Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95

Cimenteries CBR and Others

v

Commission of the European Communities

(Competition — Article 85(1) of the EC Treaty (now Article 81(1) EC) — Cement market — Rights of the defence — Access to the file — Single and continuous infringement — General agreement and measures of implementation — Liability for an infringement — Evidence of participation in the general agreement and measures of implementation — Links between the general agreement and the measures of implementation as regards objects and participants — Fine — Determination of the amount)

Summary of the Judgment

1. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Purpose — Documents useful to the defence — Appraisal solely by the Commission — Not permissible — Obligation to allow access to the whole file — Extent of the obligation as regards confidential documents*

(Council Regulation No 17, Art. 19(1) and (2); Commission Regulation No 99/63, Art. 2)

2. *Competition — Administrative procedure — Observance of the rights of the defence — Documents that may contain exculpatory evidence — Irregular access to the file — Effect on the legality of the decision — Appraisal by the Court of First Instance*

3. *Competition — Administrative procedure — Access to the file — Commission's refusal to send copies of exculpatory documents in the applicant's possession — Infringement of rights of defence — None*

4. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Incriminating document — Meaning*

5. *Competition — Administrative procedure — Commission decision finding an infringement — Exclusion of evidence in documents not disclosed to the parties — Consequences — Relevant objection may not be proved by reference to those documents*

6. *Competition — Administrative procedure — Access to the file — Documents not contained in the investigation file and which the Commission does not intend to use as incriminating evidence — Documents which may be of use to the defence — Commission's obligation to make those documents accessible to the parties on its own initiative — None — Parties must request disclosure of them*

7. *Competition — Administrative procedure — Access to the file — Commission's obligation to disclose internal documents — None — Disclosure ordered by the Community judicature — Conditions*

8. *Competition — Administrative procedure — Statement of objections — Matters to be stated*

9. *Competition — Administrative procedure — Statement of objections — Matters to be stated — Notice to undertakings and associations of undertakings that the Commission intends to impose a fine on them*

   (Council Regulation No 17, Art. 15(2))

10. *Competition — Administrative procedure — Language rules — Appendices to the statement of objections — Literal citation by the Commission of documents emanating from undertakings — Transcript of the hearing — Made available to the parties in the original language — Breach of rights of defence — None*

    (Council Regulation No 1, Art. 3; Commission Regulation No 99/63, Art. 9(4))

11. *European Communities — Language rules — Irregularity committed by an institution — Effect — Formal defect if harm suffered*

    (Council Regulation No 1, Art. 3)

12. *Competition — Administrative procedure — Advisory Committee on restrictive practices and dominant positions — Determination of the content of the file to be sent to the committee — Information as to fines*

(Council Regulation No 17, Art. 10(3) to (6))

13. *Competition — Agreements, decisions and concerted practices — Prohibition — Application to associations of undertakings — Conditions*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

14. *Competition — Agreements, decisions and concerted practices — Agreements between associations of undertakings and undertakings — Included*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

15. *Competition — Agreements, decisions and concerted practices — Participation in meetings with an anti-competitive object — Ground for concluding that, if it has not distanced itself from the decisions taken, an undertaking participated in the subsequent agreement or concerted practice*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

16. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Prejudicial to competition — Criteria for assessment — Anti-competitive object — Sufficient*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

17. *Competition — Agreements, decisions and concerted practices — Proof — Single piece of evidence — Whether permissible — Conditions*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

18. *Competition — Agreements, decisions and concerted practices — Concerted practice — Need for reciprocal contacts*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

19. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Statement of intention eliminating or substantially reducing uncertainty as to a trader's behaviour on the market — Sufficient evidence*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

20. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Need for a causal link between the concerted action and the conduct of the undertakings on the market — Presumption that the link exists*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

21. *Competition — Agreements, decisions and concerted practices — Infringements — Justification — Conduct of other traders benefiting from public aid — Commission's failure to fulfil its obligations — Not permissible*

(EC Treaty, Arts 85(1) and 155 (now Arts 81(1) and 211 EC))

22. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Form of coordination and cooperation incompatible with each undertaking's obligation to determine its market policy independently*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

23. *Competition — Agreements, decisions and concerted practices — Concerted purchases of products from one producer designed to halt or reduce its direct sales on European markets — Proof of the producer's participation in the concerted practice — Awareness by it of the purpose of those purchases — Insufficient*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

24. *Competition — Agreements, decisions and concerted practices — Cooperation between undertakings on export markets in non-member countries — Prohibition — Conditions*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

25. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Anti-competitive object — Lack of anti-competitive effect on the market — Irrelevant — Effect on trade between Member States — Criteria for assessment*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

26. *Competition — Agreements, decisions and concerted practices — Bi- or multilateral agreements or practices regarded as constituent elements of a single anti-competitive agreement — Conditions — Overall plan pursuing a common objective — Undertakings which may be charged with participation in the single agreement — Conditions*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

27. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Burden of proving the infringement and its duration on the Commission*

(EC Treaty, Art. 85(1) (now Art. 81(1) EC))

28. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision imposing fines for infringement of the competition rules — Desirability of disclosing the method of calculating the fine*

(EC Treaty, Art. 173 (now, after amendment, Art. 230 EC) and Art. 190 (now Art. 253 EC); Council Regulation No 17, Art 15)

29. *Competition — Fines — Conditions for imposing fines by the Commission — Benefit derived by the undertaking from the infringement — Exclusion — Unlawful gains taken into account when calculating the fine — Conditions*

(Council Regulation No 17, Art. 15)

30. *Competition — Fines — Amount — Determination thereof — Criteria — Application in the context of an infringement committed by several undertakings*

(Council Regulation No 17, Art. 15(2))

31. *Competition — Fines — Amount — Determination thereof — Turnover figure taken into account in order to calculate the upper limit of the fine — Turnover figure taken into account in order to calculate the fine — Distinction*

(Council Regulation No 17, Art. 15(2))

32. *Competition — Fines — Amount — Determination thereof — Turnover figure taken into account — Turnover of the whole group of undertakings — Parent company's fine calculated by including in its turnover that of subsidiaries not covered by the contested decision — Fine thereby imposed on those subsidiaries — None*

(Council Regulation No 17, Art. 15(2))

33. *Competition — Fines — Amount — Methods of calculation — Conversion into ecus of the undertakings' turnover figure in the reference year on the basis of the average exchange rate over the same year — Whether permissible*

(Council Regulation No 17, Art. 15)

34. *Procedure — Costs — Recoverable costs — Meaning — Expenses incurred in providing and maintaining a bank guarantee — Expenses incurred during the administrative procedure in competition law proceedings — Not included*

(Rules of Procedure of the Court of First Instance, Art. 91(b))

1. Access to the file in competition cases is intended to allow the addressees of a statement of objections 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 statement of objections on the basis of that evidence. 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.

Thus, in the context of the defended proceedings for which Regulation No 17 provides, and having regard to the general principle of equality of arms, it cannot be for the Commission alone to decide which documents are of use for the defence of parties involved and it is not acceptable for the Commission to be able to decide on its own whether or not to use documents against those parties, when they have had no access to them and have not therefore been able to decide whether or not to use them in their defence.

It follows that in order to allow the parties to defend themselves effectively the Commission must 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. If it takes the view that certain documents in its investigation file contain business secrets or other confidential information, it must prepare a non-confidential version of the documents in question or have them prepared by the parties from which they came. If preparation of non-confidential versions of all the documents proves difficult, it must send to the parties concerned a sufficiently precise list of the documents posing problems so as to enable them to ascertain, with knowledge of the facts, whether the documents described are likely to be relevant for their defence. A list of documents is insufficiently precise if it does not describe the content of the documents listed in it and so does not allow the parties concerned to assess whether it is expedient to request access to specific documents.

(see paras 142–144, 147–148)

2. The finding that the Commission did not give the applicants proper access to the investigation file during the administrative procedure in competition proceedings cannot in itself lead to annulment of the contested decision. 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.

The contested decision cannot therefore be annulled unless it is found that the lack of proper access to the investigation file prevented the parties from perusing documents which were likely to be of use in their defence and thus infringed their rights of defence. The large number of documents in the investigation file to which the applicants have not been given access during the administrative procedure does not in itself suffice to justify such a finding.

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. The Court cannot act as a substitute for the Commission; its examination must first of all be directed at the question whether there is an objective link between the documents which were not accessible during the administrative procedure and an objection upheld 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, the Court must first examine 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 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. 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.

(see paras 156, 240–241)

3. In the context of an administrative procedure in competition proceedings, an applicant's rights of defence cannot be infringed by the Commission's failure to disclose a document which might contain exculpatory evidence where that document emanates from that applicant or was clearly in its possession during the administrative procedure. If a document available to an addressee of the statement of objections 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.

(see para. 248)

4. A document can be regarded as a document incriminating an undertaking involved in competition proceedings only where it is used by the Commission to support a finding of an infringement in which that undertaking is alleged to have participated. In order to establish an infringement of its rights of defence, it does not suffice that the undertaking shows that it was unable to express its views during the administrative procedure on a document used in some part of the contested decision. It is necessary for the undertaking to prove that in the contested decision the Commission used a new item of evidence in order to sustain an infringement in which it is alleged to have participated.

Moreover, documents used in the contested decision in the context of an infringement attributed to an undertaking 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 has been used solely in the contested decision to substantiate an allegation that another undertaking participated in the same infringement or where it has been used to refute a specific argument relied upon by such other undertaking during the administrative procedure.

(see paras 284 and 318)

5. Documents which were used against the parties in the contested decision but which were not available to them during the administrative procedure, or from which they could not have reasonably foreseen the conclusions the Commission was going to draw, must be excluded as evidence of infringements of the competition rules.

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.

(see paras 323 and 364)

6. In an administrative procedure in competition proceedings 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 con-

cerned in the final decision. Consequently, an undertaking which learns during the administrative procedure that the Commission has documents which might be useful for its defence and wishes to inspect them 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.

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.

(see para. 383)

7. The Commission is under no obligation to grant access to its internal documents during the administrative procedure in competition proceedings. Furthermore, in proceedings before the Community judicature those 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. 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.

(see para. 420)

8. The statement of objections 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 statement of objections 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 para. 476)

9. 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 statement of objections must thus 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. The statement of objections must thus make it possible for the undertaking or association of undertakings to defend itself not only against a finding of an infringement but also against the imposition of a fine.

In particular, if, for particular reasons, the Commission intends to fine, in respect of the same infringement, both an association of undertakings and the member undertakings of that association, it must make that intention clear in the statement

of objections or in a supplement thereto. A statement of objections does not express such an intention where the only point in it dealing with the fines contains no reference to those associations other than an almost word for word citation of Article 15(2) of Regulation No 17, under which the Commission may impose fines on undertakings or associations of undertakings, and in which the Commission, in its observations in the statement of objections concerning the initial conditions for the imposition of a fine and the determination of the amount of the fine, does not express its intention to impose fines also on associations of undertakings.

(see paras 480–481, 483–485)

10. In an administrative procedure in competition proceedings, the Commission is not required to provide the undertakings with a translation of annexes to the statement of objections, since they are not 'documents', within the meaning of Article 3 of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community. Those documents do not emanate from the Commission, but are evidence on which the Commission relies.

Nor can documents emanating from undertakings or trade associations of undertakings which the Commission quotes verbatim in the statement of objections in support of those objections be regarded as emanating from the Commission, even though the statement of objections is a Commission 'document' within the meaning of Article 3 of Regulation No 1. The fact that the statement of objections contains various untranslated quotations from such documents cannot therefore be considered to infringe Article 3 of Regulation No 1.

The only purpose of the minutes of the hearings provided for in Article 9(4) of Regulation No 99/63 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. They are not therefore documents within the meaning of Article 3 of Regulation No 1 that emanate from the Commission and do not therefore have to be translated.

Moreover, in order to assess the evidential value of the evidence relied upon by the Commission in support of its statement of objections and, therefore, in order to prepare a defence, 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 statement of objections should have access during the administrative procedure to all the incriminating documents in their original versions. That principle of the rights of the defence does not however require the Commission to translate documents cited in the statement of objections, or used in support of it, into the language of the Member State where the addressees of the statement of objections are established. The applicants' argument alleging that their rights of defence were infringed by the Commission's failure to provide a translation of some evidence cited in the statement of objections or used in support of it must therefore be rejected.

(see paras 631, 633–636)

11. 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.

(see para. 643)

12. The 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.

That formal requirement is not infringed where the Commission does not inform the Advisory Committee of the exact amounts of the fines proposed, but gives an approximate overall figure in ecus, representing the total fines to be imposed, and informs it that it intends to impose a fine of 5% of the turnover on some undertakings identified in the decision which bore serious responsibility, and of 3.5% on other undertakings, also mentioned in the decision which bore lesser responsibility. In those circumstances, the Commission sent to the Advisory Committee all the material information necessary for drawing up an opinion on the fines.

(see paras 742, 744, 748)

13. It is not necessary for trade associations to have a commercial or economic activity of their own for Article 85(1) of the Treaty (now Article 81(1) EC) to be applicable to them. Article 85(1) of the Treaty applies to them 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.

(see para. 1320)

14. The wording of Article 85(1) of the Treaty (now Article 81(1) EC) 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.

(see para. 1325)

15. Where an undertaking or association of undertakings has participated, even without playing an active role, in one or more meetings at which a concurrence of wills emerged or was confirmed on the principle of anti-competitive conduct and by virtue of its presence has subscribed to or at least given the impression to the other participants that it was subscribing to the subject-matter of the anti-competitive agreement concluded and subsequently confirmed at those meetings, it must be considered to have participated in that agreement, unless it proves that it openly

distanced itself from the unlawful collusion or informed the other participants that it intended to take part in those meetings with different objects in mind.

In the absence of such proof that it distanced itself, the fact that the undertaking or association of undertakings does not abide by the outcome of those meetings is not such as to relieve it of full responsibility for the fact that it participated in the agreement or concerted practice.

(see paras 1353, 1389, 3199)

16. For the purposes of applying Article 85(1) of the Treaty (now Article 81(1) EC), 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. In such a case, the absence in the contested decision of any analysis of the agreement's effects on competition does not therefore constitute a defect in the decision capable of entailing its annulment. Thus, where the Commission has proved that the object of that agreement was anti-competitive, it does not have to show in addition that the agreement resulted in restriction of competition in the common market.

(see para. 1531)

17. There is no principle of Community law which precludes the Commission from relying on a single document in order to conclude that Article 85(1) of the Treaty (now Article 81(1) EC) has been infringed, provided that its evidential value is undoubted and that the document by itself definitely attests to the existence of the infringement in question. 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.

(see para. 1838)

18. The concept of concerted practice implies the existence of reciprocal contacts. That condition of reciprocity is satisfied where the disclosure by one competitor to another of future intentions or conduct on the market has been sought or, at the very least, accepted by the other competitor. It is the same where a meeting in the course of which a party has been informed by its competitor of its intentions or future conduct was initiated by that party and it is apparent from its record of that meeting that no reservations or objections were expressed when the competitor informed it of its intentions. In those circumstances, the attitude of that party at the meeting cannot be reduced to the purely passive role of a recipient of the information which its competitor unilaterally decided to pass on to it, without any request by it.

(see para. 1849)

19. 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 constitutes a concerted practice prohibited by Article 85(1) of

the Treaty (now Article 81(1) EC) 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. In order to prove that there has been a concerted practice, it is not therefore necessary to show that a trader 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. It is sufficient that, by its statement of intention, the trader eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of it on the market.

(see para. 1852)

20. As is clear from the very terms of Article 85(1) of the Treaty (now Article 81(1) EC), 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. Subject to proof to the contrary, which the parties concerned must adduce, it must be presumed that the concerted action by which those parties sought to share the market influenced their conduct on that market.

(see paras 1855 and 1865)

21. Undertakings cannot justify infringement of the rules on competition by claiming that they were forced into it by the conduct of other traders. Nor can the fact that the latter have received public aid justify the adoption of private anti-competitive initiatives, even if the aid in question was unlawful. 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.

The fact that the Commission may have been lax in connection with the file on the above public aid and might thus have failed to fulfil certain of its obligations under Article 155 of the EC Treaty (now Article 211 EC) cannot justify any infringements of Community law.

(see paras 2557–2559)

22. 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 it 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.

(see para. 3150)

23. The mere fact that a producer in a Member State knew that the purpose of the purchases made from it by other European producers was to halt or, at least, reduce its direct sales on Western European markets does not allow the conclusion that it was party to an agreement or concerted practice contrary to Article 85(1) of the Treaty (now Article 81(1) EC). Such knowledge can be deemed to reveal unlawful conduct only if it is established that it was accompanied by the adherence of that producer to the object pursued by the above European producers through the purchases concerned. In as much as the object in question was clearly against the interests of the producer concerned, only evidence of a commitment by that producer that, in return for the purchases under consideration, it would halt or reduce its direct sales on the European markets could be deemed to constitute its adherence to that object.

(see paras 3443–3444)

24. Cooperation between undertakings on the export markets in non-member countries can be deemed an infringement of Article 85(1) of the Treaty (now Article 81(1) EC) 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. That is so in the case of cooperation between undertakings designed to prevent incursions by competitors on the respective national markets of those undertakings in the Community.

(see paras 3868–3869)

25. It follows from the very wording of Article 85(1) of the Treaty (now Article 81(1) EC) that concerted practices are prohibited, irrespective of any effect, where they have an anti-competitive object. 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.

Moreover, 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. It 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.

Thus, the Commission was correct to classify cooperation within a committee of economic operators designed to prevent incursions by competitors in respective national markets in the Community as a concerted practice within the meaning of Article 85(1) of the Treaty. Within that framework, 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, and which, having regard to the object of the committee and the economic importance of its members, was capable of appreciably affecting trade between Member States.

(see paras 3921, 3924, 3927–3928, 3930 and 3932)

26. Bi- or multilateral concerted practices can be regarded as constituent elements of a single anti-competitive agreement only if it is established that they form part of an overall plan pursuing a common objective.

However, the fact that objects of such concerted practices and such an anti-competitive agreement coincide is not sufficient to establish that an undertaking that was party to those practices participated in that agreement.

Only where the undertaking knew, or ought to have known, when it participated in those concerted practices, that it was taking part in the single agreement, can its participation in those practices constitute the expression of its accession to that agreement.

(see paras 4027, 4109, 4112)

27. It is for the Commission to prove not only the existence of an anti-competitive agreement but also its duration.

Having regard to the method of establishing the infringement employed in the contested decision, under which, first, the participation of a party in a measure implementing the agreement constituted proof of its participation in that agreement and, second, the Commission had chosen to rely solely on specific documentary evidence to establish the agreement, the measures implementing it and the participation of each party in them, the Commission could not, without such specific documentary evidence, presume that a party to the agreement continued to adhere to that agreement beyond the point at which it was last shown to have participated in a measure implementing that agreement.

(see paras 4270, 4281–4283)

28. The statement of reasons required by Article 190 of the Treaty (now Article 253 EC), which is an essential procedural requirement within the meaning of Article 173 thereof (now, after amendment, Article 230 EC), 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.

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 having been drawn up. Moreover, the Commission has a discretion when it determines the amount of each fine, and it cannot be required to apply a precise mathematical formula for that purpose.

29. The fact that an undertaking did not benefit from an infringement of the competition rules cannot preclude the imposition of a fine, since otherwise it would cease to have a deterrent effect. It follows that the Commission is not required, in order to fix fines, to establish that the infringement brought about an unlawful advantage for the undertakings concerned, nor to take into consideration any lack of profit from the infringement. An 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 fines.

It is 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, without their being obliged, in order to do so, to bring court proceedings against the decision. That applies *a fortiori* where the Commission uses 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 able to check that the method employed and the steps followed by the Commission are free of error and compatible with the provisions and principles applicable in regard to fines, and in particular with the principle of non-discrimination. 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. Such explanations 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.

The Commission's statement in its *Twenty-first Report on Competition Policy*, to the effect that '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', 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. It shows only 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 only approximately.

(see paras 4881–4882 and 4884–4885)

(see paras 4725–4726 and 4734–4737)

30. In competition proceedings, the Commission must, when fixing the amount of the

fines, have regard 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 those infringements and the threat that infringements of that type pose to the objectives of the Community. Where an infringement has been committed by several undertakings, the relative gravity of each undertaking's participation must be examined.

(see paras 4949 and 4994)

31. As regards the fixing of the amount of the fines in competition cases, the 'turnover in the preceding business year' referred to in Article 15(2) of Regulation No 17 means the total turnover of each of the undertakings concerned achieved during the last full business year of each of those undertakings at the date of adoption of the contested decision. The references to that turnover and to that year are relevant only to the upper limit of the fine, 10%, which may be imposed.

Article 15(2) of Regulation No 17 contains no territorial limit on the turnover which may be taken into account by the Commission in order to calculate the fine.

The Commission may therefore choose which turnover to take in terms of territory and products in order to determine the fine and, if appropriate, turnover relating to an earlier business year, provided that the fine calculated on those bases does not exceed the abovementioned limit.

(see paras 5009 and 5022–5023)

32. Where an undertaking that has infringed the competition rules 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.

Such an undertaking cannot claim that subsidiaries not mentioned in the contested decision were 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. Since the fine is imposed on that undertaking in its own name, it alone is liable for that fine. The fact that the burden of those fines might be shared out within the group headed by that undertaking is of no relevance from the point of view of the rules on the determination of fines.

(see paras 5040 and 5049)

33. In a decision imposing a fine in competition proceedings, the Commission is entitled to express the amount of the fine in ecus, a monetary unit convertible into national currency.

Where the Commission has chosen to calculate the fine on the basis of the turnover in a particular reference year, expressed in national currency, it is entitled to convert that turnover into ecus

using the average exchange rate for that reference year and not on the basis of the exchange rate in force on the date of adoption or notification of the contested decision.

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 adoption or notification of the contested decision had been applied, that is merely the logical result of fluctuations in the real value of the various national currencies.

(see paras 5054 and 5056)

34. The expenses incurred by an undertaking in providing and maintaining a bank guarantee in order to avoid the enforcement of a Commission decision against it are not expenses incurred for the purpose of the proceedings within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance. Similarly, an undertaking's claim that the Commission should be ordered to reimburse the expenses incurred by it during the administrative procedure in competition proceedings must be dismissed. Although under Article 91 of those Rules of Procedure 'the following shall be regarded as recoverable costs ... expenses necessarily incurred by the parties for the purpose of the proceedings', that provision, in referring to 'proceedings', refers only to proceedings before the Court of First Instance and does not include any prior stage.

(see paras 5133–5134)