitled to find that on the markets for grey cement and white cement there was a general agreement that there should be no transhipment to home markets and that there was a series of measures intended to ensure that that agreement, including the exchanges of confidential commercial information, would be applied.

4709 With regard specifically to Aalborg, the Commission was fully entitled to find that it participated in the Cembureau agreement referred to in Article 1 of the contested decision and in the measures implementing that agreement referred to in Article 2(1) and (2) (specific and periodic exchanges of information on prices) and Article 4(1) and (3)(a) (agreement on the setting-up of the ETF and concerted practices designed to cause Calcestruzzi to cease being a customer of the Greek producers). As to Halkis, the Commission was fully entitled to find that it participated in the Cembureau agreement and in the concerted practice of the EPC referred to in Article 6 of the contested decision.

4710 In the light of those matters, it is clear that the obligations imposed on Aalborg and Halkis by Article 8 of the contested decision do not exceed what is appropriate and necessary to restore compliance with the rules infringed.

4711 The arguments of Aalborg and of Halkis must therefore be rejected.

4712 It follows from the whole of the foregoing that the Commission, in adopting Article 8 of the contested decision, did not exceed the powers conferred on it by Article 3(1) of Regulation No 17.

4713 The plea that the order is unlawful must therefore be rejected.

Alternative claims seeking the cancellation or reduction of the fines

4714 The fines imposed by the Commission on the recipients of the contested decision are set out in Articles 9 and 10 thereof:

— Article 9 sets out the fines 'imposed on the associations and undertakings concerned, in respect of the infringement found in Article 1, which was put into effect, in particular, by the conduct set out in Articles 2, 3, 4, 5 and 6', that is to say, the fines in respect of the infringement associated with the Cembureau agreement found to exist in relation to the grey cement market;

— Article 10 sets out the fines 'imposed on the undertakings named herein in respect of the infringements found in Article 7', that is to say, the fines in respect of the infringement committed on the white cement market in the context of the WCC.

4715 The grounds relating to the imposition of those fines are set out in recital 65 of the contested decision.

4716 All the applicants submit alternative claims seeking cancellation or reduction of the fines imposed.

4717 As a result of the Court's conclusions in paragraphs 478 to 488 above, there is no longer any need to examine the claims submitted by Cembureau, FIC, VNC, SFIC, BDZ, BCA, Oficemen, ATIC and AGCI.

4718 Since the participation of ENCI, Cedest, Alsen-Breitenburg, Nordcement, Rugby, Castle, Heracles and Titan in the infringement referred to in Article 1 of the contested decision has not been established (see paragraphs 4074 to 4079 above), Article 9, which links the fine to that infringement as regards the grey cement market (see paragraph 4714 above), must be annulled so far as concerns those undertakings. Since they are not affected by Article 10, their alternative claims seeking cancellation or reduction of their fines are thus devoid of purpose.

4719 Although it has been established that Buzzi participated in the three concerted practices referred to in Article 3(1) of the contested decision (see paragraphs 1819 to 2035 above), it has not been proven that its participation in those concerted practices constituted a sign of its accession to the Cembureau agreement referred to in Article 1 (see paragraphs 4108 to 4113 above). So far as concerns the market for grey cement, the Commission decided, in Article 9, to impose a fine

for participation in the Cembureau agreement alone, rather than to impose, as it could have done, a separate fine for each of the infringements referred to in Articles 1 to 6 (see paragraph 4714; see also recital 65, paragraph 8). Article 9 must therefore be annulled as against Buzzi. Since Buzzi is not concerned by Article 10, which relates to the fines imposed in respect of the finding of an infringement on the market for white cement, there is no longer any need to examine its alternative claims seeking cancellation or reduction of its fine.

4720 The arguments put forward by the other applicants, namely CBR (T-25/95), Ciments Luxembourgeois (T-34/95), Dyckerhoff (T-35/95), Vicat (T-37/95), Ciments Français (T-39/95), Heidelberger (T-42/95), Lafarge (T-43/95), Aalborg (T-44/95), Unicem (T-50/95), Valenciana (T-52/95), Asland (T-55/95), Uniland (T-58/95), Irish Cement (T-60/95), Cimpor (T-61/95), SECIL (T-62/95), Italcementi (T-65/95), Holderbank (T-68/95), Hornos Ibéricos (T-69/95), Aker (T-70/95), EUROC (T-71/95), Cementir (T-87/95), Blue Circle (T-88/95) and Halkis (T-104/95), may be broken down, essentially, into 13 pleas in law or series of pleas:

— inadequate or contradictory statement of reasons in the contested decision as regards the fines;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principle of equal treatment, inasmuch as the Commission imposed a single fine for the group of infringements found in relation to the grey cement market;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principle of proportionality in the assessment of the intentional nature of the infringements;

— infringement of Regulation No 2988/74 on limitation periods;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, the principles of equal treatment and proportionality, and manifest errors of assessment as regards the duration of the infringement found in relation to the grey cement market;

— infringements of Article 15(2) of Regulation No 17 and the principle of proportionality so far as concerns the duration of the infringement found in relation to the white cement market;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, the principles of proportionality and equal treatment, and manifest errors of assessment in assessing the gravity of the infringement found in relation to the grey cement market;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, the principles of proportionality and equal treatment, and manifest errors of assessment in assessing the responsibility of individual undertakings in respect of the infringement found in relation to the grey cement market;

— infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17 and of the principle of proportionality in assessing the responsibility of individual undertakings in respect of the infringement found in relation to the white cement market;

— infringements of Article 15(2) of Regulation No 17, the principles of proportionality and equal treatment, and manifest errors of assessment as regards the turnover taken into account for the purpose of calculating the fines;

— infringements of Article 15(2) of Regulation No 17 and the principles of equity, proportionality and equal treatment in relation to the fixing of the fines in ecus and the choice of conversion rate;

— infringements of various general principles of Community law;

— infringement of rights of the defence owing to incomplete access to the Commission file during the administrative procedure.

4721 Not all of those pleas in law are relied upon by each of the applicants mentioned in the preceding paragraph. When the Court examines each plea it will indicate which applicants have raised it.

I — *Plea alleging inadequate or contradictory statement of reasons in the contested decision as regards the fines*

4722 First, Dyckerhoff, Ciments Français, Heidelberger, Aalborg, Asland, Irish Cement, SECIL, Italcementi, Holderbank, Hornos Ibéricos, Aker, EUROC, Cementir, Blue Circle and Halkis submit that the statement of reasons for the fines in the contested decision is insufficient. The information provided in recital 65 is general, vague and insufficiently detailed. It does not explain the factual or legal considerations, the method or the basis of calculation — in particular the turnover (basis of assessment, year, rate of conversion into ecus) and the rate of the fine — adopted in respect of each undertaking. Italcementi, Holderbank, Hornos Ibéricos and Cementir state that the only information available in that respect comes from the statements made by Mr Van Miert, Member of the Commission responsible for competition policy, at a press conference held on the day on which the contested decision was adopted. Such information does not, however, redress the failure to provide a statement of reasons. Cementir adds that, even in the light of Mr Van Miert's statements, it is impossible for it to discern with precision the factors and calculation criteria used by the Commission when determining the fines. Blue Circle states that the failure to provide reasons cannot be cured by any clarification which the Commission might be called upon to provide at the request of the Court.

4723 The abovementioned applicants claim that, on reading the arguments contained in recital 65 of the contested decision, neither they nor the Court are able to verify whether the fines imposed are lawful, proportionate and non-discriminatory.

4724 Asland adds that the lack of transparency of the contested decision is made yet worse by the fact that the Commission refused to send it the recording of the press conference.

4725 The Court points out that the statement of reasons required by Article 190 of the Treaty, which is an essential procedural requirement within the meaning of Article 173 thereof, must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to which it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Commission* v *Sytraval and Brink's France*, cited in paragraph 469 above, paragraph 63).

4726 Although, in the case of a decision imposing fines on several undertakings or associations for an infringement of Community competition rules, the scope of the duty to state reasons must be assessed *inter alia* in the light of the fact that the gravity of the infringement depends on a large

number of factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, no binding or exhaustive list of the criteria to be applied has been drawn up (*SPO* v *Commission*, cited in paragraph 483 above, paragraph 54). The Commission has a discretion when determining the amount of each fine, and it cannot be required to apply a precise mathematical formula for that purpose.

4727 In the present case, the Commission sets out in recital 65 of the contested decision the factors taken into account in order to determine the amount of the fines.

4728 It explains (paragraphs 1 and 2) the reasons which lead it to consider that the infringements found in relation to the grey cement and white cement markets were committed intentionally within the meaning of Article 15(2) of Regulation No 17.

4729 It explains (paragraph 4) the duration of the infringement taken into account in determining the fines imposed. It specifies the circumstances which lead it to find that some of the addressees of the contested decision participated in the infringement over a shorter period.

4730 It sets forth (paragraphs 5 and 6) the factors taken into account in order to determine the general amount of the fines, having regard to the gravity of the infringement constituted by the Cembureau agreement. It refers to five factors which led it to conclude that the infringement was of particular gravity. It asserts nevertheless that it has taken account of the difficult situation in which the cement industry found itself during the period under consideration.

4731 After summarising, for each addressee of the contested decision, the factors on which it relied in finding its participation in the Cembureau agreement (paragraph 3), the Commission sets out the criteria used to make the amount of the fine imposed on the undertakings reflect their degree of responsibility in respect of that agreement (paragraph 9). On the basis of those criteria, it draws a distinction between two categories of undertaking. The first category includes those which it deems to bear greater responsibility on the ground that they 'participated in the Cembureau agreement or principle through accession to it and/or application of the measures and arrangements agreed to supplement the agreement ... and having direct effects tending to partition home markets' (same paragraph, subparagraph (a)). The second category contains those which 'bear a lesser responsibility' for reasons which the Commission specifies (same paragraph, subparagraph (b)). Each undertaking is allocated to a sub-category defined by the Commission within each of those two categories.

4732 So far as concerns the infringement relating to the white cement market, the Commission states (paragraph 11) that it has taken account of the fact that it was serious as a whole and that all the undertakings concerned played an important role.

4733 The Court finds that, in the light of the facts and the legal assessment put forward in respect of each addressee of the contested decision, recital 65 contains an adequate and relevant explanation of the three factors (intentional or negligent acts; gravity; duration) which Article 15(2) of Regulation No 17 requires to be taken into account when the Commission determines the amount of the fine.

4734 It is indeed desirable that in order to enable undertakings to define their position in full knowledge of the facts they should be able to determine in detail, in accordance with such system as the Commission might consider appropriate, the method of calculating the fine imposed upon them in a decision finding an infringement of the Community competition rules, without their being obliged, in order to do so, to bring court proceedings against the decision (*Tréfilunion* v *Commission*, cited in paragraph 223 above, paragraph 142).

4735 That applies *a fortiori* where, as here, the Commission has used detailed arithmetical formulas to calculate the fines. In such a case it is desirable that the undertakings concerned and, if need be, the Court should be in a position to check that the method employed and the steps followed by the Commission are free of error and compatible with the provisions and the principles applicable in regard to fines, and in particular with the principle of non-discrimination (see, in particular, *Thyssen Stahl* v *Commission*, cited at paragraph 2062 above, paragraph 609).

4736 Such calculations do not, however, constitute an additional *a posteriori* statement of reasons for the contested decision, but merely translate into figures the criteria set out in it that are capable of being quantified (*Thyssen Stahl* v *Commission*, cited at paragraph 2062, paragraph 610, and *PVC*, cited at paragraph 734 above, paragraph 1181).

4737 Pursuant to Articles 64 and 65 of its Rules of Procedure it is for the Court of First Instance to ask the Commission, if the Court considers it necessary in order to examine the applicants' pleas, for specific explanations of the various criteria applied by the Commission and referred to in the contested decision (*PVC*, cited at paragraph 734 above, paragraph 1182).

4738 In the present case, the Court asked the Commission, by a written question in June 1998, to provide it with details of the calculation of the fines imposed on various undertakings to which the contested decision was addressed. In July 1998 the Commission sent the information requested.

4739 Consequently, the Court must reject the applicants' argument that the contested decision did not adequately state reasons concerning the criteria taken into account for the purposes of determining the fine.

4740 Secondly, Aalborg claims that, in the contested decision, the Commission did not answer the argument which it had raised during the procedure as to the time-limit on proceedings in respect of events occurring before 27 November 1986.

4741 However, in recital 65, paragraph 4, of the contested decision, the Commission takes the view that Aalborg participated uninterruptedly from 14 January 1983 onwards in the infringement relating to the Cembureau agreement for which fines are imposed in Article 9, adding that it had no certainty, at the time when the contested decision was adopted, that the infringement had ever ceased. It could not therefore establish a date for the end of the infringement. To its mind, the limitation period laid down in Article 1 of Regulation No 2988/74 (see paragraph 1964 above) had therefore not even begun to run when the contested act was adopted.

4742 Such an analysis rendered it unnecessary for the Commission to answer the specific argument raised by Aalborg in the course of the administrative procedure alleging that events before 27 November 1986 were the subject of a time-bar.

4743 Thirdly, Blue Circle submits that the contested decision fails to identify the conduct for which it was fined. It believes that the fine imposed in Article 9 was imposed in respect of the conduct set out in Articles 2 to 6, including aspects of that conduct which do not concern it.

4744 In that respect, it should be recalled that according to Article 9 of the contested decision the fines were imposed in relation to the grey cement market in respect of the infringement relating to the Cembureau agreement found in Article 1, which, according to the Commission, was put into effect, in particular, by the conduct set out in Articles 2 to 6.

4745 In recital 65, paragraph 3, third subparagraph, (c), 23rd indent, the Commission states that Blue Circle implemented the Cembureau agreement by participating in the agreement relating to the ETF and in the continuous concerted practice of the EPC.

4746 Those contentions, which are moreover established (see paragraphs 4082 to 4088, 4404 and 4405), therefore clearly identify which measures implementing the Cembureau agreement are taken into account in the case of Blue Circle for the purpose of determining the fine imposed on

it in Article 9. They show, furthermore, that a fine was imposed on Blue Circle only in respect of the unlawful conduct with which it is charged.

4747 Fourthly, Halkis expresses surprise that the Commission should hold it responsible in respect of the Cembureau agreement and impose a fine on it on that account, even though the Commission has not cited any unlawful acts by it in 'The Facts'. According to Halkis, that is the result of a last-minute amendment to the contested decision. The Commission thus fined it without having proven its participation in any infringement by reference to the facts found. Halkis relies in that regard on the preliminary draft of the contested decision, which did not provide for a fine to be imposed upon it.

4748 However, it should be observed that Halkis is named both in the 'The Facts' (contested decision, recitals 35 to 37) and in the 'Legal Assessment' (recital 59) with respect to the concerted practice of the EPC referred to in Article 6. In recital 45, paragraph 10, the Commission identifies Halkis as one of the undertakings which participated indirectly in the Cembureau agreement through their involvement in arrangements and measures agreed upon to supplement that agreement and/or assist in its implementation. In recital 65, paragraph 3, third subparagraph, (c), 16th indent, the Commission states that Halkis implemented that agreement by participating in the continuous concerted practice of the EPC.

4749 The Commission therefore clearly sets out in the contested decision the matters of fact and law on the basis of which it holds Halkis responsible for the Cembureau agreement referred to in Article 1 and imposes a fine on it in Article 9.

4750 The fact that no fine on Halkis was provided for in the preliminary draft of the contested decision is totally irrelevant.

4751 The argument put forward by Halkis must therefore be rejected.

4752 It follows from the foregoing that the present plea must be dismissed.

II — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principle of equal treatment, inasmuch as the Commission imposed a single fine for the group of infringements found in relation to the grey cement market*

4753 First, Italcementi states that the Commission did not indicate in the 'Legal Assessment' that it intended to regard the whole of the unlawful conduct found as a single infringement for the purpose of imposing the fine. In its reply, it states that the Commission does not mention, in its defence, any passage of the contested decision indicating that, so far as concerns the grey cement market, the aggregate fine is imposed in respect of an overall infringement.

4754 However, it suffices to point out that recital 65, paragraph 8, of the contested decision states as follows:

'In the case of the group of infringements relating to the grey cement market, the Commission has set ... an aggregate fine on each undertaking in respect of its participation in the Cembureau agreement or principle and in the measures implementing it. Since all these actions are connected, the Commission does not feel it necessary to impose separate fines in respect of the various implementing measures.'

4755 Italcementi's argument must accordingly be rejected.

4756 Secondly, Lafarge, Asland, Italcementi and Blue Circle complain that the Commission imposed upon them a single fine for the group of infringements found in relation to the grey cement market, rather than a separate fine for each infringement found.

4757 Lafarge and Blue Circle claim that the Commission thereby made it impossible for them to determine how much of the fine is attributable to each infringement in which they are alleged to have taken part or to assess the responsibility attributed to them in respect of the various types of conduct at issue. It is therefore impossible for them to check whether the fine imposed on them is appropriate. The Commission has also made it impossible for the Court to check the legality of the fines.

4758 Asland states that, by doing so, the Commission has infringed the principle of equal treatment in holding all the undertakings equally responsible for the infringement, irrespective of the degree of their participation in it.

4759 Italcementi states that the fact of not having imposed a separate fine per infringement infringes the principles of equal treatment and of proportionality. The Commission unfairly penalised addressees of the contested decision which, as in its case, were only charged with attendance at the Cembureau Head Delegates meetings. Moreover, the Commission did not assess Italcementi's responsibility in relation to the actual gravity of only those infringements of which it was accused, the extent of its anti-competitive conduct on the market in question, and its behaviour towards the other parties. The applicant adds that the Commission cannot rely on the single and continuous nature of the infringement referred to in Article 1 in order to justify the imposition of a single fine, since it has suggested that certain infringements did not fall within the scope of single and continuous Cembureau agreement.

4760 The Court points out that according to Article 9 of the contested decision, the fines relating to the grey cement market were imposed 'in respect of the infringement found in Article 1, which was put into effect, in particular, by the conduct set out in Articles 2, 3, 4, 5 and 6'. The grounds for that choice of approach are set forth in recital 65, paragraph 8, cited in paragraph 4754 above.

4761 Under Article 15(2) of Regulation No 17, the Commission may impose a single fine on an undertaking which has committed several infringements (see in particular *Boël* v *Commission*, cited in paragraph 1353 above, paragraph 107, and *Cockerill Sambre* v *Commission*, cited in paragraph 837, paragraph 92), without being required to break down the amount of the fine by reference to each infringement. That is all the more so where the various infringements found are part of a coherent overall strategy (*Tetra Pak* v *Commission*, cited in paragraph 717 above, paragraph 236).

4762 In the present case, the Commission considered that the various items of unlawful conduct referred to in Articles 2 to 6 of the contested decision constituted manifestations by the undertakings in question of adherence to the common rule of non-transhipment to home markets, the object of the Cembureau agreement referred to in Article 1 (see contested decision, recital 46).

4763 Although that claim is unfounded so far as concerns the concerted practice referred to in Article 3(1)(b) (see paragraphs 4040 to 4042 and 4058 above), Buzzi's participation in the concerted practices found in Article 3(1) (see paragraphs 4108 to 4113 above), and the agreements and concerted practices referred to in Articles 4(4) and (5), which are not proven (see paragraphs 3397 to 3679 and 3771 to 3850 above respectively), it has, on the other hand, been found that the infringements in which Lafarge, Asland, Italcementi and Blue Circle took part on the grey cement market were the result of their accession to the Cembureau agreement (see paragraphs 4063 to 4065, 4082 to 4088, 4326, 4327, 4351, 4378, 4379, 4404 and 4405 above).

4764 It was therefore proper to impose an aggregate fine on those applicants in respect of their participation in the Cembureau agreement.

4765 The Commission's approach in Article 9 does not in itself lead to a breach of the principles of proportionality and equal treatment. Nor does it make it impossible for the undertakings concerned to check whether the fines were well founded, or for the Community judicature to carry out a review of legality, because in the present case (see paragraphs 4725 to 4738) the contested decision, read as a whole, provides the information necessary to that end (*Boël* v *Commission*, cited in paragraph 1353 above, paragraph 108).

4766 In view of the foregoing considerations, the pleas examined must be rejected.

III — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principle of proportionality in the assessment of the intentional nature of the infringements*

4767 A number of applicants object that the Commission considered generally that all the undertakings intentionally infringed Article 85(1) of the Treaty, and did not explain in what way each of them was motivated by such an intention when committing the infringements with which they are charged. Some of them put forward arguments aiming to show that their unlawful conduct was not deliberate.

4768 CBR maintains, so far as concerns its participation in the WCC, that it was entitled to believe that that committee's activities were lawful in the light of the approach adopted by the Commission in 1972 in the *Cimbel* case, which related to an overseas export agreement (see paragraph 4619 above).

4769 Ciments Luxembourgeois submits that, in view of the Commission's previous practice, it could not assume that communication of published lists of gross prices could infringe Article 85(1) of the Treaty.

4770 Dyckerhoff states that the Commission has not established that it was guilty of intentional or negligent misconduct. The passages of the contested decision referred to in recital 65, paragraph 2, relate to events in which it took no part or whose interpretation it contests. Dyckerhoff claims that it acted in good faith, without having been aware that the activities of Cembureau or the WCC were unlawful. In its reply, it maintains, as regards its participation in the ETF, that,

since the discussions in which it took part were subject to the condition that they were compatible with the Treaty's provisions on competition, it could legitimately assume that the decisions taken and measures agreed during those discussions were lawful.

4771 Lafarge submits that the conditions laid down by Article 15(2) of Regulation No 17 and the requirement to provide a statement of reasons under Article 190 of the Treaty meant that the Commission was bound to establish, for each infringement, that it had infringed Article 85(1) of the Treaty intentionally or negligently. However, the Commission does not allege negligence and has not proved that the infringements alleged against Lafarge in Articles 1, 3, 6 and 7 of the contested decision were intentional. Lafarge questions in particular the reliability of the documents referred to in recital 19, paragraphs 3 and 5, to which the Commission refers in recital 65, paragraph 2.

4772 Aalborg denies any intentional participation in the infringements.

4773 Unicem submits that its conduct in the agreements and concerted practices referred to in the contested decision cannot be characterised as intentional. It states that the facts found in recital 65, paragraph 2, in establishing the intentional nature of the infringement do not relate to it. It adds that, at the time, neither itself nor any other Italian cement producer had been the subject of competition law proceedings. Moreover, Italian laws on competition were adopted at the end of 1990.

4774 Valenciana claims to have considered, in all good faith, that its participation in the EPC and in the WCC was compatible with Article 85(1) of the Treaty, even after the accession of Spain to the Community. The other members of those committees were the largest European cement producers, whose knowledge of Community competition law was greater than its own.

4775 Asland denies having infringed Article 85(1) of the Treaty intentionally or negligently.

4776 Irish Cement submits that there is no credible evidence that the infringement was committed intentionally by it.

4777 Italcementi asserts that its participation in the infringements relating to the exchange of price information and the activities of the WCC were not intentional. As for the activities of the

WCC, it adds that it was for the Commission to prove such intention, given that the purpose of the conduct in question was exportation outside the Community and that, therefore, its incompatibility with Community competition law was not obvious.

4778 Hornos Ibéricos, in its reply, and Halkis claim that the Commission has not shown that they committed the infringement intentionally or negligently. Hornos Ibéricos cites a sentence from the letter sending the minutes of the EPC meeting of 18 November 1983 to Blue Circle: 'The following concerns intra-European business and I am not sure it should be included in our minutes.' According to Hornos Ibéricos, that sentence, placed back in its economic context, has a meaning contrary to that attributed to it by the Commission.

4779 Aker and EUROC maintain that they did not commit any infringement intentionally. So far as concerns their participation in the ETF, they observe that in 1986 they had no stake or controlling interest in the Community cement industry. In those circumstances, as the case-law stood at the time (see, in particular, *Woodpulp I*, cited in paragraph 1325 above), they had no reason to suspect that their participation in the ETF could bring them within the scope of Article 85(1) of the Treaty. They add that the Commission seeks to reinforce its conclusion that the alleged infringements were intentional by emphasising the covert nature of the activities referred to in the contested decision.

4780 Blue Circle states that its intention in participating in the ETF was solely to set up a 'think tank'. It has not been established that it was aware that the agreement had as its object the restriction of competition. As regards the setting-up of Interciment, it points out that that company remained dormant. Furthermore, several documents show that Interciment would have been the subject of notification to the Commission if a decision had been taken to make it operational. Lastly, as regards the concerted practices referred to in Article 4(3)(a) of the contested decision, it has not been established that Blue Circle was involved in practices which had as their object the prevention, restriction or distortion of competition.

4781 In that regard, the Court points out that, under Article 15(2) of Regulation No 17, 'the Commission may by decision impose on undertakings and associations of undertakings fines of from 1 000 to 1 000 000 ecus, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently ... they infringe Article 85(1) ... of the Treaty'.

4782 In this case, the Commission found that the infringements had been intentional and not merely negligent.

4783 In recital 65, paragraph 2, of the contested decision it states:

'The undertakings ... to which this Decision is addressed intentionally infringed Article 85(1). The infringements are expressly covered by Article 85(1). Although fully aware of the prohibition laid down by Community law and the risk of having substantial fines imposed on them (see in particular recital 19, paragraphs 3 and 5, recital 21, paragraph 2, recital 25 and recital 26), they intentionally adopted, within the framework of Cembureau and a system of bilateral or multilateral meetings and contacts and within the framework of the three export committees, measures and arrangements aimed at ensuring non-transhipment to home markets, the sharing of markets and the exchange of information. The infringements were therefore such as to thwart a basic principle of the common market, namely the removal of obstacles to the free movement of goods.'

4784 It is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally. It is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, paragraph 41, and *Ferriere Nord* v *Commission*, cited in paragraph 779 above, paragraph 41).

4785 In the present case, the infringements in respect of which fines have been imposed under Articles 9 and 10 of the contested decision relate to agreements or concerted practices whose object was to ensure the protection and partitioning of home markets. The undertakings could not therefore have been unaware that their participation in such agreements or concerted practices, which are moreover expressly referred to in Article 85(1)(c) of the Treaty, aimed to prevent, restrict or distort competition within the Community.

4786 It follows that the Commission was entitled, having provided adequate reasons, to conclude in recital 65, paragraph 2, of the contested decision that the infringements in question were intentional.

4787 Accordingly, the present pleas must be rejected.

IV — *Plea alleging infringement of Regulation No 2988/74 on limitation periods*

4788 The arguments alleging that events relating to the infringements found in relation to the white cement market (Article 7 the contested decision) are time barred were examined in paragraphs 4670 to 4674 above. A number of applicants maintain that the power to impose fines in respect of the infringements found in relation to the grey cement market was time barred, in whole or in part, by virtue of Regulation No 2988/74.

4789 First of all, Dyckerhoff, Heidelberger and Italcementi state that the decision ordering the investigations was notified to them in April 1989. All the events which took place before April 1984 are therefore time barred pursuant to Article 1(1)(b) of Regulation No 2988/74. Article 9 of the contested decision should therefore be annulled in so far as it imposes a fine on them in respect of those events.

4790 Lafarge states that the infringement referred to in Article 1 of the contested decision is time barred, having regard to Article 1(1)(b) of Regulation No 2988/74. The Commission has not established that that infringement continued beyond 1983. Lafarge adds that it is not for the accused undertakings to prove that the infringement was brought to an end, otherwise the burden of proof would be reversed, contrary to the fundamental principles of the law of evidence common to all the Member States and contrary to Article 6(2) and (3) of the ECHR.

4791 In that regard, the Court points out that Article 1(1) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of Article 85(1) of the Treaty. Pursuant to Article 1(2) of that regulation, the period begins to run on the day on which the infringement is committed; however, in the case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases.

4792 Under Article 2 of the regulation, any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement (for example, decisions ordering an investigation, requests for information or notification of the Commission's statement of objections) interrupts the period and each interruption starts time running afresh.

4793 In the present case, the infringement in respect of which fines are imposed in Article 9 of the contested decision is the infringement found in Article 1. It has been found that Dyckerhoff participated continuously in that infringement from 14 January 1983 to 7 November 1988 (see paragraph 4308 above), Heidelberger from 14 January 1983 to 12 August 1987 (see paragraph 4324 above), Lafarge from 14 January 1983 to 19 May 1989 (see paragraph 4328 above) and Italcementi from 19 March 1984 to 3 April 1992 (see paragraph 4380 above).

4794 Having regard to the investigations undertaken by the Commission into the applicants between April 1989 and July 1990, the requests for information sent to them and the notification of the SO in November 1991, the power of the Commission to fine them for their participation in the infringement committed on the grey cement market was not time barred when the contested decision was adopted.

4795 The applicants' arguments must therefore be rejected.

4796 Secondly, Aalborg claims that it did not receive any requests for information from the Commission and was not the subject of any investigations under Articles 11 and 14 of Regulation No 17. The procedure, in so far as it was concerned, was initiated with the dispatch of the SO, which it received on 27 November 1991. Pursuant to Articles 1 and 2 of Regulation No 2988/74, a fine could not therefore have been imposed upon it, since the most recent evidence of its participation in the unlawful acts dated from 9 September 1986 (the Head Delegates meeting in Baden-Baden), more than five years before receiving the SO.

4797 However, it has been found that Aalborg participated continuously from 14 January 1983 to 31 December 1988 in the infringement in respect of which fines were imposed in Article 9 of the contested decision (see paragraph 4332 above). It is sufficient to observe that the limitation period was in any event interrupted in November 1991, when the SO was notified to Aalborg, and there is no need to rule on the correctness of the applicant's arguments that the investigations carried out into certain undertakings to which the contested decision was addressed did not interrupt the limitation period as against it. Pursuant to Articles 1 and 2 of Regulation No 2988/74, the power of the Commission to fine Aalborg for its participation in the infringement was therefore not time barred when the contested decision was adopted.

4798 Aalborg's argument must therefore be rejected.

4799 Thirdly, Unicem states that the decision ordering investigations, which interrupted the limitation period in its regard, was taken on 24 October 1989. The unlawful conduct of which it is accused before 24 October 1984 is therefore time barred, pursuant to Article 1(1)(b) of Regulation No 2988/74.

4800 However, it has been found that Unicem's participation in the infringement for which fines are imposed in Article 9 of the contested decision was not established before 9 September 1986 (see paragraphs 4243 to 4247 and 4338 above). Examination of its argument has therefore become pointless.

4801 Fourthly, Cementir claims that the events relating to the Head Delegates meetings of 14 January 1983 and 7 November 1984, in which it took part, are time barred under Regulation No 2988/74. It observes next that the only Head Delegates meeting in which it participated, and in which price information was exchanged, was that of 14 January 1983. The duration of the infringement referred to in Article 2(1) of the contested decision was therefore no more than one day in so far as it is concerned. The allegations against it in that regard are accordingly time barred.

4802 However, it should be borne in mind that Cementir's participation in the unlawful practices arising at the Head Delegates meetings of 14 January 1983 and 7 November 1984 follows from its continuous participation between 14 January 1983 and 3 April 1992 in the infringement found in Article 1 of the contested decision (see paragraph 4401 above), in respect of which a fine was imposed on it in Article 9. Under Regulation No 2988/74, the power of the Commission to impose that fine upon it was not time barred when the contested decision was adopted. Cementir's argument must therefore be rejected.

4803 It follows from the foregoing that the plea must be dismissed.

V — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principles of equal treatment and proportionality, and manifest errors of assessment as regards the duration of the infringement found in relation to the grey cement market*

4804 All the applicants mentioned in paragraph 4720 above submit that the Commission has not correctly assessed the duration of their unlawful conduct when it determined the fines in Article 9 of the contested decision.

4805 Asland, Italcementi and Uniland dispute the date taken for them as the commencement of the infringement.

4806 They complain in particular that the Commission did not take into account the duration of their participation in the infringements found in Articles 2 to 6 of the contested decision. They were arbitrarily held responsible for the infringement until 26 March 1993. Some of them claim that that date is irrelevant to them. Unicem, Italcementi, Holderbank and Blue Circle state that it relates to the formal dissolution of Interciment by Holderbank, its sole shareholder. It does not therefore have any bearing on the duration of the infringements found in the contested decision. Valenciana, Irish Cement, Cimpor, SECIL and Hornos Ibéricos claim that the infringement relating to the setting-up of Interciment has not been attributed to them. Cementir states that it took no part in the agreement on the setting-up of Interciment. Moreover, that agreement was,

at most, a measure implementing the ETF, which had nothing to do with the structure and activities of Cembureau.

4807 The applicants request that the amounts of their fines be reduced in line with the actual duration of their participation in the infringement.

4808 In that respect, the Court points out that, so far as concerns the grey cement market, the undertakings were fined in respect of their participation in the infringement found in Article 1 of the contested decision, namely the Cembureau agreement.

4809 In recital 65, paragraph 4, first subparagraph, the Commission states that '[that] infringement was of long duration'.

4810 It takes the view that that infringement commenced on 14 January 1983 (same paragraph, second subparagraph). That date is the date of the Head Delegates meeting during which the Cembureau agreement was concluded. For the reasons set out in the third subparagraph of the abovementioned paragraph, the Commission none the less finds that some of the applicants mentioned in paragraph 4720 above participated in the infringement with effect from an earlier date. The starting date for Asland, Hornos Ibéricos, Uniland, Valenciana, Cimpor and SECIL is thus found to be 1 January 1986, for Holderbank 28 May 1986, and for Aker and EUROC 9 June 1986.

4811 While the Commission is able to establish the date on which the infringement constituted by the Cembureau agreement commenced, it has no certainty that the infringement ever really ceased. It could not therefore establish a date for the ending of the infringement. Since the final apparent manifestation of the Cembureau agreement known to it was the liquidation of Interciment on 26 March 1993, it used that date for determining the reference period for the purpose of determining the fines (fourth subparagraph).

4812 In recital 65, paragraph 10, it states that when determining the amount of their fine it took account of the fact that Asland, Hornos Ibéricos, Uniland, Valenciana, Cimpor, SECIL, Holderbank, Aker and EUROC participated in the infringement over a shorter period.

4813 It is apparent from the particulars which it forwarded to the Court in July 1998 (see paragraph 4738 above) that it calculated the duration of the infringement in months. The undertakings which, in its view, participated in the Cembureau agreement throughout the reference period,

that is to say from 14 January 1983 to 26 March 1993, were thus held responsible for the infringement for a duration of 122 months. The duration of the infringement committed by Asland, Hornos Ibéricos, Uniland, Valenciana, Cimpor and SECIL was fixed at 86.5 months, that by Holderbank at 82 months, and by Aker and EUROC at 81.5 months.

4814 The infringement in question is established:

— as against CBR, from 9 June 1986 to 7 November 1988 (see paragraph 4288 above), that is to say for a period of 29 months;

— as against Ciments Luxembourgeois, Aalborg and Irish Cement, from 14 January 1983 to 31 December 1988 (see paragraphs 4304, 4332 and 4365 above), that is to say for a period of 71.5 months;

— as against Dyckerhoff, from 14 January 1983 to 7 November 1988 (see paragraph 4308 above), that is to say for a period of 70 months;

— as against Vicat, from 11 May 1983 to 23 April 1986 (see paragraph 4316 above), that is to say, for a period of 35.5 months;

— as against Ciments Français, from 14 January 1983 to 17 February 1989 (see paragraph 4320 above), that is to say, for a period of 73 months;

— as against Heidelberger, from 14 January 1983 to 12 August 1987 (see paragraph 4324 above), that is to say, for a period of 55 months;

— as against Lafarge, from 14 January 1983 to 19 May 1989 (see paragraph 4328 above), that is to say, for a period of 76 months;

— as against Unicem, from 9 September 1986 to 3 April 1992 (see paragraph 4341 above), that is to say, for a period of 67 months;

— as against Valenciana, from 1 January 1986 to 13 May 1987 (see paragraph 4344 above), that is to say, for a period of 16.5 months;

— as against Asland, from 28 May 1986 to 31 May 1987 (see paragraph 4352 above), that is to say, for a period of 12 months;

— as against Uniland, from 9 September 1986 to 7 November 1988 (see paragraph 4357 above), that is to say, for a period of 26 months;

— as against Cimpor and SECIL, from 1 January 1986 to 24 April 1989 (see, respectively, paragraphs 4368 and 4371 above), that is to say, for a period of 40 months;

— as against Italcementi, from 19 March 1984 to 3 April 1992 (see paragraph 4380 above), that is to say, for a period of 96.5 months;

— as against Holderbank, from 28 May 1986 to 7 November 1988 (see paragraph 4384 above), that is to say, for a period of 29.5 months;

— as against Hornos Ibéricos, from 1 January 1986 to 19 May 1989 (see paragraph 4387 above), that is to say, for a period of 40.5 months;

— as against Aker and EUROC, from 9 June 1986 to 7 November 1988 (see, respectively, paragraphs 4393 and 4397 above), that is to say, for a period of 29 months;

— as against Cementir, from 14 January 1983 to 3 April 1992 (see paragraph 4401 above), that is to say, for a period of 110.5 months;

— as against Blue Circle, from 18 November 1983 to 7 November 1988 (see paragraph 4406 above), that is to say, for a period of 59.5 months;

— as against Halkis, from 18 November 1983 to 1 September 1986 (see paragraph 4416 above), that is to say, for a period of 33.5 months.

4815 The fines imposed on those applicants must therefore be reduced accordingly (see paragraph 5115 below), bearing in mind that, with regard to each of them, the fine will be related to the proportion of the total duration of 122 months represented by the actual duration of their participation, in accordance with the method of calculation applied by the Commission to addressees of the contested decision which were not found by it to have participated throughout the reference period.

VI — *Pleas alleging infringements of Article 15(2) of Regulation No 17 and the principle of proportionality so far as concerns the duration of the infringement found in relation to the white cement market*

4816 Dyckerhoff complains that the Commission has not assessed the duration of the infringement committed by each undertaking for the purposes of determining the fines in Article 10 of the contested decision.

4817 None the less, Dyckerhoff does not put forward, in support of its complaint, any argument such as to rebut the Commission's finding that it participated in the infringement committed on the white cement market throughout the period found in Article 7 of the contested decision, namely from 6 May 1982 to 26 May 1988. The Commission was therefore entitled to take that period as the duration of the infringement when determining the fine.

4818 Ciments Français states that it resigned from the WCC in October 1988.

4819 However, the infringement on the white cement market in respect of which a fine was imposed was found to have continued until 26 May 1988 (contested decision, Article 7 and recital 65, paragraph 4, last subparagraph). The argument put forward by Ciments Français is therefore irrelevant.

4820 In conclusion, the pleas examined must be dismissed.

VII — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and principles of proportionality and equal treatment as well as manifest errors of assessment in assessing the gravity of the infringement found in relation to the grey cement market*

4821 A number of the applicants contest the matters set out by the Commission in recital 65, paragraph 5, of the contested decision in support of its allegation that the infringement associated with the Cembureau agreement was of particular gravity. One argument concerns the mitigating circumstance referred to in recital 65, paragraph 6. Some applicants invoke circumstances which the Commission allegedly ignored when it assessed the gravity of the infringement.

The aggravating circumstances found in recital 65, paragraph 5, of the contested decision

4822 In recital 65, paragraph 5, of the contested decision the Commission states:

'In determining the general amount of the fines, the Commission has taken account of the fact that the infringement constituted by the Cembureau agreement or principle and by the various actions implementing it is of particular gravity, warranting substantial fines, for the following reasons:

— the collusion on market-sharing and the associated exchange of information is in itself a very serious restriction of competition;

— the cement market is a basic industrial sector that is highly important to the building and construction industry and to the economy in general;

— the undertakings and associations of undertakings participating in the infringements account for virtually the whole of the Community cement market, in which there are moreover no new market entrants;

— the collusion was institutionalised in a system of international organisations or bilateral or multilateral meetings or contacts designed to regulate and organise the cement market;

— despite the fact that the collusion took place within an institutional framework that also had legitimate objectives, the undertakings took care, in the case of conduct that might infringe the competition rules, to shroud their actions and/or decisions in secrecy (see in particular recitals 19 and 24 to 28). Although there was discussion of notifying certain practices to the Commission, such notification did not take place (see recital 26).'

4823 In the first place, Lafarge criticises the Commission for having unreasonably extended the gravity of the infringement to matters outside its proper scope. The considerations in recital 65, paragraph 5, of the contested decision, assuming they are correct, concern only the main infringement referred to in Article 1. They cannot be applied to the measures implementing it.

4824 In that respect, it should be recalled that, as regards the grey cement market, the fines were imposed in respect of the infringement found in Article 1 of the contested decision. The aggravating circumstances referred to in recital 65, paragraph 5, therefore refer specifically to that infringement. Moreover, Lafarge does not provide, in the context of that argument, any evidence to support its claim that those aggravating circumstances should not be applied to the implementation of that infringement. Its argument must therefore be rejected.

4825 Secondly, Lafarge disputes the Commission's assertion that the cement market is a basic industrial sector that is highly important to the building and construction industry (contested decision, recital 65, paragraph 5, second indent). It asserts that, in terms of value, that market represents only a minute percentage.

4826 However, it cannot be reasonably disputed that cement is an essential product for the building industry and, consequently, for the economy in general. Lafarge's argument must therefore be rejected.

4827 Thirdly, Blue Circle maintains that there is no evidence to support the claim that the undertakings and associations of undertakings which participated in the infringement represented practically the whole of the Community cement market. Rather, such an assertion is undermined by the fact that the Commission dropped the objections which it had raised against 18 European cement producers (contested decision, recital 4, paragraph 1).

4828 Nevertheless, the infringement associated with the Cembureau agreement involved the main European cement producers, all the trade associations representing the Community markets, and Cembureau, the European association. The Commission was therefore entitled to take the view that the undertakings and associations of undertakings which participated in that infringement represented 'virtually the whole of the Community cement market' (contested

decision, recital 65, paragraph 5, third indent). Accordingly, Blue Circle's argument must be rejected.

4829 Fourthly, Cementir contests the allegation that the collusion was institutionalised in a system of international organisations. It states that the trade organisations to which it belonged did not pursue an anti-competitive object.

4830 The Court points out, however, that Cementir, as a direct member of Cembureau, attended the Head Delegates meetings of 14 January 1983 and 7 November 1984, during which the Cembureau agreement was adopted. It took part, in the context of the agreement relating to the ETF, in the collective strategy designed to eliminate imports into Western Europe, in particular those from Greece. It participated from 1984 to 1988 in the system of periodic circulation of the price lists set up at Cembureau level, with a view to facilitating the implementation of the Cembureau agreement. It follows that the aggravating circumstance based on the institutionalised nature of the collusion applies to it.

4831 Blue Circle argues that the Commission has preserved the superficial appearance of a structural cartel after jettisoning the national objections and the objections relating to the 'Euro-British' contracts.

4832 That argument cannot be accepted. The Court's examination of the contested decision has shown that, despite the dropping of those objections, the Commission established the institutionalised nature of the collusion on implementation in which Blue Circle participated, with respect to the grey cement market, in the framework of the ETF and the EPC.

4833 Fifthly, Lafarge, Aker and EUROC deny that there was any plan to dissimulate. Lafarge points to the negotiations from 1973 with the Commission, in particular on the matter of the basing point system. It states also that the actions undertaken when the problem of imports of cement from Greece arose were the result of political steps which aimed precisely to raise the Commission's awareness of that problem. Aker and EUROC claim that the undertakings concerned had no reason to conceal their actions, since they did not realise that they were infringing Article 85(1) of the Treaty. In their view, the Commission's contention is also contradicted by the mass of documents gathered during its investigations.

4834 Unicem states that the arguments put forward by the Commission in recital 65, paragraph 5, fifth indent, of the contested decision to illustrate the desire of the parties to keep their actions secret do not apply to it.

4835 Cementir argues that there is no evidence to show the existence of a desire to dissimulate on its part.

4836 It should be pointed out that at the Head Delegates meeting of 14 January 1983, Aker, EUROC and Cementir shared the common intention of the participants to shroud the conclusion of the Cembureau agreement in secrecy (see paragraph 976 above).

4837 Lafarge, Unicem, Aker and EUROC participated in the agreement setting up the ETF and in measures to defend the Italian market. Those various measures were designed to eliminate destabilising imports into Western Europe, in particular those from Greece. Although it had been suggested, when the Zurich/Céligny document was drawn up, that the Commission should be notified of the collective actions planned to that end (contested decision, recital 25, paragraph 7; document 33.126/18779), none of the undertakings has been able to establish that that was the case for the abovementioned measures.

4838 Lafarge, Aker and EUROC were also party to the agreement setting up Interciment. Although various legal opinions recommended its notification to the Commission on account of its manifestly unlawful object, no such notification was ever made (see paragraph 2984 above).

4839 It follows from the foregoing that the Commission was justified in finding that the aggravating circumstance of the intention to conceal the infringements also applied to Lafarge, Unicem, Aker, EUROC and Cementir.

The mitigating circumstance found in recital 65, paragraph 6, of the contested decision

4840 In recital 65, paragraph 6, of the contested decision, the Commission states:

'In determining the amount of the fines, the Commission has taken account of the fact that the Community undertakings had, during the period in question, to cope with a sudden increase in cement imports at a time when the Community industry was having difficulty in overcoming the bad economic situation.'

4841 Lafarge claims not to be able to determine the impact of that attenuating circumstance on the calculation of the fine imposed upon it.

4842 That argument must be rejected. When determining the fines, the Commission is not required to quantify the various factors which it takes account of in assessing the gravity of the infringement.

Failure to take account of certain mitigating circumstances

A — Size and influence on the market of the offending undertaking

4843 Vicat, Uniland, Irish Cement, Cimpor, SECIL, Hornos Ibéricos and Cementir claim that the Commission did not take account of the fact that their influence on the market was limited because of their size, market share and low turnover.

4844 Placing reliance on *Boël* v *Commission*, cited in paragraph 1353 above (paragraph 131), Vicat adds that it is a family undertaking and does not belong to a powerful economic entity. Irish Cement states that it does not control, nor is it controlled by, any other European undertaking. Cementir states that it does not maintain any links with production units located in other countries.

4845 The Court points out that the factors to be taken into consideration when assessing the gravity of an infringement may include the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market (see *Musique Diffusion Française and Others* v *Commission*, cited in paragraph 439 above, paragraphs 120 and 129, and *IAZ and Others* v *Commission*, cited in paragraph 1320 above, paragraph 52).

4846 In the present case, it is clear from the information submitted to the Court by the Commission (see paragraph 4738 above) that it imposed on the undertakings a fine calculated on the basis of their turnover. It is moreover clear from that information that the fines imposed on Vicat, Uniland, Irish Cement, Cimpor, SECIL, Hornos Ibéricos and Cementir were calculated on the basis of their own turnover, whereas the fines imposed on undertakings which headed a group during the period in question were calculated on the basis of their consolidated turnover. The fines imposed on the undertakings thus reflect their size, economic power and, consequently, their influence on the market.

4847 The nature of the shareholding is of no relevance to assessing the gravity of the infringement committed by an undertaking for the purpose of determining its fine.

4848 Finally, in *Boël* v *Commission*, cited in paragraph 1353 above, relied upon by Vicat, the Court merely corrected the unequal treatment suffered by the undertaking in question in comparison with undertakings which, although not belonging to any less economically powerful entity than that to which that undertaking belonged, were given the benefit of a mitigating circumstance based on the fact that their unlawful conduct had had a limited impact on competition because they did not belong to a powerful economic entity (see paragraphs 131 and 132 of the judgment). Vicat cannot therefore rely on that judgment in order to argue that the Commission disregarded the principles laid down in the case-law by not reducing its fine on the ground that it did not belong to a powerful economic entity.

4849 In conclusion, the arguments of the applicants must be rejected.

4850 Ciments Luxembourgeois is of the view that the amount of the fine imposed upon it is totally unfair, inasmuch as its turnover in 1991 amounted to LUF 1 764 000 000

4851 None the less, that argument must be rejected on the grounds set out in paragraph 4846 to the extent that it consists in objecting that the Commission imposed on Ciments Luxembourgeois a fine that was disproportionate in view of its low turnover.

B — Absence or minor impact of the anti-competitive effects of the infringements

4852 Some applicants complain that the Commission did not take account of the absence or at least the minor impact of the anti-competitive effects, whether actual or potential, of the unlawful conduct of which they are accused.

4853 Vicat states that the anti-competitive effect of the concerted practice referred to in Article 3(1)(c) of the contested decision was minimal in view of the unrepresentativeness of the two undertakings in question, on the one hand, and the limited nature of its sales in the geographical area concerned by its disputed contacts with Buzzi, on the other. It criticises the Commission for not having carried out an analysis of the market and of the extent to which competition on the south of France regional market was affected.

4854 Aalborg and Italcementi criticise the Commission for not having taken account of the fact that their participation in the infringement did not have any effect on the market. Italcementi adds that, in view of the nature of the Italian market and its own conduct, the Cembureau agreement would have been of the same nature, extent, duration and would have had the same effects as those described in the contested decision if the Commission had not found that Italcementi had participated in it.

4855 Unicem criticises the Commission for not having acknowledged that its conduct had not caused any damage to consumers. Its conduct did not prevent the continuing growth of imports into Italy of cement from Greece between 1986 and 1991.

4856 Asland states that the contested decision does not contain any passage on the actual effects of the infringement found. It complains that the Commission did not examine those effects, thereby depriving itself of a significant factor on the basis of which to assess the gravity of the actions in question. Such an analysis, it is claimed, would have led the Commission to find that intra-Community trade in cement had increased since 1985.

4857 Irish Cement maintains that its involvement in the exchange of price information referred to in the contested decision had no impact on competition within the Community.

4858 Cimpor complains that the Commission did not compare the actual effects of its participation in the infringement with those resulting from the participation of the other undertakings involved.

4859 SECIL criticises the Commission for not having taken account of the actual effects of its participation in the infringement.

4860 Cementir claims that the Commission, in omitting to take account of the special features of the cement market, did not establish that by the very nature of the competition which existed on that market any restrictive effects which could have arisen from the infringements found would necessarily have been marginal, limited to a reduction in any trade there might have been in the border areas between regional markets.

4861 Blue Circle complains that the Commission did not take account of the fact that during the period of the infringement intra-Community trade flows increased significantly and that

imports of cement into the United Kingdom rose despite the fact that there were substantial constraints, unrelated to any unlawful conduct, on imports of cement into the United Kingdom.

4862 The Court points out that, in order to find that an agreement is contrary to Article 85(1) of the Treaty, it is not necessary to establish that the agreement in question had an anti-competitive effect. A finding that the agreement pursued an anti-competitive object is sufficient for it to be declared contrary to Article 85(1) of the Treaty (see the case-law cited in paragraph 837 above).

4863 So far as concerns fines, the assessment of the effects of an infringement may be relevant where the Commission takes precisely such effects into account when determining the gravity of the infringement in question, and does not succeed in proving them or providing good reasons for taking them into account.

4864 In the present case, it should be observed that in recital 65, paragraph 5, of the contested decision the Commission does not rely on the fact that the Cembureau agreement led to anti-competitive effects in finding that it was particularly serious. It points out, correctly, that the collusion on market-sharing and the associated exchange of information is in itself a very serious restriction of competition (recital 65, paragraph 5, first indent).

4865 It is true that it is clear from recital 65, paragraph 9, that in order to assess the respective responsibilities of the undertakings concerned the Commission relied in particular on the effects of the measures by means of which they had implemented the Cembureau agreement. It thus placed the heaviest burden of responsibility on those undertakings which had taken part in measures 'having direct effects tending to partition home markets' (same paragraph, (a)). On the other hand, it deemed less serious the responsibility of those undertakings which participated only in the measures designed to channel production surpluses to third countries, on the ground that such measures had 'less direct effects on the protection of home markets' (same paragraph, (b), first indent).

4866 The latter considerations cannot, however, be regarded as an analysis of the anti-competitive effects observed as a result of the infringement which the Commission ought to have substantiated with specific details. They are the result of a theoretical assessment, which is not contested by the parties, of the effects on competition potentially linked to those two types of measure.

4867 The arguments of the parties must therefore be rejected.

C — Conduct on the market during the period in question

4868 Vicat criticises the Commission for not having taken account of its independent commercial strategy, centred in particular around the development of a product which it alone produces: 'Prompt'.

4869 However, that does not prove that Vicat sought to abstain from implementing the Cembureau agreement during the period between 11 May 1983 and 23 April 1986 during which it acceded to it by way of its participation in the concerted practice found in Article 3(1)(c) of the contested decision (see paragraph 4316 above). Its argument must be rejected.

4870 Asland criticises the Commission for not having accorded any importance in the contested decision to its competitive conduct during the period in question. It refers to the tables which show the constant increase, between 1985 and 1991, of trade in cement between Spain and the other Community countries. It also points to its shareholding in Hispacement, a joint subsidiary belonging to several Catalan producers seeking to promote trade in cement outside the Catalan market.

4871 It should be recalled that Asland's participation in the Cembureau agreement is only established between 28 May 1986 and 31 May 1987 (see paragraph 4352 above). Therefore, Asland's contentions relating to the period prior to 28 May 1986 and that subsequent to 31 May 1987 are now irrelevant.

4872 In addition, the overall data indicating a constant increase from 1985 in cement exports from Spain to other Community countries do not prove that Asland had itself adopted a competitive mode of conduct on the market.

4873 Finally, the Cembureau agreement did not prohibit all intra-Community trade in cement. It was designed to prevent only 'random' exports capable of destabilising the markets. It did not exclude traditional or even structural exports (see paragraph 1121 above).

4874 In such a context, the circumstances put forward by Asland cannot be interpreted as establishing its desire not to implement the Cembureau agreement during the period in which it adhered to it.

4875 Asland's argument must therefore be rejected.

4876 Cementir criticises the Commission for having systematically failed to take account of the policy which it had actually followed on the market during the period in question. Moreover, the Commission did not show that Cementir's policy arose out of the agreements or concerted practices found. Thus, its participation in the agreements concluded with Calcestruzzi did not and could not have had the least effect on imports of cement from Greece, which had grown appreciably since 1987.

4877 However, Cementir does not produce, in support of its argument, any evidence that it intended to refrain from implementing the Cembureau agreement between 14 January 1983 and 3 April 1992 when it acceded to the agreement. The appreciable increase in imports into Italy of cement from Greece cannot be deemed to reveal a desire on its part to distance itself from that agreement (see paragraph 4401 above). At most, it signifies that the measures to implement it, in which Cementir participated, as found in paragraphs 3283 to 3290 and 3343 to 3396 above, following the advent of the problem relating to imports of Greek cement into Western Europe, did not produce the anticipated effects on the Italian market. Cementir's argument must, accordingly, be rejected.

D — No benefit from the infringement

4878 Vicat and Ciments Français criticise the Commission for not having taken account of the fact that they derived no benefit from the infringements of which they are accused.

4879 Lafarge states that the Commission did not take account of the rules which it had itself, laid down specifically in its *Twenty-first Report on Competition Policy*, under which any financial advantage gained by undertakings from an infringement was in the future to be a determining factor when calculating the amount of their fine.

4880 Irish Cement criticises the Commission for failing to establish or not even seeking to prove that it had derived or attempted to derive any benefit from its unlawful activities.

4881 However, the fact that an undertaking did not benefit from an infringement cannot preclude the imposition of fines, since otherwise they would cease to have a deterrent effect (see T-143/89 *Ferriere Nord* v *Commission*, cited in paragraph 779 above, paragraph 53). It follows that the Commission is not required, in order to determine fines, to establish that the infringement

brought about an unlawful advantage for the undertakings concerned, nor to take into consideration any lack of benefit from the infringement.

4882 Assessment of the unlawful gains from the infringement may be relevant if the Commission bases itself precisely on such gains in order to assess the gravity of the infringement and/or to calculate the fine.

4883 However, that is not the case here. In recital 65, paragraph 5, of the contested decision, the Commission does not rely on the existence of a profit linked to the Cembureau agreement in concluding that that infringement is particularly serious. As has been pointed out (see paragraph 4846 above), it calculated the fines on the basis of the turnover of the undertakings concerned.

4884 So far as Lafarge is concerned, it should further be pointed out that in its *Twenty-first Report on Competition Policy* the Commission stated (p. 120):

'In assessing the fine, the Commission takes into account all the relevant facts of the case. The financial benefit which companies infringing the competition rules have derived from their infringements will become an increasingly important consideration. Wherever the Commission can ascertain the level of this ill-gotten gain, even if it cannot do so precisely, the calculation of the fine may have this as its starting point. When appropriate, that amount could then be increased or decreased in the light of the other circumstances of the case, including the need to introduce an element of deterrence or penalty in the sanction imposed on the participating companies.'

4885 That does not mean that the Commission has now taken it upon itself to establish in every case, for the purpose of determining the fine, the financial advantage linked to the infringement found to have been committed. It only shows its intention to take that factor more into account and to use it as a basis for calculating fines, where it is able to assess it, even if it cannot do so precisely. However, that was not the case here.

4886 In the light of the foregoing considerations, the arguments put forward by Vicat, Lafarge and Irish Cement must be rejected.

E — The state of the cement market during the period in question

4887 Irish Cement claims that it was itself the victim of serious dumping on its domestic market by exporters from non-member countries from 1982 to 1986, which led it to complain to the

Commission. Hornos Ibéricos criticises the Commission for not having taken account of the general situation of the cement market during the period in question.

4888 In that respect, the Court points out that in recital 65, paragraph 6, of the contested decision the Commission states: 'In determining the amount of the fines, the Commission has taken account of the fact that the Community undertakings had, during the period in question, to cope with a sudden increase in cement imports at a time when the Community industry was having difficulty in overcoming the bad economic situation.'

4889 In reply to a request to clarify that statement in the course of proceedings, the Commission explained (reply of 6 July 1998 to a written question from the Court):

'[T]he allusion in recital 65(6) of the decision to a "sudden increase in cement imports" refers to imports from non-member countries. During the period of the infringement there were in particular considerable imports from Tunisia, Turkey and Romania, in respect of which anti-dumping complaints were submitted.'

4890 At the hearing, Irish Cement explained that it was referring to imports from East Germany and Spain.

4891 In that regard, it must be observed that the Commission's explanations show that the examples of imports from Tunisia, Turkey and Romania are indicative rather than exhaustive.

4892 Furthermore, since a decision constitutes a single whole, each of its parts must be read in the light of the others (see Cases T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 66, and Case T-49/95 *Van Megen Sports Group* v *Commission* [1996] ECR II-1799, paragraph 51). The considerations set forth in recital 65, paragraph 6, of the contested decision must thus be read in the light of the explanations contained in 'The Facts', which mention the problems caused by imports from East Germany and Spain during the period referred to by Irish Cement (see recital 18, paragraphs 2 and 3, and recital 19, paragraphs 9 and 10).

4893 In the light of the foregoing, the arguments put forward by Irish Cement and Hornos Ibéricos must be rejected.

F — Self-defence

4894 Ciments Français, Lafarge, Unicem, Hornos Ibéricos and Blue Circle criticise the Commission for not having taken account of the fact that the measures against imports of cement from Greece were taken in legitimate self-defence as a reaction to the conditions of unfair competition in which such importation took place. They criticise the Commission for its inertia and the ineffectiveness of its actions with regard to the aid granted at the time by the Greek authorities to their cement industry.

4895 Ciments Français, Unicem and Hornos Ibéricos rely on *AITEC and Others* v *Commission*, cited in paragraph 2554 above, as support for their arguments that the Commission failed to analyse correctly the effects of the importation of cement from Greece. The Commission thus misassessed the difficulties created by such illegally subsidised imports.

4896 In that respect, and in addition to what is set out in paragraphs 2556 to 2559 above, it should be recalled that, so far as concerns the grey cement market, in Article 9 of the contested decision a fine was imposed on those applicants in respect of their participation in the Cembureau agreement, which was an agreement designed to ensure non-transhipment to home markets and to regulate cement transfers from one Community country to another (see paragraph 1085 above).

4897 Their involvement in that infringement consisted, in whole or in part, in unlawful conduct that was totally unrelated to the problem concerning the importation of low-cost cement from Greece, or whose scope was not restricted to that problem.

4898 Unicem participated in the periodic exchange of price information designed to facilitate the implementation of the Cembureau agreement (Article 2(2)). Lafarge participated in a concerted practice with Buzzi involving the sharing of the market in southern France (Article 3(1)(a)). Ciments Français and Lafarge were involved in agreements and concerted practices concerning the regulation of cement supplies between France and Germany (Article 3(3)(a)). Ciments Français, Lafarge, Hornos Ibéricos and Blue Circle participated in the continuous concerted practice of the EPC relating to the examination of the situation on Community markets, the sharing of third-country markets, the setting of prices for products intended for overseas export, the exchange of individualised data on export availabilities and on actual exports to third countries, which aimed to prevent incursions by competitors into each national market in the Community (Article 6).

4899 Although the measures adopted in the context of the agreement relating to the ETF were undoubtedly the result of the threat of cheap cement imports from Greece, several of those measures pursued an unlawful objective which went beyond that particular case. Thus, the purpose of the agreement on the setting-up of the ETF was the elimination of any import of

cheap cement likely to destabilise European markets (see paragraph 2560 above). The purpose of the agreement on the setting-up of Interciment was the carrying-out of persuasive and dissuasive measures against countries threatening the stability of the member countries' markets (Article 4(2)).

4900 Finally, it must be pointed out that, so far as concerns the measures referred to in Article 4(3), an undertaking cannot properly rely on the defensive nature of the agreement or concerted practice in which it has taken part, once it has resorted to measures incompatible with Community law in order to protect the participants' markets against competition from other Member States (*Baustahlgewebe* v *Commission*, cited in paragraph 415 above, paragraph 148).

4901 The arguments of the parties must, accordingly, be rejected.

G — Cooperation during the administrative procedure

4902 Lafarge and Valenciana emphasise their willingness to cooperate with the Commission during the administrative procedure. Valenciana states that it facilitated the investigations carried out by the Commission at its premises, that it submitted its written and oral observations on the SO despite not knowing precisely what the complaint against it was, and that it took part in the hearing. Aker and EUROC submit that they sent to the Commission during the administrative procedure the record of the ETF meeting of 19 August 1986 drawn up by Mr Ulestig (Scancem). The Commission must have considered that document sufficiently important, for it sent it to all the parties to which the SO was addressed. Aker and EUROC further state that they sent one of their main directors and the senior president of Scancem to the hearing in March 1993.

4903 However, Lafarge does not substantiate its claims with any evidence which makes it possible to assess whether it is well founded. For that reason alone, its argument must be rejected.

4904 Valenciana's conduct, for its part, was no more than the performance of its obligations and the exercise of rights under the regulations applicable to the conduct of administrative procedures in matters of infringements of Community competition law. Its argument must therefore also be rejected (see, to this effect, Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraphs 341 and 342). On the same grounds, the argument put forward by Aker and EUROC based on the attendance of one of their main directors and of the senior president of Scancem at the hearing of March 1993 must also be rejected.

4905 Aker and EUROC did indeed append to their reply to the SO (annex 3, document 15) the record of the ETF meeting of 19 August 1986 drawn up by Mr Ulestig (Scancem), a document to which the Commission refers on various occasions in 'The Facts' (recitals 25, paragraphs 14 to 20, 27, paragraph 3, and 28, paragraphs 3, 15 to 18 and 22) and in the 'Legal Assessment' (recitals 53, paragraphs 7 and 8, 55, paragraph 1, and 56, paragraphs 5, 8, 11 and 13) concerning the ETF.

4906 However, it is clear from their reply to the SO (Points 6.3.5.7 and 6.3.5.16) that the reason for sending that document to the Commission was not so much a desire to facilitate establishing the complaints made by the Commission in the SO as a desire to deny the involvement of Aker and EUROC in the infringement regarding the agreement on the setting-up of Interciment. In those circumstances, it must be held that the Commission did not commit an error of assessment in failing to consider that factor to be a mitigating circumstance when it fixed the fines in respect of those two applicants. Consequently, their argument must also be rejected.

H — Intention to comply with Community competition law

4907 Lafarge criticises the Commission for not having taken account of the conduct of the undertakings against which proceedings had been brought which had sought throughout the period in question to act within the law, as attested by the numerous references in the documents seized by the Commission to the requirements of Community competition law.

4908 However, such a line of reasoning does not alter the fact that infringements were committed on the grey and white cement markets, or reduce their gravity. Nor does it make it possible to disregard the factors referred to in paragraphs 4836 to 4838 above, which bear witness to the willingness of the participants in the infringement, including Lafarge, to shroud in secrecy some of the unlawful practices which they adopted in the context of the Cembureau agreement.

4909 Unicem claims that, as soon as it became aware of the importance of Community competition law, it adopted a code of conduct to be followed by its staff.

4910 None the less, whilst it is important that Unicem took steps to prevent fresh infringements of Community competition law from being committed by members of its staff in the future, that circumstance does not alter the fact that it has been found to have committed a serious infringement in the present case (see, in particular, T-7/89 *Hercules Chemicals* v *Commission*, cited in paragraph 140 above, paragraph 357, and T-13/89 *ICI* v *Commission*, cited in paragraph 323 above, paragraph 395).

I — Novelty of the matter at issue

4911 Lafarge objects that the Commission did not take account of its own practice of not imposing fines, or of imposing only moderate fines, where it takes a decision for the first time on the operation of a particular Community market, which is the case here.

4912 Dyckerhoff states that a fine should not have been imposed in the context of a legal situation which had yet to be clarified by administrative practice. The Commission's view as to the unlawfulness of the collaboration maintained with regard to third countries in the framework of the WCC was entirely new or, at least, could not have been foreseen by the undertakings.

4913 Although it is true that in determining the amount of the fine, the Commission and the Community judicature may, in certain circumstances, take account of the fact that at the date of the events at issue the practices objected to had not been clearly identified as such in the Commission's previous decisions (*AKZO* v *Commission*, cited in paragraph 323 above, paragraph 163, and *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraph 143), the novelty of the matter at issue must be assessed not with regard to the business sector concerned, but rather the legal questions raised by the infringement found.

4914 In the present case, the infringement in respect of which a fine has been imposed arose, on both the grey and the white cement markets, from an agreement on non-transhipment to home markets. The incompatibility of such an agreement or concerted practice with the rules on competition is expressly set out in Article 85(1)(c) of the Treaty and laid down in settled case-law. The applicants had therefore been informed that their practices were unlawful.

4915 Their argument that the matters raised in the contested decision were new must, accordingly, be rejected.

J — The European cement industry as world leader

4916 Lafarge submits that the Commission did not take account of the fact that, thanks to an efficient restructuring policy, the European cement industry had become the leading cement industry in the world. To penalise an entire industry which has overcome a difficult crisis by being adaptable does not appear to it to be in accordance with the objectives of a Community industrial policy, the importance of which is laid down in Article 130 of the EC Treaty (now Article 157 EC).

4917 However, the interest in encouraging a leading industrial sector cannot rule out the imposition of substantial fines in respect of serious infringements of Community competition law, otherwise undertakings operating in fields considered to be important for European industry and its economy would be certain of impunity.

K — Legal and technical barriers to intra-Community trade in cement

4918 Valenciana refers to the barriers, legal (initiation of an anti-dumping procedure against Portland cements from Spain) and technical (disparity between national rules on type-approval), which it has come across in its export activities, both before and after the accession of Spain to the Community.

4919 However, such factors do not affect either the reality, seriousness or duration of the infringement by Valenciana. They do not therefore warrant reducing its fine.

L — Arrival of a new competitor on the market

4920 Irish Cement complains that the Commission did not take account of the entry of a new producer into the Irish market, namely Sean Quinn Cement Limited, which commenced production in 1989 just north of the border between Ireland and Northern Ireland.

4921 However, that event is subsequent to 31 December 1988, the date taken by the Court as marking the end of Irish Cement's participation in the infringement found in Article 1 of the contested decision (see paragraphs 4365 and 4366 above). There is therefore no purpose in examining the merits of Irish Cement's claim

M — Fines not tax-deductible

4922 Italcementi submits that the amount of the fine imposed upon it is excessive in that it does not take into consideration the fact that fines are not tax deductible in Italy.

4923 However, in fixing fines, the Commission is not required to take into account differences existing between national tax laws (Case 44/69 *Buchler* v *Commission* [1970] ECR 733, paragraph 51).

N — Financial situation of the offender

4924 Halkis claims that the fine imposed upon it exceeds its ability to pay and could place it in dire financial straits, since it is under special winding-up arrangements. In its reply, it adds that, although it was put into liquidation after the date on which the contested decision was adopted, the consequences of Decision 91/144 on the aid which had been granted to it by the Greek Government had left it, since then, in a very difficult financial position.

4925 However, the Commission is not required to take into account the loss-making situation of an undertaking when determining its fine, since that may give an unjustified competitive advantage to undertakings least well adapted to the market conditions (*IAZ and Others* v *Commission*, cited in paragraph 1320 above, paragraph 55).

4926 It follows from the foregoing considerations that the pleas examined cannot be upheld.

VIII — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, the principles of proportionality and equal treatment, and manifest errors of assessment in assessing the responsibility of individual undertakings in respect of the infringement found in relation to the grey cement market*

4927 First, Aalborg submits that to be ordered to pay a fine for infringement of Article 85 of the Treaty presupposes individual responsibility. It cannot be ordered to pay a fine on the basis of collective responsibility for acts committed by others. Blue Circle considers that an undertaking cannot be held responsible for an infringement in which it did not participate, even if the infringement was committed pursuant to an agreement or concerted practice to which it was party.

4928 However, as is apparent from the examination carried out in paragraphs 4330 to 4333 and 4403 to 4407 above, Aalborg and Blue Circle were fined only in respect of the matters charged against them individually in the context of the infringement found in Article 1. Their argument must therefore be rejected.

4929 Secondly, a large number of applicants complain that the Commission applied abstract and general criteria when it assessed their responsibility in the infringement on the grey cement market in respect of which fines were imposed, and did not take account of their individual involvement in that infringement. Several of them argue that the Commission did not take into account the actual role which they played in the elements of the infringement attributed to them. A number claim that the Commission ought to have taken account of the limited number of infringements which they had committed in the framework of the Cembureau agreement and/or the degree of gravity of each of the measures implementing it.

4930 CBR complains that the Commission inferred its accession to the Cembureau agreement from the fact that one of its directors had represented, as head delegate, his national association at the Cembureau Head Delegates meetings of 14 January 1983, 19 March and 7 November 1984. However, the conduct of that director in the course of his duties in the FIC could not be attributed to CBR. Moreover, his participation in the abovementioned meetings of 14 January 1983 and 19 March 1984 were only aimed at continually ensuring that actions likely to be undertaken in the framework of Cembureau were compatible with Article 85. The Commission attempted to portray that director as playing an important role in the conclusion and implementation of the Cembureau agreement, whereas his only involvement related to the basing point system, the lawfulness of which is not challenged in the contested decision. CBR further claims that its role in the ETF was very limited.

4931 Dyckerhoff complains that the Commission did not allude, even briefly, to its minor role in the infringement referred to in Article 3(3)(a) of the contested decision.

4932 Vicat observes that, according to the contested decision, it participated in only one measure implementing the Cembureau agreement, namely the concerted practice referred to in Article 3(1)(c) of the contested decision. That infringement is also less serious than the other measures implementing that agreement. Vicat complains that the Commission did not take account of that aspect, placing it on the same footing as the other undertakings, against which there was much greater inculpating evidence, and that it did not set out the reasons why it believed it could fine it as heavily as the other undertakings. After comparing its situation with that of Lafarge and Italcementi, it concludes that the unit value of the fine per infringement committed is clearly greater in its case than in the case of those two undertakings.

4933 Ciments Français states that it participated, by means of one of the members of its board of directors acting as chairman of the SFIC, in only one of the three Cembureau Head Delegates meetings during which the Cembureau agreement was adopted. It claims that it was only very

slightly involved in the collusion prompted by the importation of cement from Greece. Finally, it contends that its participation in the EPC was negligible, having regard to the insignificant role it was able to play on the overseas exports markets.

4934 Heidelberger complains that the Commission based itself on the argument that there existed a single and continuous agreement so that it could totally ignore the individual role played by each undertaking and determine an aggregate fine in respect of participation in that agreement. Its fine should therefore be cancelled or, at least, reduced. Heidelberger claims to have been involved but slightly in the events referred to in the contested decision. Only five unlawful measures were held against it from amongst those mentioned in the contested decision. Moreover, the extent of its participation was clearly less than that of the other undertakings. Its participation in the events at issue was restricted to more or less passive attendance at negotiations during which anti-competitive agreements or concerted practices were adopted. By imposing on it such a heavy fine, the Commission totally failed to take account of its role in the Cembureau agreement. Heidelberger adds that the principle of equal treatment precludes that an undertaking accused of a minor participation in an agreement or concerted practice should be fined more heavily than an undertaking accused of more serious conduct.

4935 Aalborg states that the Commission failed to observe the principle that fines must be proportional to the degree of responsibility and the scope of the infringement. It also criticises the Commission for not having compared its degree of responsibility and the gravity of its infringement with those of the other undertakings. Comparing its situation with that of Ciments Luxembourgeois, Aalborg claims that a very large part of its fine may be explained by its presence at the Head Delegates meeting of 9 September 1986 in Baden-Baden. It, therefore, criticises the Commission for not having checked scrupulously the reasons for its participation in that meeting, which in actual fact related only to the lodging of an anti-dumping complaint and to the lobbying activities concerning Greek State aid. It further criticises the fact that its unintentional participation in aspects of the infringement found in the contested decision resulted in a fine as heavy as that imposed on the undertakings which were most involved.

4936 Unicem claims that it played a purely passive role in the periodic exchanges of price information and that it participated in only one of the fourteen meetings which took place between May 1986 and May 1987 within the framework of the ETF. It never took measures to implement the Cembureau agreement. Moreover it had no part whatsoever in certain practices referred to in the contested decision. Its marginal role in the infringements committed showed in particular its limited interest in international trade. However, the Commission imposed on it a fine of the same size as that imposed on undertakings which played a major role in the anti-competitive practices in question.

4937 Valenciana submits that by imposing on each undertaking an aggregate fine in respect of its participation in the various infringements found in relation to the grey cement market the

Commission failed to assess the gravity of the unlawful conduct of each undertaking. Thus no account was taken of the lesser gravity of its own participation in the EPC. The contested decision is silent about the fact that its export activities were directed towards the United States and that it did not participate in the EPC sub-committees or the Committee for Development of International Cement Trade.

4938 Asland criticises the Commission for having held all the undertakings responsible for the infringement in the same measure, irrespective of the degree of their participation in the infringement. It points specifically to its own limited role in the ETF.

4939 Uniland states that the Commission, by relying solely on the passive and sporadic presence of Mr Rumeu at two meetings of the ETF in order to accuse it of participating in the agreements and concerted practices referred to in Articles 1 and 4(1), (2) and (3)(a) of the contested decision, unjustifiably attributes to it a role comparable to that of undertakings such as Holderbank, the scale and degree of whose participation in the Cembureau agreement are, in its view, manifestly not comparable to its own.

4940 Irish Cement maintains that it played a minor role in the infringement constituted by the Cembureau agreement, which the Commission failed to take into account. It submits that it did not participate in the principal bi- or multilateral agreements identified in the contested decision. The evidence gathered by the Commission might at the very most be used to show that Irish Cement went along with the Cembureau agreement and the various associated implementing agreements. Nor was Irish Cement directly involved in the ETF, as the Commission recognises. The Commission also acknowledged that the commercial relations between Irish Cement and the United Kingdom did not constitute an implementation of the Cembureau agreement. Irish Cement concludes that, by placing it in the category of undertakings which played the largest roles in the infringement, the Commission attributes excessive and disproportionate responsibility to it compared with the other undertakings in the same category.

4941 Cimpor points out that, whereas some undertakings have been held responsible for nine infringements, it is charged with only two. It states, next, that it was not directly involved in the conclusion of the Cembureau agreement, since it was not a member of Cembureau.

4942 SECIL submits that it is amongst the undertakings accused of the smallest number of infringements. Reliance on abstract and uniform criteria, which place it among the undertakings which seriously infringed Article 85(1) of the Treaty, therefore constitutes a breach of the principle of proportionality with regard to the fine imposed on it.

4943 Cimpor and SECIL further criticise the Commission for not having taken account of the fact that they took no initiative in the infringements they were found to have committed in the contested decision. Nor has the Commission established that their activities were ever considered to be a 'hot spot' or that they transmitted sensitive or confidential information to ATIC or to Cembureau.

4944 Italcementi points to the existence of a statutory price control system in Italy, the nature of the information exchanged, its lack of interest in exports and the lack of interest in Italy on the part of the other European producers. It states that the measures adopted in the framework of the ETF by the Italian cement producers amounted to an independent and lawful response to Greek competitors. Such measures can therefore be treated in the same way as measures designed to channel Greek production surpluses towards non-member countries. Finally, Italcementi's conduct with regard to Interciment cannot be compared to that of Holderbank, the sole shareholder in that company, from creation to liquidation.

4945 Holderbank, in its reply, criticises the Commission for not having examined its particular involvement in the various infringements of which it is accused.

4946 Hornos Ibéricos states that the EPC was a legitimate instrument. The specific allusions to certain intra-Community situations in the course of EPC meetings do not prove that all the meetings of that committee were unlawful. Furthermore, the Commission did not take account of the fact that none of those allusions concerned Hornos Ibéricos. Nor did it take into account the fact that it took no initiative in the setting-up of that committee, the limited nature of its duties and responsibilities within the EPC, or of the fact that it was never part of the EPC's Steering Committee. Moreover, the contested decision contains no discussion of the economic and legal context in which the EPC was created or the accession of Hornos Ibéricos to that committee. Hornos Ibéricos further claims that, by imposing a fine on it of the same magnitude as that imposed on undertakings which committed more serious infringements, the Commission infringed the principle of equal treatment.

4947 Cementir complains that the Commission imposed fines in respect of the agreements concluded with Calcestruzzi in the same way as the agreements or concerted practices which aimed to monitor or eliminate trade between Member States. It further complains that the Commission did not take account of its marginal or even non-existent role within Cembureau and the ETF, its lack of interest in exporting and its irregular attendance at Head Delegates meetings. In its view, the Commission should have differentiated between the fine which it imposed upon it and that which it imposed on Italcementi and Unicem, since the latter played a much more important role in the infringements found to have been committed.

4948 Halkis criticises the Commission for not having taken into account the fact that the infringement it was found to have committed was not serious. It also observes that the Commission relied only on its participation in the EPC in order to fine it, without proving that

such participation contributed to the implementation of an agreement on the sharing of home markets.

4949 The Court points out that, in fixing the amount of the fines, regard must be had to all the factors capable of affecting the assessment of the gravity of the infringements, such as the role played by each of the parties to the infringement and the threat that infringements of that type pose to the objectives of the Community (*Musique Diffusion Française and Others* v *Commission*, cited in paragraph 439 above, paragraphs 120 and 129, and *IAZ and Others* v *Commission*, cited in paragraph 1320 above, paragraph 52). Where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (C-51/92 P *Hercules Chemicals* v *Commission*, cited in paragraph 142 above, paragraph 110 and *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 207).

4950 In the present case, the Commission states in recital 65, paragraph 9, of the contested decision:

'In determining the amount of the fine for each undertaking in respect of the infringements described in Chapters 8, 9 and 10, the Commission started from the fact that, as it specified in paragraph 3 above, all the undertakings acceded to the agreement or principle of non-transhipment to home markets. However, within this general approach, it has taken account of the role played by each undertaking in the conclusion of the home market agreement or principle of not transhipping to home markets and the arrangements and measures agreed to supplement the agreement or principle and/or assist in its implementation, the participation of each undertaking in the various measures or arrangements agreed to supplement the agreement or principle and/or assist in its implementation, and the duration of such measures and arrangements.'

4951 On the basis of those considerations, the Commission identifies two categories of undertaking.

4952 The first category includes those which, in its view, bear the greatest responsibility in the infringement relating to the Cembureau agreement, in that they 'participated in the Cembureau agreement or principle through accession to it and/or application of the measures and arrangements agreed to supplement the agreement or principle and having direct effects tending to partition home markets' (contested decision, recital 65, paragraph 9, subparagraph (a)). It is clear from recital 65, paragraph 9(a), second indent *in fine*, and (b), first indent, that, by those measures and arrangements, the Commission means the infringements referred to in Articles 3 and 4 of the contested decision.

4953 Within that first category the Commission identifies three subsets.

4954 In the first of those, it places the undertakings which 'as Cembureau members, participated directly in the conclusion of the agreement or principle of non-transhipment to home markets' (contested decision, recital 65, paragraph 9(a), first indent). Among the applicants referred to in paragraphs 4929 to 4948, Aalborg, Unicem, Irish Cement, Italcementi and Cementir are included in that subset.

4955 The second subset contains the undertakings which 'performed, through their most senior staff, the function of Head Delegate within Cembureau either at the time when the agreement or principle of non-transhipment to home markets was agreed or during the period of its implementation' (contested decision, recital 65, paragraph 9(a), second indent). The Commission considers (*ibidem*) that 'there is thus no doubt as to the essential role of these undertakings in the conclusion and/or implementation of the agreement', adding that those undertakings also participated in measures implementing the Cembureau agreement designed directly to protect home markets. Among the applicants referred to in paragraphs 4929 to 4948, CBR, Dyckerhoff, Ciments Français, Heidelberger, Asland and Cimpor are in that subset.

4956 The third subset groups together the undertakings which 'participated in measures implementing the Cembureau agreement or principle that were designed directly to protect home markets' (contested decision, recital 65, paragraph 9(a), third indent). Among the applicants referred to in paragraphs 4929 to 4948, Vicat, Uniland, SECIL and Holderbank are in that subset.

4957 It is apparent from the information communicated by the Commission during the present proceedings (see paragraph 4738 above) that the basic rate of the fine imposed on the undertakings in that first category was 4% of their reference turnover.

4958 The second category includes the undertakings which 'bear a lesser responsibility' for the Cembureau agreement (contested decision, recital 65, paragraph 9(b)).

4959 Within that second category, the Commission again identifies three subsets.

4960 In the first, it places the undertakings which 'participated only in the measures implementing the Cembureau agreement or principle that were designed to channel production surpluses to third countries' (contested decision, recital 65, paragraph 9(b), first indent). In its view (*ibidem*), such measures 'have less direct effects on the protection of home markets than those described in Chapters 4 and 5'. Among the applicants referred to in paragraphs 4929 to 4948, Valenciana, Hornos Ibéricos and Halkis are included in that subset.

4961 The second subset concerns the undertakings which, 'though participating in measures implementing the Cembureau agreement or principle that were designed directly to protect home markets, tried to avoid implementing the Cembureau agreement to which they acceded' (contested decision, recital 65, paragraph 9(b), second indent). There is no longer any point in assessing whether the identification of that subset is well founded because the fines imposed on the three undertakings in it, namely Cedest, Heracles and Titan have been annulled (see paragraph 4718 above).

4962 A third subset contains Ciments Luxembourgeois, which, 'though a direct member of Cembureau and though participating in the Head Delegate meetings at which the Cembureau agreement or principle was agreed, did not, as far as the Commission is aware, put into effect any implementing measure' (contested decision, recital 65, paragraph 9(b), third indent). In its view (*ibidem*), the 'less active role [of that undertaking] therefore warrants its inclusion in the group of undertakings that bear a lesser responsibility'.

4963 According to the information provided by the Commission during the present proceedings (see paragraph 4738 above), the basic rate of the fine imposed on the undertakings in that second category was 2.8% of their reference turnover.

4964 The Court finds that the Commission's analysis set out in paragraphs 4950 to 4963 above appropriately assesses the degree of responsibility borne by each of the applicants for the infringement in relation to the grey cement market in respect of which they were fined.

4965 As the Court has held in paragraphs 4753 to 4766 above, the Commission chose, properly, to impose fines, in relation to the grey cement market, in respect of the infringement constituted by the Cembureau agreement rather than to impose separate fines in respect of the various constituent elements of that infringement. In those circumstances, it was justified in assessing the overall responsibility of the undertakings involved in that infringement. It was not required to evaluate the specific role played by each of them in the various unlawful acts found in the contested decision.

4966 The number of individual infringements committed by a given undertaking in the framework of the Cembureau agreement does not constitute, in the present case, an appropriate criterion by which to assess its degree of responsibility in that agreement. Each undertaking that was a party to it 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 in respect of which a fine was imposed.

4967 As for the gravity of each of the measures implementing the Cembureau agreement, it is apparent from the Commission's arguments set out in paragraphs 4950 to 4963 above that it drew a distinction between the measures referred to in Articles 3 and 4 of the contested decision, on the one hand, and the measures channelling production surpluses to non-member countries, on the other. The undertakings involved in the former were fined at a basic rate of 4% of their reference turnover. Those whose participation in the Cembureau agreement stemmed exclusively from their involvement in the latter measures were fined at a basic rate of 2.8% of their reference turnover.

4968 Such differentiation is well founded, a point which is, moreover, not formally disputed by any applicant. The practices found in Articles 3 and 4 of the contested decision which constituted measures implementing the Cembureau agreement were, as the Commission rightly points out in recital 65, paragraph 9(a), measures aimed at directly protecting home markets. Such practices were far more serious than measures to channel production surpluses to non-member countries, which, as the Commission rightly observes in recital 65, paragraph 9(b), had less direct effects on the partitioning of home markets.

4969 For the remainder, the Commission was not required to assess the gravity of each measure within each group of measures arising from the distinction considered in the two preceding paragraphs. First of all, those measures were not fined separately, since the Commission properly chose to impose one fine in respect of the infringement found in Article 1 of the contested decision (see paragraphs 4760 to 4765 and 4965 above). Next, the measures falling within the first of those two groups were all equally serious. They were all designed directly to partition home markets, each within the geographical area in which they were to produce their effects. There is no longer any purpose in dealing with the measures in the second group, since the only measure of that type which has been established is the continuous concerted practice of the EPC.

4970 In conclusion, the arguments of the parties must be rejected.

4971 It has been found that Unicem did not take part in the Head Delegates meetings of 14 January 1983 and 19 March and 7 November 1984 and that it did not therefore participate directly in the conclusion of the Cembureau agreement (see paragraphs 1405 to 1412 above).

4972 It has also been held that the Commission wrongly found that infringements or aspects of infringements referred to in Articles 2 to 5 of the contested decision had been committed by parties to which it was addressed.

4973 Thus, as regards the applicants mentioned in paragraph 4720 above:

— the infringement with which CBR is charged in Article 4(4)(g) is not established (see paragraphs 3619 to 3646 above);

— in Article 2(2)(a) the Commission was wrong to find that the system of periodic exchange of price information in which Ciments Luxembourgeois, Aalborg, Unicem, Irish Cement, Italcementi and Cementir participated related, so far as concerned the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, that country's producer's prices, inclusive of rebates (see paragraphs 1584 to 1593 above);

— in Article 3(3)(a) the Commission was wrong to accuse Dyckerhoff, Ciments Français, Heidelberger and Lafarge of an agreement to share the Saarland market (see paragraphs 2172 to 2225 above);

— the infringement with which Dyckerhoff, Aalborg, Unicem, Irish Cement, Italcementi and Cementir are charged in Article 5 is not established (see paragraphs 3771 to 3850 above);

— the participation of Ciments Français in the infringement found in Article 4(3)(a) is not established (see paragraphs 3208 to 3215 above);

— the participation of Heidelberger and Asland in the infringement found in Article 4(2) and (3)(a) is not established (see paragraphs 3039 to 3046, 3057 to 3065, 3216 to 3223 and 3254 to 3263 above);

— in Article 3(1)(a) the Commission was wrong to accuse Lafarge of participating in a concerted practice with Buzzi involving the sharing of the market in southern France and the restriction of their autonomy of conduct with regard to production sources (see paragraphs 1831 to 1835 above);

— the infringements with which Lafarge is charged in Article 4(4)(e) and (f) are not established (see paragraphs 3570 to 3617 above);

— the participation of Unicem in the infringement found in Article 2(1) and in Article 4(2) is not established (see paragraphs 1549 to 1555 and 3047 to 3056 above);

— the infringements with which Holderbank is charged in Article 4(4)(c) and (d) are not established (see paragraphs 3515 to 3569 above);

— the infringement with which Aker and EUROC are charged in Article 4(4)(h) is not established (see paragraphs 3648 to 3678 above);

— the participation of Cementir in the infringements found in Article 4(1) and (2) is not established (see paragraphs 2767 to 2782 and 3076 to 3080 above);

— the infringements with which Blue Circle is charged in Article 4(4)(a) and (b) are not established (see paragraphs 3402 to 3513).

4974 Furthermore, it has been held that Ciments Français, by participating in the concerted practice found in Article 3(1)(b) of the contested decision, did not implement the Cembureau agreement, in respect of which a fine was imposed in Article 9 (see paragraphs 4040 to 4042 and 4058 above).

4975 Those various factors cannot however result in a reduction in the fine imposed on the undertakings concerned. As has been stated in paragraphs 4753 to 4766 and 4965 above, the Commission did not impose separate fines in respect of the various unlawful practices covered by the Cembureau agreement. The Commission properly decided to penalise participation in that agreement as such. In spite of what has been stated in paragraphs 4971 to 4974, such participation is still, for each of those undertakings, of the gravity correctly found by the Commission in recital 65, paragraph 9, of the contested decision.

4976 Thus, it is still established that the undertakings in the category referred to in recital 65, paragraph 9(a), of the contested decision manifested their continuous adhesion to the Cembureau agreement by taking part in one or more of the measures implementing that agreement which were rightly regarded as the most serious, namely those designed directly to protect home markets. As for Ciments Luxembourgeois, the factor mentioned in the second indent of paragraph 4973 above does not call in question the assessment made by the Commission in recital 65, paragraph 9(b), third indent, relating to its degree of responsibility in the Cembureau agreement.

4977 Thirdly, Vicat, Unicem and SECIL submit that they did not attend the Head Delegates meetings in 1983 and 1984 during which the Cembureau agreement was adopted. They therefore played no role at all in the conclusion of that agreement. Nevertheless, they were fined as heavily as the undertakings which had not only taken part in measures implementing the Cembureau agreement but had even been party to the conclusion and confirmation of the agreement at the above meetings.

4978 However, the Court points out that those applicants participated in the infringement in respect of which a fine was imposed in Article 9 of the contested decision through one or more measures implementing the Cembureau agreement that were rightly regarded by the Commission as the most serious, namely those designed directly to partition home markets. Vicat acceded to the Cembureau agreement through its participation in the concerted practice referred to in Article 3(1)(c) (see paragraph 4315 above). Unicem acceded to that agreement particularly through its participation in the agreements and concerted practices referred to in Article 4(1) and (3) (see paragraph 4340 above). SECIL implemented it by participating in the agreement referred to in Article 3(2) (see paragraph 4370 above). The fact that those undertakings did not take part in the Head Delegates meetings during which the Cembureau agreement was adopted does not in any way diminish the extent of their accession to that agreement nor, therefore, the gravity of their responsibility in the infringement in question. The Commission therefore rightly imposed a fine on them at a basic rate of 4% of their reference turnover. The applicants' argument must therefore be rejected.

4979 Fourthly, Ciments Luxembourgeois criticises the Commission for not having taken account of the limited nature of its participation in the infringements found in the contested decision. It points out that the Commission itself acknowledged that it had not participated in most of the infringements. Nor did the Commission discover any measure by it implementing the Cembureau agreement.

4980 However, as observed in paragraph 4962 above, the Commission, having regard to the considerations set out in recital 65, paragraph 9(b), third indent, of the contested decision, took the view that Ciments Luxembourgeois bore lesser responsibility in the Cembureau agreement than the undertakings mentioned in recital 65, paragraph 9(a). Accordingly, Ciments Luxembourgeois was fined at the basic rate of 2.8% of its reference turnover, instead of at the rate of 4% applied to the other undertakings. Those findings are sufficient to reject the arguments put forward by Ciments Luxembourgeois.

4981 Fifthly, Vicat maintains that, since a single fine is imposed in respect of two infringements, one of which is not established, the fine should be reduced accordingly.

4982 However, it should be recalled that Vicat was fined under Article 9 of the contested decision in respect of its participation in the infringement found in Article 1, which was properly established by the Commission on the basis of the finding that it had participated in the

infringement referred to in Article 3(1)(c) (see paragraph 4315 above). Vicat's argument must therefore be rejected.

4983 Sixthly, Hornos Ibéricos maintains that, contrary to what is stated in recital 65, paragraph 9(b), of the contested decision, the Commission did not take account of the lesser gravity of its responsibility in the Cembureau agreement. A reduction of the rate of its fine to 2.8% would show that the limited duration of its participation in that agreement, rather than just its participation in the EPC's activities, had been taken into account.

4984 However, it is apparent from the information submitted by the Commission (see paragraph 4738 above) that it took account of the limited responsibility of Hornos Ibéricos in the Cembureau agreement by reducing the basic rate of its fine to 2.8%. The argument put forward by Hornos Ibéricos is thus unfounded.

4985 Seventhly, Halkis points out that, by setting only two basic rates for the determination of the fines, the Commission placed it on the same footing as other Greek undertakings which it nevertheless accuses of a much greater number of infringements. Moreover, the Commission infringed the principle of proportionality, in view of the minor difference between the fine imposed on it and those imposed on the other European producers, even though the latter are accused of conduct which is much more detrimental to competition.

4986 In that respect, the Court points out that although the participation of Halkis in the Cembureau agreement has been established (see paragraph 4101 above) it has not been found that Heracles and Titan participated (see paragraphs 4074 to 4079 above).

4987 Furthermore, the Commission could validly take the view that a reduction of the basic rate of the fine from 4 to 2.8% (that is to say, a 30% reduction) was a fair reflection of the fact that account had been taken of Halkis' lesser responsibility in the infringement in comparison with that of the undertakings mentioned in recital 65, paragraph 9(a), of the contested decision.

4988 Halkis' argument must therefore be rejected.

4989 It follows from all the foregoing that the pleas examined must be dismissed.

IX — *Pleas alleging infringements of Article 190 of the Treaty, Article 15(2) of Regulation No 17, and the principle of proportionality in assessing the responsibility of individual undertakings in respect of the infringement found in relation to the white cement market*

4990 Dyckerhoff claims that the Commission did not separately assess the gravity of the infringement committed by each undertaking in the framework of the WCC. It complains that it did not even briefly mention the role which it might have played in the infringement found in Article 7 of the contested decision.

4991 Ciments Français points to its negligible role in the WCC, as attested by the extract of CBR's internal memorandum of 3 October 1985, according to which the WCC was not able to fix export prices, on the ground in particular that Ciments Français no longer exported very much and that it was a spectator rather than a player (contested decision, recital 39, paragraph 3; document 33.126/9958).

4992 Valenciana claims that the Commission did not take account of various factors showing the lesser gravity of its participation in the WCC. It cites its absence from the meetings during which the rule of non-transhipment to home markets was adopted and subsequently applied against Aalborg, as well as the lack of trust which the members of the WCC had in Valenciana. It further points to a passage of the contested decision (recital 40, paragraph 5) which reports that at the WCC meeting of 3 October 1985 Lafarge sharply rebuked Valenciana for having 'slashed' its prices on the Tunisian market.

4993 Italcementi states that the Commission does not substantiate its allegations in recital 65, paragraph 11, of the contested decision. In particular, it complains that the Commission did not make itself clear as to the specific responsibility attributed to Italcementi in the context of the infringement committed in the WCC. Next, it points to its altogether marginal role in the activities of the WCC on account of the limited nature of its white cement export activities.

4994 It should be borne in mind that, in fixing the amount of the fines, regard must be had to all the factors capable of affecting the assessment of the gravity of the infringements, such as the role played by each of the parties to the infringement (*Musique Diffusion Française and Others* v *Commission*, cited in paragraph 439 above, paragraphs 120 and 129, and *IAZ and Others* v *Commission*, cited in paragraph 1320 above, paragraph 52). Where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (C-51/92 P *Hercules Chemicals* v *Commission*, cited in paragraph 142 above, paragraph 110 and *Montecatini* v *Commission*, cited in paragraph 270 above, paragraph 207).

4995 In the present case, the Commission states, in recital 65, paragraph 11, of the contested decision, that all the undertakings mentioned in Article 7 played an important role in the infringements committed in the context of the WCC.

4996 The Court finds that throughout the period of the infringement Dyckerhoff, Ciments Français and Italcementi in fact manifested their unconditional adherence to the twofold rule on the respect for home markets and the channelling of production surpluses under a general agreement, which was the WCC's object. They participated consistently in the meetings and activities of the WCC. They took the initiative, along with Lafarge and CBR, of setting up the new WCC in January 1984, after it was found that Aalborg's infringement of the above rule made it impossible to cooperate with Aalborg. They actively participated in the WCC meetings held between June and October 1986 for the purpose of examining retaliatory measures to counter possible attacks by Aalborg on their home markets. The Commission was therefore right to consider that those undertakings played an important, and equally serious, role in the infringement fined in Article 10 of the contested decision.

4997 On the other hand, although it has been established that Valenciana participated in that infringement (see paragraphs 4627 to 4659 above), aspects relating to the period of the infringement it was found to have committed, namely between 1 January 1986 and 26 May 1988, reveal less strict adherence on its part to the unlawful rule agreed at WCC level and lesser involvement in the most flagrant applications of that rule, namely the conduct of that committee vis-à-vis Aalborg.

4998 First, it is apparent from the record of the WCC meeting of 24 July 1986 (contested decision, recital 39, paragraph 12; documents 33.126/9882 and 9883) that the members of the WCC considered the case of Valenciana, which had not been invited to the meeting, and that they wondered about the approach to take in regard to it. CBR first of all observed that the 'strategy proposed by Lafarge for the [United States]' and 'Valencia's own strategy' competed with each other. Ciments Français stated: '[T]he Spanish are not people who would readily give their opinion or their word. They cannot be trusted as much as the other members.' CBR however was of the view that it was 'difficult not to have them participate'. Lafarge, for its part, said: '[W]e cannot take the risk of provoking Valenciana into leaving the WCC by continuing to meet without them, which they will end up by hearing about. We must be patient with them, however irritating that may be.' Item 4 ('Other business') of the record states that Mr Fraisse, of Lafarge, after having pointed out that at the time 'Aalborg's delivery price to GPI [Florida] [was] USD 106 cif per short ton', adds: 'Valenciana offered USD 90 cif per short ton!'

4999 At the WCC meeting of 2 October 1986 which was a follow-up to that of 24 July 1986, Ciments Français stated that 'Spain [was] as dangerous as Aalborg' (CBR's record of that meeting; contested decision, recital 39, paragraph 4; document 33.126/9874).

5000 Those statements show that at that time Valenciana was temporarily excluded from the WCC's deliberations because its conduct on the overseas export markets did not appear, in the eyes of the other members, to comply with the WCC's rule on the channelling of production surpluses under a general agreement.

5001 On the other hand, although it had supported Aalborg's exclusion from the WCC (see paragraphs 4639 to 4645 above), Valenciana was not involved in the deliberations of that committee on the retaliatory measures that might be envisaged to counter a possible attack by Aalborg on the home markets of the WCC members. It did not attend the meeting of 19 and 20 June 1986, during which it was agreed to organise a special seminar, on 24 July 1986, to consider those retaliatory measures (contested decision, recital 39, paragraph 11; documents 33.126/9914 to 9920). As observed in paragraph 4998 above, it was not invited to take part in the last-mentioned meeting (contested decision, recital 39, paragraph 12; documents 33.126/9876 to 9883).

5002 It thus follows from the foregoing that Valenciana bears less responsibility in the infringement for which a fine is imposed in Article 10 of the contested decision.

5003 According to the information provided by the Commission (see paragraph 4738 above), Valenciana was fined at a basic rate of 4% of its reference turnover. In view of the foregoing, the Court considers, in the exercise of its unlimited jurisdiction, that that rate should be reduced to 2.8%.

5004 In conclusion, the plea by Valenciana alleging infringement of Article 15(2) of Regulation No 17 must be upheld in so far as it concerns the white cement market. The other pleas examined must be rejected.

X — *Pleas alleging infringements of Article 15(2) of Regulation No 17, the principles of proportionality and equal treatment, and manifest errors of assessment as regards the turnover taken into account for the purpose of calculating the fines*

5005 A number of applicants dispute the turnover figure used by the Commission to calculate their fine.

5006 First, Vicat, Ciments Français, Unicem, Italcementi, Holderbank and Cementir claim that under Article 15(2) of Regulation No 17 the Commission is required to calculate fines on the basis of the turnover for the business year preceding that in which the contested decision is adopted. In the present case, that should therefore be turnover for 1993. However, the Commission took into account turnover for 1992. Ciments Français and Italcementi claim that, at the very least, the Commission should have given reasons for such a choice in the contested decision.

5007 Ciments Français, Italcementi and Cementir add that the Commission was in a position to calculate the fine on the basis of their turnover for 1993 since they had sent that figure with the figure for 1992. In their view, the Commission should have taken all necessary measures to have all the undertakings do likewise.

5008 Vicat, relying on *Boël* v *Commission*, cited in paragraph 1353 above (paragraph 133), claims that that error had serious consequences, since its turnover in 1993 was lower than that for 1992, which increased the disproportionate nature of the fine imposed upon it. Ciments Français points to an increase in its fine in the order of a million ecu. Unicem, Holderbank and Cementir observe that their turnover in 1992 was much higher than in 1993. The Commission's choice, in their view, significantly increased their fine. Italcementi states that its turnover in 1992 was 22% greater than in 1993.

5009 The Court points out that 'preceding business year', within the meaning of Article 15(2) of Regulation No 17, refers to the last full business year of each of the undertakings concerned as at the date of adoption of the contested decision, that is to say, in the present case, the 1993 business year. Reference to that year is, however, relevant only to the upper limit of the fine, 10%, which may be imposed on an undertaking for infringement of Article 85(1) of the Treaty (see *Musique Diffusion and Others* v *Commission*, cited in paragraph 439 above, paragraph 119, and *PVC*, cited in paragraph 734 above, paragraph 1146). It is therefore open to the Commission to take into account, when determining the fines, the turnover relating to an earlier business year, provided that the fine calculated on that basis does not exceed the above-mentioned limit.

5010 In the present case, it is apparent from the information provided by the Commission (see paragraph 4738) that the fines imposed in respect of the infringements committed on the grey and white cement markets were calculated on the basis of the turnover relating to the 1992 business year of the undertakings concerned.

5011 Since none of the applicants has established that this choice of business year resulted in the imposition of a fine exceeding the limit set by Article 15(2) of Regulation No 17, it must be held that the Commission was justified in taking such turnover as the basis for calculating the fine.

5012 Furthermore, as regards Vicat, the Court in *Boël* v *Commission*, cited in paragraph 1353, reduced the fine imposed on the undertaking concerned because its turnover during the reference year applied by the Commission, namely 1985, had been the highest of the whole period of the infringement in question, whilst the turnover of the other undertakings involved in the infringement had been less significant in that year. The Court considered that, for that

undertaking, the choice of that year had merely exacerbated the disproportionate nature of the fine imposed upon it (see *Boël* v *Commission*, cited in paragraph 1353 above, paragraph 132).

5013 In the present case, it is sufficient to state that, according to the information which it provided in the course of proceedings (reply of 3 July 1998 to a written question put by the Court on 29 May 1998), Vicat achieved a turnover in 1992 that was certainly greater than in 1993, but lower than that in the four preceding years.

5014 It follows from the foregoing that the arguments of the applicants must be rejected.

5015 It is apparent from paragraph 4814 above that, with the exception of Unicem, Italcementi and Cementir, none of the applicants mentioned in paragraph 4720 above was still participating in the infringement in 1992. The reference year chosen by the Commission, in terms of turnover, for the purpose of calculating the fines is not therefore within the period in which the Court has found that they participated in the Cembureau agreement.

5016 However, such a finding cannot call into question the choice made at the relevant time by the Commission.

5017 On the one hand, none of the applicants has submitted that, in the event that the Court should find that it did not participate in the Cembureau agreement until the end of the reference period applied by the Commission, its fine should be recalculated on the basis of the turnover for the year during which it ceased to participate in the infringement or that relating to the last business year falling entirely within the infringement period found by the Court.

5018 Moreover, so far as concerns the infringement relating to the white cement market, it is clear from the information sent by the Commission (see paragraph 4738 above) that the Commission also correctly relied (see paragraphs 5009 to 5011 above) on the turnover of the undertakings concerned in 1992, even though it finds that that infringement continued only until 26 May 1988. In the contested decision, the date of the end of the period of infringement was not therefore the decisive criterion as regards the reference year to be taken into account, in terms of turnover, when determining the fines.

5019 Secondly, the applicants criticise the Commission for having calculated the fine on the basis of turnover that was too widely defined in terms of geography and products.

5020 Vicat and Ciments Français submit that the turnover which should have been taken into account is their turnover in the geographical area(s) affected by the specific infringement(s) in which they are alleged to have participated. Relying on *Parker Pen* v *Commission*, cited in paragraph 643 above, Vicat states that the turnover on the geographical market of its plant in La Grave de Peille is only 12% of its total turnover, that is to say, a relatively low amount by comparison with its turnover from total sales. Lafarge submits that the Commission, once it had dropped the national objections, should have taken account only of the turnover relating to exports. Italcementi claims that the Commission should only have used the turnover relating to its sales on the local northern Italian markets and on those of bordering countries.

5021 Unicem, Italcementi and Cementir submit that turnover relating to sales of clinker should not have been incorporated in the figure used to calculate the fines. The Commission found restrictions on competition only on the cement market. Italcementi lays particular emphasis on the fact that the order set out in Article 8 of the contested decision does not mention the clinker market. Moreover, the contested decision itself states (recital 11, paragraph 1) that grey cement, white cement and clinker constitute separate markets, since each product meets different requirements.

5022 In this connection, the turnover referred to in Article 15(2) of Regulation No 17 as the upper limit of a fine must be understood as referring to the total turnover of the undertaking concerned, which alone gives an approximate indication of its size and influence on the market (see *Musique Diffusion Française and Others* v *Commission*, cited at paragraph 439 above, paragraph 119, T-13/89 *ICI* v *Commission*, cited at paragraph 323 above, paragraph 376, and *Baustahlgewebe* v *Commission*, cited at paragraph 415 above, paragraph 158). Article 15(2) of Regulation No 17 contains no territorial limit in regard to the turnover (Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, summary publication, paragraph 39).

5023 Provided it remains within the limit laid down by Article 15(2), the Commission may choose which turnover to take in terms of territory and products in order to determine the fine.

5024 In the present case, it is apparent from the information provided by the Commission (see paragraph 4738) that, when determining the fine imposed in respect of the infringement committed on the grey cement market, it relied on the turnover relating to sales of grey cement and clinker for grey cement within the territory of the Member States of the Community in 1992. In order to determine the fine imposed in respect of the infringement committed on the white cement market, it took the turnover relating to sales of white cement and white cement clinker within the territory of the Member States of the Community for the same year.

5025 Having regard to the rate of the fine applied by the Commission to that basic figure (4 or 2.8%, as appropriate), the fines laid down in Articles 9 and 10 of the contested decision are well below the upper limit set down in Article 15(2) of Regulation No 17, a fact not disputed by any of the applicants.

5026 As regards Vicat, it should be pointed out that the Community judicature has in the past indeed found that the fact that the turnover realised by the undertaking in question from the products concerned by the infringement represented no more than a small proportion of its total turnover indicated that the infringement committed by it was less serious and that its fine should be reduced accordingly (see *Musique Diffusion and Others* v *Commission*, cited in paragraph 439 above, paragraph 121, and *Parker Pen* v *Commission*, cited in paragraph 643 above, paragraph 94).

5027 However, in the present case, Vicat does not claim that its turnover in the reference year from the product concerned by that infringement, as defined in recital 11, paragraph 1, represented only a small proportion of its total turnover. Its argument is based on the modest nature, by comparison with its total turnover, of sales from its plant in the south of France mentioned in 'The Facts' (recital 20, paragraph 1) relating to the concerted practice with which it is charged in Article 3(1)(c). However, as held in paragraphs 1093 and 1094 above, the geographical market concerned by the infringement relating to the Cembureau agreement, in respect of which Vicat was fined in Article 9, was Europe. Since Vicat does not argue that its sales on the European market represented only a small part of its total turnover, it cannot properly rely on the judgment in *Parker Pen*, cited in paragraph 643 above.

5028 Cementir pleads that there was an accounting error in the figures it sent to the Commission with its letter of 22 February 1994. In that letter, it sent figures including amounts relating to the supply of goods and services which were unconnected, in its view, with sales of grey cement and clinker, namely amounts relating to the reimbursement of transport costs, sales of bags and, to a lesser extent, to other services. It explains that, on noticing its mistake, it asked the Commission on 22 February 1995 to alter the fine imposed in the contested decision, in line with the correct figures in the accounting certificate from the auditing firm of Arthur Andersen, a request which was rejected by the Commission on 2 March 1995. It is convinced that other undertakings restricted themselves to sending the Commission figures relating only to sales of grey cement. By not carrying out the requested correction, the Commission not only calculated its fine on the basis of erroneous figures but also infringed the principle of equal treatment.

5029 That argument cannot however be accepted.

5030 So far as concerns transport costs, where, at the customer's request, a cement producer delivers the quantities sold to a specified destination the transport service becomes an integral part of the sale of the product. The price charged for such a service, even where it corresponds, as Cementir maintains, to the reimbursement of amounts payable by the seller to the independent carrier on whose services it has called, is therefore a component of the total sale price, as the system of quoting a price for delivery to a given destination reflects for that type of sale.

5031 So far as concern the supply of bags, Cementir cannot reasonably dispute that, when selling bagged cement, sale of the bag is an integral part of sale of the product. The price charged for such supply is therefore a component of the total price of the transaction.

5032 Cementir provides no particulars of the 'other services' which are allegedly unrelated to the sales of grey cement and of clinker for grey cement. Finally, its claim that other undertakings had not communicated to the Commission their turnover relating to sales of grey cement is mere speculation. Cementir cannot therefore plead breach of the principle of equal treatment.

5033 Fourthly, Ciments Français, Italcementi and Holderbank criticise the Commission for having included in the turnover used in calculating their fine the turnover of subsidiaries which are not concerned by the contested decision.

5034 Ciments Français cites the case of its Spanish subsidiaries Financiera y Minera (hereinafter 'FyM') and Cementos Rezola (hereinafter 'Rezola'), its Belgian subsidiary CCB (see paragraph 1169 above) and its Greek subsidiary Halyps. It adds that, as it had pointed out to the Commission in February 1994 when it sent it its data on turnover in 1992 and 1993, it did not take over Rezola until July 1989, FyM until January 1990 and Halyps until May 1990. It claims that the rate of its fine, applied to its own turnover, is 6.5%.

5035 Italcementi cites the case of its two subsidiaries, Cementerie di Sardegna and Cementerie Siciliane, stating that it does not fully control them.

5036 Holderbank mentions the case of its two Belgian subsidiaries Ciments d'Obourg and Ciments d'Origny.

5037 Ciments Français and Holderbank add that, by proceeding in that way, the Commission penalised subsidiaries not concerned by the contested decision more heavily than subsidiaries which it had considered responsible for infringements of Article 85(1) of the Treaty.

5038 Ciments Français asserts that the Commission applied a different procedure and fine to the foreign subsidiaries of groups charged in the contested decision than it did to their parent company, even though it was a majority, or even sole, shareholder in them throughout the period in question. It cites the cases of ENCI, Hornos Ibéricos, Alsen-Breitenburg, Nordcement, Asland, Heracles, Cementir, CBR and Cedest, which received a fine in respect of the infringements alleged against them individually, without their turnover having been included in that of the parent company in order to calculate the fine imposed on the latter. Ciments Français considers itself to have been the victim of discriminatory treatment inasmuch as the undertakings in its group, although not referred to in the contested decision, were fined more heavily than the undertakings acknowledged to have conducted themselves unlawfully.

5039 Holderbank states that it was fined at a rate of 4% of its turnover, which included that of its two Belgian subsidiaries mentioned in paragraph 5036 above. Therefore, those of its subsidiaries which were individually fined in the contested decision in respect of their participation in the Cembureau agreement (Alsen-Breitenburg, Nordcement and Hornos Ibéricos) were treated more favourably than its two Belgian subsidiaries. They were fined at a rate of 2.8% of their turnover, whereas the two Belgian subsidiaries were fined at a rate of 4% as a result of the incorporation of their turnover into the figure used to calculate the fine on their parent company.

5040 In that connection, the Court points out that where the perpetrator of an infringement heads a group which constitutes an economic unit the turnover of the group as a whole must be taken into account when calculating its fine. That turnover is the best indicator of its economic weight on the market.

5041 In the present case, Italcementi does not dispute that it controls Cementerie Siciliane and Cementerie di Sardegna. At most it states that it does not fully control them. Upon being requested to expand on that point by a written question of 10 June 1998, it produced on 20 July 1998 a series of documents from which it is clear that until 1986 it was sole shareholder in those two subsidiaries and that since that date it holds 71.41% of share capital of the former and 76.67% of share capital of the latter.

5042 In those circumstances, the Commission was right, in view of the economic unit constituted by Italcementi and its two subsidiaries, to include the subsidiaries' turnover in the figures used to calculate the fines imposed on Italcementi under Articles 9 and 10 of the contested decision.

5043 Holderbank does not deny that it wholly controls Ciments d'Obourg and Ciments d'Origny. In those circumstances, the Commission was right, in view of the economic unit constituted by Holderbank and its two Belgian subsidiaries, to include the subsidiaries' turnover in the figure used to calculate the fines imposed on Holderbank under Article 9 of the contested decision.

5044 Ciments Français does not dispute that, when it took part in the infringements found to have been committed on the grey cement and white cement markets, it controlled CCB. At most, it indicated during the course of proceedings (reply of 3 July 1998 to a written question put by the Court on 29 May 1998) that the turnover of its Belgian subsidiary had not been incorporated into its accounting system until 1 July 1990.

5045 On the other hand, it is apparent that Ciments Français took control of FyM, Rezola and Halyps when its participation in the abovementioned infringements had come to an end. The participation of Ciments Français in the Cembureau agreement is not established after 17 February 1989 (see paragraphs 4318 to 4321 above) and the infringement in which it took part in the framework of the WCC is held to have continued until 26 May 1988 (Article 7 of the contested decision). In those circumstances, it is necessary to exclude, from the figure used by the Commission in determining the fines to be imposed on Ciments Français in Articles 9 and 10, amounts relating to sales by its three subsidiaries during the reference business year on the Community market for grey cement and for clinker for grey cement and on that for white cement and for clinker for white cement.

5046 It is apparent from the information provided by the Commission (see paragraph 4738 above) that the turnover taken into account by it when calculating the fine imposed on Ciments Français in respect of its participation in the Cembureau agreement amounted to FRF 4 232 000 000. According to the information provided by Ciments Français in the course of proceedings (see the reply to the written question put by the Court referred to in paragraph 5044 above), the turnover from the aggregate sales in 1992 by FyM, Rezola and Halyps on the Community market for grey cement and for clinker for grey cement was FRF 650 000 000. The fine imposed on Ciments Français in respect of its participation in the infringement found in Article 1 of the contested decision should be recalculated on the basis of a lower reference turnover of FRF 3 582 000 000.

5047 So far as concerns the infringement in respect of which a fine is imposed in Article 10 of the contested decision, the information provided by the Commission (see paragraph 4738 above) shows that the turnover taken into account by it when calculating the fine imposed on Ciments Français in respect of its participation in that infringement amounted to FRF 181 000 000. According to the information provided by Ciments Français mentioned in the preceding paragraph, the turnover corresponding to the aggregate sales in 1992 by FyM, Rezola and Halyps on the Community market for white cement and for clinker for white cement was FRF 1 000 000. The fine imposed on Ciments Français for participating in the infringement found in Article 7 of the contested decision should therefore be recalculated on the basis of a lower reference turnover of FRF 180 000 000.

5048 The Court must reject the arguments put forward by Ciments Français and Holderbank alleging that the subsidiaries referred to in the contested decision were treated differently from other subsidiaries as regards fines.

5049 They cannot claim that the subsidiaries not mentioned in the contested decision were nevertheless fined as a result of the incorporation of their turnover into that of their parent company for the purpose of calculating the fine imposed on it. The fines in Article 9(2) and (21) are imposed on the 'undertakings' 'Holderbank Financière Glar[u]s SA' and 'Société des Ciments Français SA'. The fine in Article 10(4) is imposed on the 'undertaking' 'Société des Ciments Français SA'. Those two undertakings are the addressees of the contested decision (see Article 12(2) and (17)). They alone are therefore liable for those fines. The fact that the burden of those fines might be shared out within the group headed by those undertakings is of no relevance from the point of view of the rules on the determination of fines.

5050 It follows from the foregoing considerations that, subject to what has been held in paragraphs 5046 and 5047 above regarding Ciments Français, the pleas examined must be rejected.

XI — *Pleas alleging infringements of Article 15(2) of Regulation No 17, and the principles of equity, proportionality and equal treatment, owing to the fixing of the fines in ecus and the choice of conversion rate*

5051 Asland and Cementir, relying on Joined Cases 41/73, 43/73 and 44/73 *Société Anonyme Générale Sucrière and Others* v *Commission* [1977] ECR 445, and Uniland, claim that Community law does not require the Commission to express the amount of a fine in ecus. The Commission is only required to avoid unjustified differences in treatment between participants in the same infringement solely on account of appreciation or depreciation in national currency, which the Commission failed to do in this case.

5052 Those applicants, with Unicem and Italcementi, complain that the Commission converted into ecus the turnover figures expressed in national currencies, using the average exchange rate for 1992. In their view, such calculation should have been made at the exchange rate in force on the day on which the contested decision was adopted or notified. Unicem, Asland and Cementir add that the other possibility open to the Commission was to calculate and express the fine in the national currency of the Member State of the undertaking concerned.

5053 The applicants specified in the preceding paragraph claim that their national currency depreciated as against the ecu between 1992 and November 1994. They consider themselves to have suffered unjustified discrimination in comparison with undertakings from a country whose currency remained stable or has appreciated as against the ecu during that period. Unicem claims that the Commission's choice increased their fine by 23.16%. Asland estimates the detriment at approximately ESP 170 000 000. It compares the value of the fine imposed upon it with that which an undertaking in its position would have incurred had its turnover for the reference year been expressed in German marks at that year's rate of exchange. Uniland calculates the detriment at ECU 361 000. Italcementi considers its fine was increased by about 25% as a result of the Italian lira's devaluation in relation to the ecu between 1992 and November 1994. Cementir estimates a 23% increase in the actual burden of its fine between the reference year applied by the Commission for the conversion into ecu of the amounts expressed in national currencies and the year in which it lodged its application. In real terms, its fine corresponds to a fine of 5.5% of its 1992 turnover, at the 1995 rate of exchange from ecu to Italian lire.

5054 The Court points out that the Commission is entitled to express the amount of the fine in ecus, a monetary unit convertible into national currency. The possibility of converting the ecu into national currency distinguishes it from the unit of account originally referred to in Article 15(2) of Regulation No 17, in respect of which the Court of Justice (*Société Anonyme Générale Sucrière*, cited in paragraph 5051 above, paragraph 15) expressly recognised that, not being a currency in which payment is made, it necessarily entailed the fixing of the amount of the fine in national currency (Case T-157/94 *Ensidesa* v *Commission* [1999] ECR II-707, paragraph 470, and *PVC*, cited in paragraph 734 above, paragraph 1220.

5055 In the present case, it is apparent from the information provided by the Commission (see paragraph 4738 above) that in order to calculate the fines it converted the turnover figures expressed in national currency into ecus on the basis of the average exchange rate for the year to which those figures related, namely 1992.

5056 The arguments put forward by the applicants to the effect that such a conversion should have been carried out at the exchange rate on the date of adoption or notification of the contested decision cannot be upheld. Since the Commission properly chose (see paragraphs 5009 to 5011 above) to calculate the fine on the basis of the 1992 turnover, it was entitled to convert it from the national currency in which it was expressed using the average exchange rate for that reference year. If such an approach may mean that a particular undertaking must pay an amount in its national currency which is more or less than the amount it would have had to pay if the exchange rate in force on the date of notification or adoption of the contested decision had been applied, that is merely the logical result of fluctuations in the real value of the various national currencies.

5057 In any event, none of the applicants has established that through depreciation in the currency of its own Member State the fine imposed on it under Article 9 and, in the case of Italcementi,

Article 10 of the contested decision, even when expressed in national currency, exceeds the upper limit laid down in Article 15(2) of Regulation No 17.

5058 The pleas examined must therefore be dismissed.

XII — *Pleas alleging infringements of various general principles of Community law*

5059 A number of applicants argue that the determination of the fines is vitiated inasmuch as they infringe various general principles of Community law: the protection of legitimate expectations, *non bis in idem* and equal treatment.

5060 First, Lafarge claims that, in view of the Commission's conduct during the period in question (lack of reaction to the publication of the study carried out in 1976 at its request by Mr Phlips on 'Spatial pricing and competition' — a study cited in recital 10 of the contested decision —; informal assessments of the price system contemplated by CBR, as well as the dumping of imports from eastern (European) countries; approach to the 'Greek file'), the European cement producers were entitled to think that their conduct complied with the Community competition rules or, at least, was tolerated. By imposing such a heavy fine on Lafarge, the Commission infringed the principle of the protection of legitimate expectations.

5061 That plea is unfounded. In the contested decision, the Commission does not criticise at all the parties' discussing systems of price-setting and dumped imports. Its criticism is aimed at conduct whereby those parties sought to protect home markets and regulate the transfer of cement from one country to another. Lafarge cannot seriously claim that the arguments it puts forward in support of its plea in law could reasonably have made European cement producers believe that such conduct, which is formally prohibited by Article 85(1) of the Treaty, was permissible under Community competition rules.

5062 Secondly, Dyckerhoff, Uniland and Holderbank — the latter in its reply — complain that the Commission fined them twice in respect of the same conduct, first for their accession to the Cembureau agreement referred to in Article 1 of the contested decision and a second time for participating in measures implementing that agreement. Blue Circle claims that the fine imposed on it for the alleged infringements of which it is accused in Article 4 of the contested decision had the effect of imposing a second fine on it for conduct which had already received a fine in respect of the infringement found in Article 1.

5063 It should however be observed that only one fine is imposed on the applicants so far as concerns the grey cement market. According to Article 9 of the contested decision, that fine is imposed on them in respect of their participation in the Cembureau agreement. The arguments alleging that the principle *non bis idem* was infringed must therefore be rejected.

5064 Aalborg claims that, under Article 9 of the contested decision, a specific fine was imposed on Cembureau. Since its responsibility for the infringements is not linked to its capacity as a direct member of Cembureau, it considers itself to have been punished twice for the same conduct. Blue Circle states that it will bear over half of the fine imposed on the BCA. Since the Commission also considers it responsible for the infringement referred to in Article 1, it is being fined twice for the same infringement.

5065 However, there is no longer any point in examining those arguments because the fines imposed on the associations of undertakings to which the contested decision was addressed have been annulled (see paragraphs 478 to 488 above).

5066 Blue Circle adds that, under Article 9 of the contested decision, it has been fined in respect of the infringement found in Article 1, which was implemented, in particular, by the conduct set out in Article 2. However, according to that article, BCA alone was involved in that conduct so far as concerns the United Kingdom market. Blue Circle was thus fined for conduct for which it was not held responsible.

5067 However, as observed in paragraph 4746 above, Blue Circle was fined in respect only of unlawful conduct with which it is itself charged. Its argument must therefore be rejected.

5068 Thirdly, CBR, Ciments Français, Lafarge, Asland, Uniland, Cimpor, SECIL and Hornos Ibéricos claim that the Commission infringed the principle of equal treatment when determining the fines.

5069 First of all, CBR and Ciments Français state that the Commission infringed the principle of non-discrimination by imposing a fine for participating in the Cembureau agreement only on those undertakings which were both represented by their association within Cembureau and had clearly manifested their accession to that agreement by participating in other actions objected to in the contested decision (recital 65, paragraph 8), whereas elsewhere it states that the Cembureau agreement rendered liable all Cembureau's members and the whole of the European cement industry represented in it throughout the period of the infringement found (recital 45,

paragraphs 5 and 8, and recital 65, paragraph 3). Ciments Français adds that, by doing so, the Commission made the fine out of all proportion to the infringement.

5070 In addition to what has been stated in paragraphs 4425 to 4427, the Court points out that where the conduct of an undertaking infringes Article 85(1) of the Treaty it cannot escape the fine imposed on it on the ground that no fine was imposed on other economic operators when, as in the present case, those other undertakings' circumstances are not even the subject of proceedings before the Community judicature (see *Woodpulp II*, cited in paragraph 106 above, paragraph 197, *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraph 176, and *Van Megen Sports* v *Commission*, cited in paragraph 4892 above, paragraph 56).

5071 As regards Ciments Français, it should be added that, by not fining the indirect members of Cembureau in respect of which it had no evidence of their participation in measures implementing the Cembureau agreement, the Commission has not infringed the principle of proportionality to the detriment of those who, like Ciments Français, did in fact participate in such measures.

5072 Secondly, Lafarge claims that there is no rational, consistent or objective explanation for the variations in the treatment meted out to the undertakings on which fines were imposed, despite the information provided in recital 65 of the contested decision as to the criteria taken into account by the Commission when calculating the fines. There are flagrant discrepancies in that the total turnover of certain undertakings was not taken into account, or that the Commission, contrary to Mr Van Miert's statements at the press conference of 30 November 1994, applied more than two rates of fines.

5073 In that regard, it has been held (see paragraphs 4725 to 4739) that the reasons set forth in recital 65 of the contested decision contain an adequate statement of the criteria taken into account by the Commission for the purpose of determining the fines laid down in Articles 9 and 10.

5074 Moreover, it is apparent from the information provided by the Commission (see paragraph 4738 above) that, so far as concerns the infringement relating to the grey cement market, the Commission applied two basic rates in order to calculate the fines. Those undertakings which, for the reasons set out in recital 65, paragraph 9(a), bear greater responsibility for that infringement, were fined at a basic rate of 4%. Those whose responsibility for that infringement is less serious, on the grounds set out in recital 65, paragraph 9(b), had a fine imposed on them at a rate of 2.8%. In respect of the infringement relating to the white cement market, the Commission adopted a basic rate of 4% for all the undertakings involved. Those rates were applied, so far as concerns the infringement committed on the grey cement market, to the turnover from the sales of each undertaking concerned on the Community market for grey cement and for clinker for grey cement in 1992 and, so far as concerns the infringement

committed on the white cement market, to the turnover from the sales of each undertaking concerned on the Community market for white cement and for clinker for white cement in the same year. The amount of the fine on each undertaking was adjusted in accordance with the duration of its participation in the infringement in question.

5075 Since Lafarge puts forward no concrete evidence to show that it was the subject of unjustified discrimination in the application of those calculation criteria, its argument must be rejected.

5076 Thirdly, Asland claims that, so far as concerns the gravity of the infringement, the Spanish undertakings were treated less favourably than the other undertakings mentioned in the contested decision inasmuch as the border between Spain and Portugal is the only area in which the infringement committed by the Spanish undertakings could have been committed, whereas the unlawful conduct of the German, French and United Kingdom undertakings produced effects on a more varied range of border regions, namely those straddling the borders between their respective Member States.

5077 In that connection, the Court has pointed out (paragraph 4864 above) that the question whether the Cembureau agreement did or did not have anti-competitive effects on the Community's markets was not taken into account in the assessment of the gravity of that infringement. It is only when examining the responsibility of the undertakings involved in that infringement that the Commission assessed the effects normally associated with measures such as those through which those various undertakings implemented the Cembureau agreement. In that context, Asland was properly classed among the undertakings bearing greater responsibility for the infringement. The measure implementing the Cembureau agreement in which it participated, namely the agreement on the setting-up of the ETF (Article 4(1)), is one of the measures which had direct effects tending to partition the home markets. Asland's arguments must therefore be rejected.

5078 Asland claims that it did not receive the reduction in the percentage of its fine which was accorded to the other Spanish and Portuguese undertakings on the basis that they participated in the infringement over a shorter period.

5079 However, it is clear from the information sent by the Commission (see paragraph 4738 above) that the fine imposed on Asland was calculated, as were those imposed on the other Spanish and Portuguese addressees of the contested decision, by taking into account an infringement period of 86.5 months. In any case, it will be taken into account (see paragraph 5115 below) that Asland's participation in the Cembureau agreement is established only from 28 May 1986 to 31 May 1987, that is to say for a period of 12 months (see the 10th indent of paragraph 4814 above).

5080 Fourthly, Ciments Français observes that, according to the contested decision, Hornos Ibéricos attended five ETF meetings. However, the Commission identified that undertaking as among those bearing less responsibility in the Cembureau agreement on the ground that its participation in that infringement was restricted to involvement in measures to channel production surpluses towards non-member country markets, which had a less direct effect on the protection of home markets. Uniland states that the Commission infringed the principle of non-discrimination in fining it and deeming its participation in the Cembureau agreement to be serious, whereas other undertakings which, according to the contested decision itself, participated continuously and actively in the infringements relating to the ETF and Interciment were not fined in that connection (Hornos Ibéricos and Cementos del Norte) or were excluded from the proceeding. Asland also complains of the treatment of Hornos Ibéricos and Cementos del Norte.

5081 It must be pointed out that it is not for the Court, in the exercise of its review of legality, to substitute its own appraisal for that of the Commission as to the situation of an undertaking in relation to an infringement which it has not been found to have committed in the contested act.

5082 In the present case, Ciments Français, Asland and Uniland were properly classed in recital 65, paragraph 9(a), of the contested decision among the undertakings bearing greater responsibility for the infringement in respect of which a fine was imposed in Article 9. Those three applicants participated in the Cembureau agreement by means of implementing measures designed directly to protect home markets. Thus, Ciments Français was in particular involved in the Franco-German agreements and practices referred to in Article 3(3)(a), in the agreement setting up the ETF (Article 4(1)) and in the agreement establishing Interciment (Article 4(2)) (see paragraph 4319 above). Asland participated in the agreement setting up the ETF (see paragraph 4351 above). Uniland was party to that last-mentioned agreement, to the agreement establishing Interciment and to the concerted practices to defend the Italian market referred to in Article 4(3)(a) (see paragraph 4356 above).

5083 In those circumstances, they cannot properly compare their situation with that of the undertakings to which they refer in their respective arguments in order to claim the cancellation or reduction of the fine imposed on them in Article 9 (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 197, *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraph 176, and *Van Megen Sports* v *Commission*, cited in paragraph 4892 above, paragraph 56).

5084 Fifthly, Cimpor and SECIL observe that, according to the documents mentioned in recital 21 of the contested decision, various Spanish producers took part in the meetings examined at that point in the contested decision. They cite Portland Mallorca, Cementos del Mar, Cementos del Atlantico, Portland Valderrivas, Cementos Portland Hispania, Asland, Hisalba, Hispacement, Cementos Cosmos, Tudela Veguin and Cementos Alba. However, most of those undertakings were not addressees of the contested decision. Those which were, were not charged with the infringement referred to in Article 3(2). Moreover, Oficemen, which, in addition to the infringements found against it in Articles 1, 2, 4 and 5 of the contested decision, assumed sole responsibility for the Hispano-Portuguese agreement on the Spanish side, was fined only

ECU 70 000, whereas fines of ECU 9 324 000 and ECU 3 017 000 were imposed on Cimpor and SECIL respectively. They claim that this is a blatant infringement of the principle of equal treatment.

5085 In that connection, the Court points out, in addition to the principle set out in paragraph 5081 above, that Cimpor and SECIL were rightly included in the category of undertakings bearing greater responsibility for the infringement fined in Article 9 of the contested decision. The Hispano-Portuguese agreement found in Article 3(2), whereby the two applicants implemented the Cembureau agreement, was designed directly to protect home markets. In those circumstances, they cannot properly compare their situation with that of the undertakings to which they refer in their arguments in order to claim the cancellation or reduction of the fine imposed on them in Article 9 (see, to that effect, *Woodpulp II*, cited in paragraph 106 above, paragraph 197, *Dunlop Slazenger* v *Commission*, cited in paragraph 270 above, paragraph 176, and *Van Megen Sports* v *Commission*, cited in paragraph 4892 above, paragraph 56).

5086 As to the discrimination which they allege to have suffered in comparison with Oficemen, it should be borne in mind that, although Oficemen's responsibility in the infringement found in Article 3(2) is indeed established, its situation is objectively different from that of Cimpor or SECIL. As the Commission rightly points out in recital 44, paragraph 5, of the contested decision, the cement producers are the real actors. They act through their trade associations. In those circumstances, the Commission was justified in punishing the conduct of the undertakings with large fines, calculated in accordance with their turnover, whereas when it imposed a small overall fine on the trade associations, its intention was to dissuade them from taking the initiative in or facilitating such restrictive agreements and practices in the future (recital 65, paragraph 8, first indent).

5087 Cimpor and SECIL also submit that the Commission imposed on Oficemen and on the five Spanish undertakings to which the contested decision was addressed fines totalling ECU 10 576 000, that is to say a lower amount than the sum of the fines imposed on the two Portuguese undertakings (ECU 12 341 000).

5088 None the less, a mere comparison of the cumulative amounts of the fines imposed on the Spanish and Portuguese addressees of the contested decision cannot lead to a finding that the principle of equal treatment was infringed, having regard to the range of objective parameters which may explain the differences.

5089 It follows from the foregoing that the pleas examined must be dismissed.

XIII — *Plea alleging infringement of rights of the defence owing to incomplete access to the Commission file during the administrative procedure*

5090 In the observations which they submitted following the measures of 2 October 1996 and 18 and 19 June 1997 (see paragraphs 164 and 168 above) a number of applicants maintain that, by granting them only limited access to the file during the administrative procedure, the Commission infringed their rights of defence when determining the fines, inasmuch as they were deprived of access to exculpatory evidence.

5091 In the first place, Lafarge refers, in its observations of 28 January 1998, to two documents which allegedly show that the Commission had been notified at the material time of certain collective action which the Western European cement producers planned to take against imports from Greece.

5092 It relies first of all on document 33.126/19009, a Blue Circle note of the meeting of 6 November 1986 between Mr Sutherland, member of the Commission, and representatives of the European cement industry. According to that document, they informed the member of the Commission of their difficulties in exporting to Greece as a form of reprisal against that country's producers.

5093 However, as stated in paragraph 3114, that document does not prove that the representatives of the European cement industry had informed Mr Sutherland of the measures which they had in any event already adopted at the time with a view to eliminating cheap cement imports into Western Europe, primarily those from Greece, namely the setting-up of the ETF, the setting-up of Interciment and the concerted practices designed to cause Calcestruzzi to cease being a customer of the Greek producers, and of Titan in particular. Any comments that Lafarge might have made on the basis of that document during the administrative procedure would not therefore have altered the Commission's conclusions in recital 65, paragraph 5, fifth indent, of the contested decision as to the desire of the parties to shroud their unlawful conduct in secrecy.

5094 Next, Lafarge puts forward an extract from a letter sent on 6 November 1986 by Mr Van Hove (CBR) to Mr Akermann (Holderbank) (document 33.126/7639) to show that the Commission had been aware at the time of the setting-up of Interciment:

'The Competition Directorate-General of the EEC believes that that founding of this company should be notified, if several EEC cement companies are to participate as shareholders or members of a board of directors.'

5095 However, any comments that Lafarge might have made on the basis of that extract during the administrative procedure could not have refuted the specific complaint levelled by the Commission against the parties involved in the agreement on the setting-up of Interciment, namely that it had never been notified to it despite the fact that various legal opinions had recommended such notification in view of the manifestly unlawful object of that measure (contested decision, recital 26, paragraph 13, and recital 65, paragraph 5, fifth indent).

5096 In conclusion, Lafarge's comments examined in paragraphs 5091 to 5095 above would not have had even a small chance of altering the outcome of the administrative procedure.

5097 Secondly, Aalborg submits, in its observations of 12 January 1998, that according to documents 33.126/3833 to 3844, 18130 to 18138 and 171 to 174 the Commission did not originally intend to investigate an overall European agreement or concerted practice, but regional agreements or concerted practices and suspected cooperation between several large European cement producers — the 'Group of 8' — with which Aalborg had no connection whatsoever. Aalborg states that the documents would have enabled it to show that the Commission investigated the supposed existence of the Cembureau agreement only later and, therefore, that the conduct alleged against it in the context of that agreement was the subject of a time bar.

5098 However, documents 33.126/171 to 174, cited by Aalborg, contain the decision of the Commission of 20 April 1989 relating to the investigations which gave rise to the present case. It is clear from them that those investigations were justified by the following considerations:

'... the Commission received information that agreements and/or concerted practices have been agreed upon by the major European cement producers during meetings held in various European cities.

... according to the information received by the Commission, those agreements and/or concerted practices had [in particular] as their object:

(1) the agreed reduction of production capacity in the common market with the aim of protecting the market share of each producer;

...

(iii) the allocation of quotas and the geographical distribution of the markets as well as control of their implementation through checks on the destination of products;

...

(v) the systematic exchange of information, intended to ensure that the agreements or concerted practices are implemented and to allow the setting-off of quotas allocated to each producer from one year against the next'.

5099 It is apparent from those extracts that the Commission's investigations following its decision of April 1989 were aimed from the outset at the Cembureau agreement and the implementing measures. Aalborg's argument is therefore unfounded.

5100 Thirdly, Italcementi maintains in its observations of 26 November 1997 that several documents show its marginal role in the infringements committed. It is thus evident from documents 33.126/4869 to 4871 and 3944 to 3948, as well as from document 33.322/1478, that the Italian cement industry has different features from those of the other European cement industries (natural barriers and price level creating an obstacle to exportation from Italy; absence of vertical integration leaving the Italian market vulnerable to imports) and, therefore, that Italcementi was not involved at all in the discussions which took place on questions concerning international trade in cement.

5101 Certain documents also reveal that the other cement producers saw Italcementi certainly as a large, but relatively inactive, operator at international level (documents 33.126/8895, 8774, 8791, 8792 and 8894) and that when it participated in meetings of European cement producers Italcementi dealt with the problems exclusively from the angle of its home market (documents 33.126/2545 to 2548 and 4923 to 4926).

5102 Finally, documents 33.126/19868 to 19870 and 19884 allegedly confirm the marginal and lawful nature of Italcementi's activity within the ETF. They were restricted to participation in the lobbying activities by that working group in order to resolve the problems linked to imports from Greece. They never took the form of dissuasive or even aggressive actions for which the United Kingdom cement producers might sometimes have been responsible.

5103 In conclusion, Italcementi states that if it had had the entire investigation file available during the administrative procedure it would have been able to persuade the Commission of the need to make, when determining the fines, an assessment of the individual responsibility of each producer for the conduct complained of, rather than an overall assessment of responsibilities.

5104 None the less, such comments could not have prevailed over the factual evidence of Italcementi's presence, in its capacity as a direct member of Cembureau, at the Head Delegates meetings of 19 March and 7 November 1984 during which the Cembureau agreement was confirmed, as well as its leading role in the setting-up of the ETF and Interciment and in the measures adopted to defend the Italian market against cement imports from Greece. They were not therefore such as to lead the Commission to assess Italcementi's responsibility for the infringement relating to the market in grey cement differently than in recital 65, paragraph 9(a), of the contested decision, namely that Italcementi should be classed among those undertakings bearing grave responsibility for that infringement.

5105 Nor would those comments have been of such a nature as to prevail over the evidence contained in the bundle of documents referred to in recitals 38 to 40 of the contested decision, from which it is evident that Italcementi participated constantly and assiduously, throughout the period in question, in meetings and in the unlawful activities of the WCC. They could not therefore have overturned the finding that Italcementi played an important role in the infringement committed on the white cement market.

5106 It is apparent from the foregoing that Italcementi's comments examined in paragraphs 5100 to 5105 above would not have had even a small chance of altering the outcome of the administrative procedure.

5107 Fourthly, in its observations of 8 December 1997 Holderbank puts forward a fax from Blue Circle of 20 October 1987 (document 33.126/10959) worded as follows:

'A sum of money had been advanced to Holderbank with the intention that this should be a contribution towards share capital, but subsequently a decision was made and communicated to Holderbank that the Group did not wish to participate in the company's share capital. This latter decision was not communicated, however, to those responsible for maintaining the books of BCO AG and hence an error was made in recording the nature of this cash outflow. This error will be corrected in 1987.'

5108 Holderbank claims that, if it had had that document available during the administrative procedure, it would have been able to refute the Commission's charge that Blue Circle wanted

to conceal its participation in Interciment by misrepresenting the purpose of its advance to Holderbank. It considers that it would have been able to rebut the Commission's argument that the undertakings sought to dissimulate their unlawful behaviour.

5109 In that connection, it suffices to observe that the document put forward by Holderbank was classified as 'A: European producers' for the purposes of the consultation of the file during the administrative procedure (see paragraph 250 above) and that it was even in the Box (see paragraph 95 above). In those circumstances, Holderbank cannot now rely upon it in order to show that its rights of defence were infringed during the administrative procedure.

5110 Fifthly, Cementir bases itself, in its observations of 29 October 1997, on the documents referred to in paragraph 3391 above to illustrate the strong penetration of Greek exports into the Italian market during the period covered by the contested decision, particularly from 1987 onwards. Those documents allegedly show at the very least that the Cembureau agreement had no effect in Italy, which the Commission should have taken into account, if only when fixing the fines.

5111 None the less, had it been possible for Cementir to have made such comments during the administrative procedure they could not have prevailed over the considerations set forth correctly by the Commission in recital 65, paragraph 9(a), of the contested decision, according to which Cementir bore grave responsibility for the infringement relating to the grey cement market in view of the fact that, as a direct member of Cembureau, it participated directly in the conclusion of the Cembureau agreement and took part in measures implementing that agreement which were designed directly to protect home markets.

5112 It follows that Cementir's comments set out in paragraph 5110 above would not have had even a small chance of altering the outcome of the administrative procedure.

5113 In conclusion, the plea must be dismissed.

XIV — *Conclusions*

5114 Article 9 of the contested decision must be annulled as against ENCI, Cedest, Alsen-Breitenburg, Nordcement, Buzzi, Rugby, Castle, Heracles and Titan (see paragraphs 4718 and 4719 above).

5115 In the light of the examination carried out by the Court in paragraphs 4714 to 5113 above and the figures provided by the Commission during the proceedings, the fines in Articles 9 and 10 of the contested decision, expressed in euro pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), must be reduced as follows:

— the fine imposed on CBR in Article 9 is reduced to EUR 1 711 000;

— the fine imposed on Ciments Luxembourgeois in Article 9 is reduced to EUR 617 000;

— the fine imposed on Dyckerhoff in Article 9 is reduced to EUR 7 055 000;

— the fine imposed on Vicat in Article 9 is reduced to EUR 2 407 000;

— the fines imposed on Ciments Français in Articles 9 and 10 are reduced to EUR 12 519 000 and to EUR 1 051 000 respectively;

— the fine imposed on Heidelberger in Article 9 is reduced to EUR 7 056 000;

— the fine imposed on Lafarge in Article 9 is reduced to EUR 14 248 000;

— the fine imposed on Aalborg in Article 9 is reduced to EUR 2 349 000;

— the fine imposed on Unicem in Article 9 is reduced to EUR 6 399 000;

— the fines imposed on Valenciana in Articles 9 and 10 are reduced to EUR 250 000 and to EUR 388 000 respectively;

— the fine imposed on Asland in Article 9 is reduced to EUR 740 000;

— the fine imposed on Uniland in Article 9 is reduced to EUR 592 000;

— the fine imposed on Irish Cement in Article 9 is reduced to EUR 2 065 000;

— the fine imposed on Cimpor in Article 9 is reduced to EUR 4 312 000;

— the fine imposed on SECIL in Article 9 is reduced to EUR 1 395 000;

— the fine imposed on Italcementi in Article 9 is reduced to EUR 25 701 000;

— the fine imposed on Holderbank in Article 9 is reduced to EUR 1 918 000;

— the fine imposed on Hornos Ibéricos in Article 9 is reduced to EUR 836 000;

— the fine imposed on Aker in Article 9 is reduced to EUR 14 000;

— the fine imposed on EUROC in Article 9 is reduced to EUR 14 000;

— the fine imposed on Cementir in Article 9 is reduced to EUR 7 471 000;

— the fine imposed on Blue Circle in Article 9 is reduced to EUR 7 717 000;

— the fine imposed on Halkis in Article 9 is reduced to EUR 510 000.

The claims for reimbursement of the fine, together with interest, and for reimbursement of the expenses incurred in providing a bank guarantee

5116 In Cases T-31/95 and T-32/95, the applicants request that the Commission be ordered to pay them interest on the fine wrongly paid.

5117 In Cases T-50/95 and T-51/95, the applicants request that the Commission be ordered to reimburse the expenses incurred by them in providing a bank guarantee, at least in respect of the amount by which the fine is reduced.

5118 Suffice it to state that those claims in actual fact concern compliance with the present judgment and that it is for the Commission to take the necessary steps to comply with it, in accordance with Article 176 of the EC Treaty (now Article 233 EC) (see Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 697). The claims are therefore inadmissible.

Costs

5119 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

5120 Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, order costs to be shared or order each party to bear its own costs.

5121 Under the second subparagraph of Article 87(3), the Court may also order a party, even if successful, to pay the costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. A successful party may thus be ordered to pay costs which have arisen as a result of the conduct of that party (Case T-7/96 *Perillo* v *Commission* [1997] ECR II-1061, paragraph 47).

5122 In the present case, the second subparagraph of Article 87(3) is to be applied, having regard to the conduct of the Commission which, by not granting proper access to the investigation file during the administrative procedure (see paragraph 152 above), did not satisfy the requirements of sound administration. It cannot be held against an applicant that it instituted proceedings before the Court for review of such conduct, if necessary, after adoption of the requisite measures of organisation of procedure.

5123 In the light of the above principles, costs are to be determined in the various cases before the Court by reference to five separate categories.

5124 First, since the Commission has been unsuccessful in its submissions in Cases T-31/95, T-38/95, T-45/95, T-46/95, T-53/95, T-56/95, T-57/95 and T-64/95, it must be ordered to pay the costs relating to those cases, as sought by the applicants concerned.

5125 Secondly, although the applicant in Case T-51/95 has failed on some of its claims, it has succeeded on most of them. The Court has held in particular that Articles 1 and 9 of the contested decision must be annulled in so far as they concern it. Moreover, the applicant complained about the irregular access to the Commission's file granted to it during the administrative procedure.

5126 Accordingly, the Court will make an equitable assessment of the circumstances of the case in holding that in Case T-51/95 the applicant is to bear one third of its costs and the Commission is to pay two thirds of the applicant's costs and to bear its own costs.

5127 Thirdly, in Cases T-26/95, T-30/95, T-32/95, T-36/95, T-48/95, T-54/95, T-59/95, T-63/95 and T-103/95, the applicants in question have failed on some of their claims but have succeeded on a significant number of them. The Court has held in particular that Article 9 of the contested decision, imposing a fine on them, must be annulled in so far as it concerns them. Moreover, the applicants in Cases T-26/95, T-30/95, T-32/95, T-36/95, T-48/95, T-59/95, T-63/95 and T-103/95 complained about the irregular access to the Commission's file granted to them during the administrative procedure.

5128 In those circumstances, it must be held that in Cases T-26/95, T-30/95, T-32/95, T-36/95, T-48/95, T-59/95, T-63/95 and T-103/95 the applicants and the Commission are each to bear their own costs. On the other hand, since the applicant in Case T-54/95 did not complain about the irregular access to the Commission's file granted to it during the administrative procedure,

the Commission is to be ordered to bear three quarters of its own costs and the applicant to pay one quarter of the Commission's costs and to bear its own costs.

5129 Fourthly, the applicant in Case T-55/95 has failed on some of its claims, but has succeeded on a significant number of them. The Court has held in particular that Article 1 of the contested decision must be annulled in so far as it finds that it participated in the infringement complained of before 28 May 1986 and after 31 May 1987. Moreover, the applicant complained about the irregular access to the Commission's file granted to it during the administrative procedure.

5130 Accordingly, the Court will make an equitable assessment of the facts of that case in holding that in Case T-55/95 the Commission is to bear three quarters of its costs and that the applicant is to pay one quarter of the Commission's costs and to bear its own costs.

5131 Fifthly, in Cases T-25/95, T-34/95, T-35/95, T-37/95, T-39/95, T-42/95, T-43/95, T-44/95, T-50/95, T-52/95, T-58/95, T-60/95, T-61/95, T-62/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95 and T-104/95, the applicants in question have failed on a significant number of their claims, even though they have succeeded on some of them. In Cases T-25/95, T-35/95, T-39/95, T-43/95, T-52/95 and T-65/95, the applicants have failed in particular on their claims concerning Article 7 of the contested decision relating to the white cement market. None the less, in Cases T-25/95, T-34/95, T-35/95, T-37/95, T-39/95, T-42/95, T-43/95, T-44/95, T-50/95, T-52/95, T-58/95, T-60/95, T-61/95, T-62/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95 and T-88/95, the applicants complained about the irregular access to the Commission's file granted to them during the administrative procedure.

5132 Accordingly, in those cases the Commission is to bear two thirds of its costs and the applicants are to pay one third of the Commission's costs and to bear their own costs. On the other hand, since the applicant in Case T-104/95 did not complain about the irregular access to the Commission's file granted to it during the administrative procedure, the Commission is to bear one half of its own costs and the applicant is to pay one half of the Commission's costs and to bear its own costs.

5133 Irrespective of the abovementioned categories, the claims by the applicants in Cases T-55/95, T-58/95 and T-59/95 for an order that the Commission pay the costs, including the costs of providing and maintaining the bank guarantee, must be dismissed. It is settled law that expenses incurred in providing a bank guarantee in order to avoid the enforcement of a decision are not expenses incurred for the purpose of the proceedings within the meaning of Article 91(b) of the Rules of Procedure (see the order of 20 November 1987 in Case 183/83 *Krupp* v *Commission* [1987] ECR 4611, paragraph 10, and the judgment in *Weig* v *Commission*, cited in paragraph 4626 above, paragraph 308).

5134 Likewise, the applicant's claim in Case T-51/95 that the Commission should be ordered to reimburse the expenses incurred by it during the administrative procedure must be dismissed. According to Article 91 of the Rules of Procedure, 'the following shall be regarded as recoverable costs ... expenses necessarily incurred by the parties for the purpose of the proceedings'. By 'proceedings' that provision refers only to proceedings before the Court of First Instance and does not include any prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to 'proceedings before the Court of First Instance' (see, by analogy, the orders of the Court of Justice in Case 75/69 *Hake* v *Commission* [1970] ECR 901 and Case C-294/90 DEP *British Aerospace* v *Commission* [1994] ECR I-5423, paragraphs 10 to 12). In any event, if that claim were to be regarded as a claim for damages, it would have to be declared inadmissible inasmuch as it does not fulfil the requirements of Article 19 of the EC Statute of the Court of Justice or of Article 44(1)(c) of the Rules of Procedure (Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 27).

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition),

hereby:

1. Joins Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 for the purposes of judgment.

2. In Case T-25/95 *Cimenteries CBR* v *Commission*:

   — annuls Article 1 of Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 4(4)(g) of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 1 711 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

3. In Case T-26/95 *Cembureau — Association Européenne du Ciment* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between the applicant and its members related, so far as concerns Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

4. In Case T-30/95 *Fédération de l'Industrie Cimentière Belge* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

5. In Case T-31/95 *Eerste Nederlandse Cementindustrie (ENCI)* v *Commission*:

— annuls Articles 1, 5 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

6. In Case T-32/95 *Vereniging Nederlandse Cementindustrie (VNC)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

7. In Case T-34/95 *Ciments Luxembourgeois* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands

prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 617 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

8. In Case T-35/95 *Dyckerhoff* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 3(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in an agreement on the sharing of the Saarland market and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC) after 12 August 1987;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 7 055 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

9. In Case T-36/95 *Syndicat National de l'Industrie Cimentière (SFIC)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by

lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 3(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in an agreement on the sharing of the Saarland market, a concerted practice with Bundesverband der Deutschen Zementindustrie eV before 1984 and in a concerted practice designed to exert pressure on Cedest SA and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— annuls Article 3(3)(b) of Decision 94/815 in so far as it finds the existence of a concerted practice between the applicant and Bundesverband der Deutschen Zementindustrie eV designed to monitor the destination of French exports to Germany according to the Land of destination and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

10. In Case T-37/95 *Vicat* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 11 May 1983 and after 23 April 1986;

— annuls Article 3(1)(c) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 23 April 1986;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 2 407 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

11. In Case T-38/95 *Groupe Origny* v *Commission*:

— annuls Articles 1, 3(3)(a) and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

12. In Case T-39/95 *Ciments Français* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 17 February 1989 and in so far as it finds that the applicant implemented the Cembureau agreement by participating in the infringement referred to in Article 3(1)(b);

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

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 6 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983;

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

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

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

13. In Case T-42/95 *Heidelberger Zement* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 12 August 1987;

— annuls Article 3(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in an agreement on the sharing of the Saarland market and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the Treaty before 17 November 1982 and after 12 August 1987;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) and (3)(a) of Decision 94/815 in so far as they concern the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 7 056 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

14. In Case T-43/95 *Lafarge Coppée* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 19 May 1989;

— annuls Article 3(1)(a) of Decision 94/815 in so far as it finds that the applicant participated in a concerted practice with Fratelli Buzzi SpA involving the restriction of their autonomy of conduct with regard to production sources;

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

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(4)(e) and (f) of Decision 94/815 in so far as they concern the applicant;

— annuls Article 6 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 14 248 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

15. In Case T-44/95 *Aalborg Portland* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 31 May 1987;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 2 349 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

16. In Case T-45/95 *Alsen* v *Commission*:

— annuls Articles 1, 5 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

17. In Case T-46/95 *Alsen* v *Commission*:

— annuls Articles 1, 5 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

18. In Case T-48/95 *Bundesverband der Deutschen Zementindustrie* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 3(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in an agreement on the sharing of the Saarland market and a concerted practice with the Syndicat National de l'Industrie Cimentière (SFIC) before 1984, and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— annuls Article 3(3)(b) of Decision 94/815 in so far as it finds that there was a concerted practice between the applicant and Syndicat National de l'Industrie

Cimentière (SFIC) designed to monitor the destination of French exports to Germany according to the Land of destination and in so far as it finds that the applicant participated in an infringement of Article 85(1) of the Treaty after 12 August 1987;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

19. In Case T-50/95 *Unicem* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 3 April 1992;

— annuls Article 2(1) of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer and in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 6 399 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

20. In Case T-51/95 *Fratelli Buzzi* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 3(1)(a) of Decision 94/815 in so far as it finds that the applicant participated in a concerted practice with Lafarge Coppée SA involving the restriction of their autonomy of conduct with regard to production sources;

— annuls Article 3(1)(c) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 23 April 1986;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders the applicant to bear one third of its own costs;

— orders the Commission to bear its own costs and two thirds of the costs incurred by the applicant.

21. In Case T-52/95 *Compañia Valenciana de Cementos Portland* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 13 May 1987;

— annuls Article 6 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 13 May 1987;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 250 000;

— fixes the amount of the fine imposed on the applicant by Article 10 of Decision 94/815 at EUR 388 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

22. In Case T-53/95 *The Rugby Group* v *Commission*:

— annuls Articles 1, 4(4)(a) and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

23. In Case T-54/95 *British Cement Association* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of

Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one quarter of the costs incurred by the Commission;

— orders the Commission to bear three quarters of its own costs.

24. In Case T-55/95 *Asland* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 28 May 1986 and after 31 May 1987;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) and (3)(a) of Decision 94/815 in so far as they concern the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 740 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one quarter of the costs incurred by the Commission;

— orders the Commission to bear three quarters of its own costs.

25. In Case T-56/95 *Castle Cement* v *Commission*:

— annuls Articles 1, 4(4)(a), 5 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

26. In Case T-57/95 *Heracles General Cement Company* v *Commission*:

— annuls Articles 1, 4(4)(d), (f) and (g), 6 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

27. In Case T-58/95 *Corporación Uniland* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 592 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

28. In Case T-59/95 *Agrupación de Fabricantes de Cemento de España (Oficemen)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 24 April 1989;

— annuls Article 2(1) of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

29. In Case T-60/95 *Irish Cement* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986 and after 31 May 1987;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 2 065 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

30. In Case T-61/95 *Cimpor — Cimentos de Portugal* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 24 April 1989;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 4 312 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

31. In Case T-62/95 *SECIL — Companhia Geral de Cal e Cimento* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 24 April 1989;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 1 395 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

32. In Case T-63/95 *Associação Técnica da Indústria de Cimento (ATIC)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

33. In Case T-64/95 *Titan Cement Company* v *Commission*:

— annuls Articles 1, 4(4)(b), (c), (e), (g) and (h), 6 and 9 of Decision 94/815 in so far as they concern the applicant;

— orders the Commission to pay the costs.

34. In Case T-65/95 *Italcementi — Fabbriche Riunite Cemento* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 19 March 1984 and after 3 April 1992;

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

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

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

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

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

35. In Case T-68/95 *Holderbank Financière Glarus* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(4)(c) and (d) of Decision 94/815 in so far as they concern the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 1 918 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

36. In Case T-69/95 *Hornos Ibéricos Alba (Hisalba)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 19 May 1989;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 836 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

37. In Case T-70/95 *Aker RGI ASA* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 4(4)(h) of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 14 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

38. In Case T-71/95 *Scancem (publ)* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 June 1986 and after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 4(4)(h) of Decision 94/815 in so far as it concerns the applicant;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 14 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

39. In Case T-87/95 *Cementir — Cementerie del Tirreno* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 3 April 1992;

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

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 4(1) and (2) of Decision 94/815 in so far as they concern the applicant;

— annuls Article 4(3)(a) of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 9 September 1986;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

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

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

40. In Case T-88/95 *Blue Circle Industries* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983 and after 7 November 1988;

— annuls Article 4(1) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 May 1987;

— annuls Article 4(2) of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 7 November 1988;

— annuls Article 4(4)(a) and (b) of Decision 94/815 in so far as they concern the applicant;

— annuls Article 6 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 7 717 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one third of the costs incurred by the Commission;

— orders the Commission to bear two thirds of its own costs.

41. In Case T-103/95 *Enosi Tsimentoviomichanion Ellados* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement after 31 December 1988;

— annuls Article 2(1) of Decision 94/815 in so far as it finds that there were agreements on the exchange of price information at the meetings of the Executive Committee of Cembureau — The European Cement Association, and in so far as it finds that the applicant participated in the infringement after 19 March 1984;

— annuls Article 2(2) of Decision 94/815 as regards the applicant in so far as it finds that the periodic circulation of information between Cembureau — The European Cement Association and its members related, so far as concerns the Belgian and Netherlands prices, to those two countries' producers' minimum prices for supplies of cement by lorry and, so far as concerns Luxembourg, the prices, inclusive of rebates, of that country's producer;

— annuls Article 5 of Decision 94/815 in so far as it concerns the applicant;

— annuls Article 9 of Decision 94/815 in so far as it concerns the applicant;

— dismisses the remainder of the application;

— orders each party to bear its own costs.

42. In Case T-104/95 *Tsimenta Chalkidos* v *Commission*:

— annuls Article 1 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983 and after 1 September 1986;

— annuls Article 6 of Decision 94/815 in so far as it finds that the applicant participated in the infringement before 18 November 1983 and after 1 September 1986;

— fixes the amount of the fine imposed on the applicant by Article 9 of Decision 94/815 at EUR 510 000;

— dismisses the remainder of the application;

— orders the applicant to bear its own costs and to pay one half of the costs incurred by the Commission;

— orders the Commission to bear one half of its own costs.

Lindh García-Valdecasas Lenaerts

Azizi Jaeger

Delivered in open court in Luxembourg on 15 March 2000.

H. Jung P. Lindh

Registrar President

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